आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, CHENNAI

श्री चंद्र पूजारी, लेखा सदस्य एवं

श्री वी. दुर्गा राव, न्यायिक सदस्य के समक्ष

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER &
SHRI V. DURGA RAO, JUDICIAL MEMBER

आयकर अपील सं./ **I.T.A. No.1197/Mds/2012**

(निर्धारण वर्ष **/** Assessment Year : 2007-2008)

Infrastructure Development Finance Company Limited, KRM Tower, 8th floor, No.1, Harrington Road, Chetpet, Chennai 600 031.	Vs	The Assistant Commissioner of Income Tax, Co. Circle II(3), Chennai 600 034.
[PAN: AAACI 2663N] (**अपीलार्थी**/Appellant)		(**प्रत्यर्थी**/Respondent)

अपीलार्थी की ओर से / Appellant by : Shri. Farrokh V. Irani, Advocate

प्रत्यर्थी की ओर से / Respondent by : Shri. N. Rengaraj, IRS, CIT.

सुनवाई की तारीख/Date of hearing : 23.04.2015

घोषणा की तारीख /Date of Pronouncement : 22.05.2015

आदेश / O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER

This appeal filed by assessee is directed against the order of the Commissioner of Income Tax-I, Chennai, dated 30.03.2012 passed u/s. 263 of the Act.

2. The first ground raised for our consideration is with regard to validity of order passed u/s.263 of the Act by Commissioner of Income Tax.

3. The ld. Authorised Representative for assessee submitted that assessment in this case was completed u/s.143(3) of the Act vide order dated 30.12.2009 and the Assessing Officer considered all the issues raised by the Commissioner of Income Tax in his notice dated 12.03.2012 for revising the order of assessment.

4. The ld. Authorised Representative for assessee submitted that the Assessing Officer after calling for the various clarifications vide his letter dated 03.07.2009 and after having been satisfied by the reply given by the assessee in its letters dated 7.12.2009, 10.12.2009 and 18.12.2009, he has completed the assessment after due application of his mind. The Assessing Officer has taken one possible view while completing the assessment i.e., not to make any addition on the issues raised by the Commissioner of Income tax. In the impugned assessment order, the Commissioner of Income Tax cannot find fault with the Assessing Officer. According to the ld. Authorised Representative for assessee, the Commissioner of Income tax should not have been issued the notice for invoking jurisdiction u/s.263 of

the Act on the reason that the assessee has furnished all the information required by the Assessing Officer for completing the assessment and the matter was properly looked into by the Assessing Officer by discussing the issue with the assessee's representative. According to him, invoking jurisdiction u/s.263 is totally bad in law and it was not warranted. He submitted that though the Assessing Officer failed to discuss various issues in his order, it cannot be said that Assessing Officer has not applied his mind. The assessee relied on the judgment of Calcutta High Court in the case of *CIT vs M/s. J.L. Morrison (India) Ltd in ITA No.168/2011 and G.A. No1541/2012 vide order dated 15.5.2014.* He further relied on the judgment of I.T.O vs. Lall & Co., reported in 53 ITR 231(S.C), wherein it was held as under:-

> " A proceeding for assessment is not a suit for adjudication of a civil dispute. That an income tax proceeding is in the nature of a judicial proceeding between contesting parties, is a matter which is not capable of even a plausible argument. The Income Tax authorities who have power to assess and recover tax are not acting as judges deciding a litigation between the citizen and the State; they are administrative authorities who proceedings are regulated by statue, but whose function is to estimate the income of the taxpayer and to assess him to tax on the basis of that estimate. Tax legislation necessitates the setting up of machinery to ascertain the taxable income, and to assess tax on the income, but that does not impress the proceeding with the character of an action between the citizen and the State''.

4.1 He also relied on the judgment *of CIT vs. Gabriel India Ltd reported in 203 ITR 108 (Bom.)* wherein it was held as under:-

> "The Income Tax Officer in this case had made enquires in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be ''erroneous'' simply because in his order, he did not make an elaborate discussion in that regard''

4.2 Further, he submitted that the aforesaid views expressed by the Bombay High Court was quoted in the case of *CIT vs. Sunbeam Auto Ltd., reported in 332 ITR 167 (Delhi) and he* also drew our attention to a judgment of the Punjab & Haryana High Court in the case of *Hari Iron Trading Co. vs. CIT, reported in 263 ITR 437 (Punjab),* wherein the following views were expressed:-

> The expression 'record' has also been defined in Clause (b) of the Explanation so as to include all records relating to any proceedings available at the time of examination by the CIT. Thus, it is not only the assessment order but the entire record which has to be examined before arriving at a conclusion as to whether the AO had examined any issue or not. The assessee has no control over the way an assessment order is drafted. The assessee on its part had produced enough material on record to show that the matter had been discussed in detail by the AO. The least that the Tribunal could have done was to refer to the assessment record to verify the contentions of the assessee. Instead of doing that, the Tribunal has merely been swayed by the fact that the AO has not mentioned anything in the assessment order. During the course of assessment proceedings, the AO examines numerous issues. Generally, the issues which are accepted do

> not find mention in the assessment order and only such points are taken note of on which the assessee's explanations' are rejected and additions/disallowances are made. As already observed, we have examined the records of the case and find that the AO had made full inquiries before accepting the claim of the AO qua the amount of ₹10 lacs on account of discrepancy in stock. Not only this, he has even gone a step further and appended an office note with the assessment order to explain why the addition for allegation discrepancy in stock was not being made. In the absence of any suggestion by the Commissioner as to how the inquiry was not proper, we are unable to upheld the action taken by him under Section 263 of the Act.

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4.3 He also submitted that the Commissioner of Income Tax has not established that the finding of the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue nor he has made it clear in what manner he wants the Assessing Officer to redo the assessment, without suggesting manner in which the Assessing Officer is required to enquire the issue in dispute he has setaside the assessment order. In other words, it is necessary for the Commissioner of Income to point out the exact error in the order which he proposes to revise so that the assessee would have an adequate opportunity of meeting that error before the final order is made. Affording any further opportunity after setting aside the order of the Income Tax Officer would not amount to an opportunity of meeting the alleged error in the assessment proposed to be revised. For this purpose, he relied on the judgment of the Andhra Pradash High Court in the case

of CIT vs. G.K. Kabra reported in 211 ITR 336 (AP). Further, he submitted that Commissioner of Income Tax travelled beyond the issue raised in the show cause notice. On this count also section 263 is bad in law. According to him, the Commissioner of Income Tax gave a direction to the Assessing Officer to verify the genuineness of claim of the assessee in representing Assignment loss. However, he has not raised the issue of genuineness of Assignment loss in his show cause notice issued to the assessee. For this purpose, he relied on the judgment of *Jurisdictional High Court in TC (A) No.1023 of 2005 dated 19.06.202 in the case of M/s. PVP Ventures Limited*. He also placed reliance in the following cases:-

(i) Sharma Engineering Company vs. ITO (1986) 26 TTJ 629 (Allahabad).
(ii) Geometric Software Solutions Co. Ltd vs. ACIT, (2009) 32 SOT 428 (Mum).
(iii) CIT vs. Ashish Rajpal (2010) 320 ITR 674 (Delhi)

4.4 Without prejudice to the above, he submitted that order of the Assessing Officer dated 30.12.2009 is subject matter of appeal before the Commissioner of Income Tax (Appeals) as the assessee carried on the appeal before him before issue of notice by the Commissioner of Income Tax (Admin) for invoking jurisdiction u/s.263 on 12.03.2012. Being so, the issue raised by the Commissioner of Income Tax (Admin) in his order u/s.263 has merged with the order of Commissioner of

Income Tax (A) as a whole hence it was no more amenable to revisional jurisdiction of Commissioner of Income Tax (Admin) in view of Explanation (c) to Sec. 263 of the Act.. For this purpose he relied on the following judgments:

(i) Marico Industries Ltd. vs. ACIT 115 TTJ (Mum) 497.
(ii) Sonal Garments vs. JCIT, 95 ITD 363 (Mum)
(iii) Sujata Grover vs. DCIT, 74 TTJ 347 (Delhi).
(iv) Oil India Ltd vs. CIT, 138 (ITR 836) (Calcutta).

5. On the other hand, the ld. Departmental Representative relied on the order of the Commissioner of Income Tax.

6. We have heard both the parties and perused the material on record. We have carefully considered the rival submissions in the light of the material placed before us and also gone through all the judgments cited by the parties before us. First we take up the legal issue with reference to the jurisdiction of invoking the provisions of section 263 of the Act by the learned CIT. The scheme of the IT Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to erroneous order of the assessing officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interest of the revenue. As held in the case of *Malabar Industries Co. Ltd., Vs. CIT (243 ITR 83) (SC),* the Commissioner can exercise revision jurisdictional u/s 263 if he is satisfied that the order of the assessing officer sought to be

revised is (i)erroneous; and also (ii) prejudicial to the interests of the revenue. The word 'erroneous' has not been defined in the Income Tax Act. It has been however defined at page 562 in Black's Law Dictionary (seventh Edition) thus';

> 'erroneous, adj. Involving error, deviating from the law'.
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> The word 'error' has been defined at the same page in the same dictionary thus:
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> 'error No. 1 : A psychological state that does not conform to Objective reality; a brief that what is false is true or that what is true is false'. At page 649/650 in P. Ramanatha Aiyer's Law Lexicon Reprint 2002, the word 'error' has been defined to mean-
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> 'Error: A mistaken judgement or deviation from the truth in matters of fact, and from the law in matters of judgement 'error' is a fault in judgement, or in the process or proceeding to judgement or in the execution upon the same,
> in a Court of Record; which in the Civil Law is called a Nullityie" (terms delay).
>
> Something incorrectly done through ignorance or inadvertence S.99 CPC and S.215 Cr.PC.
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> Error, Fault, Error respects the act; fault respect the agent, an error may lay in the judgement, or in the conduct, but a fault lies in the will or intention."

7. At page 650 of the aforesaid Law Lexicon, the scope of Error, Mistake, Blunder, and Hallucination has been explained thus:

> "An error is any deviation from the standard or course of right, truth, justice or accuracy, which is not intentional. A mistake is an error committed under a misapprehension of misconception of the nature of a case. An error may be from the absence of knowledge, a mistake is from insufficient or false observation. Blunder is a practical error of a peculiarly gross or awkward kind, committed through glaring ignorance, heedlessness, or awkwardness. An error may be overlooked or atoned for, a mistake may be rectified, but the

> shame or ridicule which is occasioned by a blunder, who can counteract. Strictly speaking, Hallucination is an illusion of the perception, a phantasm of the imagination. The one comes of disordered vision, the other of discarded imagination. It is extended in medical science to matters of sensation, whether there is no corresponding cause to produce it. In its ordinary use it denotes an unaccountable error in judgement or fact, especially in one remarkable otherwise for accurate information and right decision. It is exceptional error or mistake in those otherwise not likely to be deceived."

8. In order to ascertain whether an order sought to be revised under Section 263 is erroneous, it should be seen whether it suffers from any of the aforesaid forms of error. In our view, an order sought to be revised under Section 263 would be erroneous and fall in the aforesaid category of "errors" if it is, inter alia, based on an incorrect assumption of facts or an incorrect application of law or non-application of mind to something which was obvious and required application of mind or based on no or insufficient materials so as to affect the merits of the case and thereby cause prejudice to the interest of the revenue.

9. Section 263 of the Income-tax Act seeks to remove the prejudice caused to the revenue by the erroneous order passed by the Assessing Officer. It empowers the Commissioner to initiate suo moto proceedings either where the Assessing Officer takes a wrong decision without considering the materials available on record or he takes a decision without making an enquiry into the matters, where such inquiry was prima facie warranted. The Commissioner will be

well within his powers to regard an order as erroneous on the ground that in the circumstances of the case, the Assessing Officer should have made further inquiries before accepting the claim made by the assessee in his return. The reason is obvious. Unlike the Civil Court which is neutral in giving a decision on the basis of evidence produced before it, the role of an Assessing Officer under the Income-tax Act is not only that of an adjudicator but also of an investigator. He cannot remain passive in the face of a return, which is apparently in order but calls for further enquiry. He must discharge both the roles effectively. In other words, he must carry out investigation where the facts of the case so require and also decide the matter judiciously on the basis of materials collected by him as also those produced by the assessee before him. The scheme of assessment has undergone radical changes in recent years. It deserves to be noted that the present assessment was made u/s. 143(3) of the Income-tax Act. In other words, the Assessing Officer was statutorily required to make the assessment under Section 143(3) after scrutiny and not in a summary manner as contemplated by Sub-section (1) of Section 143. Bulk of the returns filed by the assessees across the country is accepted by the Department under Section 143(1) without any scrutiny. Only a few cases are picked up

for scrutiny. The Assessing Officer is therefore, required to act fairly while accepting or rejecting the claim of the assessee in cases of scrutiny assessments. He should be fair not only to the assessee but also to the Public Exchequer. The Assessing Officer has got to protect, on one hand, the interest of the assessee in the sense that he is not subjected to any amount of tax in excess of that is legitimately due from him, and on the other hand, he has a duty to protect the interests of the revenue and to see that no one dodged the revenue and escaped without paying the legitimate tax. The Assessing Officer is not expected to put blinkers on his eyes and mechanically accept what the assessee claims before him. It is his duty to ascertain the truth of the facts stated and the genuineness of the claims made in the return when the circumstances of the case are such as to provoke inquiry. Arbitrariness in either accepting or rejecting the claim has no place. The order passed by the Assessing Officer becomes erroneous because an enquiry has not been made or genuineness of the claim has not been examined where the inquiries ought to have been made and the genuineness of the claim ought to have been examined and not because there is anything wrong with his order if all the facts stated or claim made therein are assumed to be correct. The Commissioner may consider an order of the Assessing

Officer to be erroneous not only when it contains some apparent error of reasoning or of law or of fact on the face of it but also when it is a stereo-typed order which simply accepts what the assessee has stated in his return and fails to make enquiries or examine the genuineness of the claim which are called for in the circumstances of the case. In taking the aforesaid view, we are supported by the decisions of the Hon'ble Supreme Court in *Rampyari Devi Saraogi v. CIT (67 ITR 84) (SC), Smt. Tara Devi Aggarwal v. CIT ITR 323) (SC), and Malabar Industrial Co. Ltd's case (243 ITR 83) (SC)*.

10. In *Malabar Industrial Co. Ltd*. case the Hon'ble Court has held as under:

> "There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall the orders passed without applying the principles of natural justice or without application of mind. In our humble view, arbitrariness in decision-making would always need correction regardless of whether it causes prejudice to an assessee or to the State Exchequer. The Legislature has taken ample care to provide for the mechanism to have such prejudice removed. While an assessee can have it corrected through revisional jurisdiction of the Commissioner under Section 264 or through appeals and other means of judicial review, the prejudice caused to the State Exchequer can also be corrected by invoking revisional jurisdiction of the Commissioner under Section 263. Arbitrariness in decision-making causing prejudice to either party cannot therefore be allowed to stand and stare

at the legal system. It is difficult to countenance such arbitrariness in the actions of the Assessing Officer. It is the duty of the Assessing Officer to adequately protect the interest of both the parties, namely, the assessee as well as the State. If he fails to discharge his duties fairly, his arbitrary actions culminating in erroneous orders can always be corrected either at the instance of the assessee, if the assessee is prejudiced or at the instance of the Commissioner, if the revenue is prejudiced. While making an assessment, the ITO has a varied role to play. He is the investigator, prosecutor as well as adjudicator. As an adjudicator he is an arbitrator between the revenue and the taxpayer and he has to be fair to both. His duty to act fairly requires that when he enquires into a substantial matter like the present one, he must record a finding on the relevant issue giving, howsoever briefly, his reasons therefor. In S.N. Mukherjee v. Union of India AIR 1990 SC 1984, it has been observed by the Hon'ble Supreme Court as follows:

"Reasons, when recorded by an administrative authority in an order passed by it while exercising quasi-judicial functions, would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But the other considerations, referred to above, which have also weighed with this Court in holding that an administrative authority must record reasons for its decision are of no less significance. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances or arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. In our opinion, therefore, the requirement that reasons be recorded should govern the decisions of an administrative authority exercising quasi-judicial functions irrespective of the fact may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or

> revisional authority agrees with the reasons contained in the order under challenge."

11. Similar view was earlier taken by the Hon'ble Supreme Court in *Siemens Engg. & Mfg. Co. Ltd. v. Union of India AIR 1976 SC 1785*. It is settled law that while making assessment on assessee, the ITO acts in a quasi-judicial capacity. An assessment order is amenable to appeal by the assessee and to revision by the Commissioner under Sections 263 and 264. Therefore, a reasoned order on a substantial issue is legally necessary. The judgments on which reliance was placed by the learned Counsel for the assessee also points to the same direction. They have held that orders, which are subversive of the administration of revenue, must be regarded as erroneous and prejudicial to the interests of the revenue. If the Assessing Officers are allowed to make assessments in an arbitrary manner, as has been done in the case before us, the administration of revenue is bound to suffer. If without discussing the nature of the transaction and materials on record, the Assessing Officer had made certain addition to the income of the assessee, the same would have been considered erroneous by any appellate authority as being violative of the principles of natural justice which require that the authority must indicate the reasons for an adverse order. We find no reason why the same view should not be taken when an order is against the interests of the revenue. As a

matter of fact such orders are prejudicial to the interests of both the parties, because even the assessee is deprived of the benefit of a positive finding in his favour, though he may have sufficiently established his case.

12. In view of the foregoing, it can safely be said that an order passed by the Assessing Officer becomes erroneous and prejudicial to the interests of the Revenue under Section 263 in the following cases:

(i) The order sought to be revised contains error of reasoning or of law or of fact on the face of it.

(ii) The order sought to be revised proceeds on incorrect assumption of facts or incorrect application of law. In the same category fall orders passed without applying the principles of natural justice or without application of mind.

(iii) The order passed by the Assessing Officer is a stereotype order which simply accepts what the assessee has stated in his return or where he fails to make the requisite enquiries or examine the genuineness of the claim which is called for in the circumstances of the case.

13. We shall now turn to the facts of the case to see whether the case before us is covered by the aforesaid principles. A perusal of the assessment order passed by the Assessing Officer does not show that application of mind on his part on the issues raised by the CIT. The evidence available on record is not enough to hold that the return of

the assessee with reference to this income was objectively examined or considered by the Assessing Officer. The assessment order placed before us was though passed after examination or enquiry or verification or consideration of the claim made by the assessee, the Assessing Officer has omitted to examine the issues relating to assignment loss, provision for standard assets in true prospective. His order is a completely non-speaking order on this issue. In our view, it was a fit case for the learned Commissioner to exercise his revisional jurisdiction under section 263 which he rightly exercised by cancelling the assessment order and directing the Assessing Officer to pass a fresh order considering this issues raised by the CIT and the assessee should have no grievance in the action of learned Commissioner in exercising the jurisdiction u/s. 263 of the IT Act.

14. It was however contended by the learned Counsel that the Assessing Officer had taken a possible view in accepting the return of the assessee with reference to the issue raised by the CIT and hence, the Commissioner was not justified in assuming the revisional jurisdiction under Section 263. We have given our thoughtful consideration to the aforesaid submissions. As already stated earlier, an order becomes erroneous because enquiries, which ought to have

been made on the facts of the case, were not made and not because there is anything wrong with the order if all the facts stated or the claims made in the return are assumed to be correct. Thus, it is mere failure on the part of the Assessing Officer to make the necessary enquiries or to examine the claim made by the assessee in accordance with law, which renders the resultant order erroneous and prejudicial to the interest of the revenue. Nothing more is required to be established in such a case. One would not know as to what would have happened if the Assessing Officer had made the requisite enquiries or examined the claim of the assessee in accordance with law. He could have accepted the assessee's claim. Equally, he could have also rejected the assessee's claim depending upon the results of his enquiry or examination into the claim of the assessee. Thus, the formation of any view by the Assessing Officer would necessarily depend upon the results of his inquiry and conscious, and not passive, examination into the claim of the assessee. If the Assessing Officer passes an order mechanically without making the requisite inquiries or examining the claim of the assessee in accordance with law, such an order will clearly be erroneous in law as it would not be based on objective consideration of the relevant materials. It is therefore, the mere failure on the part of the Assessing Officer in not making the inquiries or not

examining the claim of the assessee in accordance with law that per se renders the resultant order erroneous and prejudicial to the interest of the revenue. Nothing else is required to be established in such a case to show that the order sought to be revised is erroneous and prejudicial to the interests of the Revenue. In our opinion, the Commissioner of Income Tax, rightly assumed jurisdiction u/s.263 of the Income Tax Act.

15. The next ground raised by the assessee is that the Commissioner of Income Tax erred in holding that the loss of ₹16,86,21,187/- incurred on assignment of loan has not been verified as to whether the same is a genuine business loss and pertains to assessment year 2007-08.

16. The ld. Authorised Representative submitted that loss on assignment of loan was incurred in the ordinary course of its business of money lending and its allowable u/s. 28/37 of the Act. The assignment of loan was made within the framework of commercial expediency and the same was generally eligible within the meaning of section 37(1) of the Act. He relied on the following judgments:-

(i) CIT vs. Gillanders Arbuthnot and Co. Ltd 195 (ITR 331) (Calcutta).
(ii) Patnaik & Col Ltd vs. CIT 161 (ITR 365) (S.C).

(iii) Indian Commerce and Industries Co. P. Ltd vs. CIT 213 (ITR 533) (Mad).
(iv) CIT vs. Investa Industrial Corporation of India 119 (ITR 380) (Bom).

Further, he submitted that the Commissioner of Income Tax issued a notice to the assessee questioning whether the Assignment loss is allowable u/s.36(2)(v) of the Act r.w.s. 36(1)(viia) of the Act. However, while passing the order, Commissioner of Income Tax observed that it is also not established or verified that the assessee had suffered genuine business loss on account of the transactions and whether the same relates to the previous year relevant to the assessment year under consideration and gave direction to examine allowability of expenditure u/s.37(1) of the Act. According to the ld. Authorised Representative of the assessee the Commissioner of Income Tax exceeded his jurisdiction as it is beyond the scope of issuing notice by him.

17. On the other hand, the ld. Departmental Representative submitted that the assessee had debited the provisions in respect of loss on assignment of loan of M/s. ABEL. The fact remains that this was a provision which is not in respect of bad and doubtful debts, as such no deduction could have been available u/s.36(1)(viia) of the Income Tax Act. Regarding allowability of the

claim u/s.28 or 37(1) of the Income Tax Act, the primary requirement is that the same should either be classified as loss or expenses. This was not done. Further, it is also not established or verified that the assessee has suffered genuine business loss on account of the transactions and whether the same relates to the previous year relevant to the assessment year. If the same is to be considered as expenses u/s.37(1), the assessee had to satisfy that the expenses have been incurred within the frame work of commercial expediency and the same was generally eligible within the meaning of Section 37(1) of the Income Tax Act. None of this aspect were available on records and the Assessing Officer also did not call for any of the detail to satisfy himself that the assessee was eligible for such deduction. In the above circumstances, there is an error of the Assessing Officer which is also prejudicial to the interest of Revenue.

18. We have heard both the sides and perused the material on record. The primary argument of the assessee's counsel is that assignment losses are to be allowed as bad debts and it was rightly considered by Assessing Officer as bad debts. In our opinion, this argument of the assessee's counsel at this stage is premature since the assessee has not written off the amount as bad debts and

claimed loss of assets due to transfer of debtors by due deed of assignment. In our opinion, for claiming bad debts as allowable under the provision, the same be written off under the provision of the Act. Being so, we cannot appreciate the argument of ld. Authorised Representative for assessee .

19. Alternatively, the Authorised Representative contested the direction of the Commissioner of Income Tax to Assessing Officer to examine allowability of expenditure u/s. 37(1) of the Act. In order to claim an expenditure u/s.37(1) of the Act the assessee shall satisfy that the expenditure incurred by it was only for the purpose of business and it was not the capital expenditure or expenditure in the nature of personal expenditure. In our opinion, if the genuine expenditure incurred exclusively for the purpose of business, then it is to be allowed. Since there was no proper enquiry by Assessing Officer at the time of passing assessment order considering the totality of fact of the case, the Commissioner of Income Tax gave a direction to verify the expenditure incurred for the purpose of business and decide thereupon.

20. The objections of the assessee regarding the matters raised in present proceedings being subject matter of appellate proceedings before the Commissioner of Income Tax (Appeals) has been considered regarding doctrine of merger. A perusal of the assessment order, grounds of appeal before the Commissioner of Income Tax (Appeals) and the order passed by the CIT(A) III dated 12.10.2011 have been examined. The Assessing Officer had considered issues relating to the deduction u/s.36(1)(viia)(c) and 36(i)(viii). A reading to the assessment order indicated that the issues considered by the Assessing Officer are totally different from the issues raised in the present proceedings, even though the same may fall under the common head. "The subject matter of appeal" as envisaged in Clause (c) of explanation to Section 263(1) of Income Tax Act refers to the issues considered and not to aspect totally different from the issues considered. In the present ease, since the issues are totally different from that was considered the objection referred by the assessee is not valid. We, therefore, find no merit in the argument of the ld. Authorised Representative. Accordingly, this ground of the assessee is dismissed.

21. The assessee raised next ground with regard to Commissioner of Income Tax not considering the fact that the assessee is eligible

to claim deduction u/s 36(1)(viia) (c) in respect of the provisions made as per provisioning policy of the company.

22. The ld. Authorised Representative submitted that in the notice it has been stated that the Company was allowed a deduction of as ₹22.75 crore under section 36(1)(viia)(c) of the Act out of which, an amount of as ₹15.51 crore represented assets other than provision for doubtful debts like standard assets, etc. It has been mentioned in the notice that the deduction under section 36(1)(viia)(c) is admissible only against provision for doubtful debts and accordingly the aforementioned deduction allowed by the Assessing Officer in respect of provision for standard assets is erroneous. In this regard, it is submitted that the regulatory provisioning requirement for standard assets was not applicable to the Company in AY 2007-08. However, the Company was required to classify all its advances under four categories i.e. (i) standard assets, (ii) sub-standard assets, (iii) doubtful assets, and (iv) loss assets depending upon the performance of such assets as per RBI guidelines. During the captioned AY, the Company created provision for standard assets amounting to ₹49.85 crores including provision under section 36(1)(viia). It is submitted that provision on standard asset is made as per the provisioning policy of the Company, which includes

provision under section 36(1)(viia) of the Act. It may be noted that the standard assets represent loans and advances granted by the Assessee and hence, the provision against these assets is akin to the provision against debts. In its annual accounts, the Assessee also discloses the fact that provision against standard assets includes provision under section 36(1)(viia) of the Act. It may be noted that standard assets represent those loans and advances which may not have remained overdue for more than 180 days and hence classified as standard assets under RBI guidelines. However, there were some loans though performing under RBI guidelines but had overdue for a period not exceeding 180 days. As per the provisioning policy of the company approved by the Board, entire loan portfolio is reviewed on quarterly basis to determine the extent to which provision is required. The provision is created after careful examination of the portfolio in view of the general economic environment, adverse factors affecting particular sectors/ industry, exceptional circumstances confronting a specific borrower affecting his repayment capacity etc. The Company makes provision on those loans/advances which in view of the management are stressed and doubtful of recovery. It may be noted that though such provision is shown under the head 'provision against standard assets', in true

sense they are nothing but provision for Doubtful debts itself. It shall be appreciated that by the very nature of business of the Company, there are bound to be some bad or doubtful debts in respect of its entire portfolio of loans and advances. In other words, even in respect of assets that are classified as standard assets, a part of the debts are doubtful of recovery. It is pertinent to note that the fact that a provision is made against standard assets in absence of regulatory requirement by itself indicates that a part of the standard assets are doubtful of recovery. Accordingly, the entire provision made by the Company, including in respect of standard assets is for bad and doubtful debts as envisaged by section 36(1)(viia) of the Act. It may also be mentioned that CBDT Instruction No 17/2008 dated 26 November 2008 issued in the context of banks indicates that provision for standard assets are not allowable as a deduction under section 37(1) of the Act as it is contingent in nature. In this connection, it is pertinent to note that the Company is claiming deduction in respect of provision for standard assets under section 36(1)(viia) and not section 37(1). It may also be noted that the CBDT has not indicated that provision for standard assets are not deductible under section 36(1)(viia) they have only commented on the same in the context of section 37(1). This appears to indicate

that the CBDT is of the view that provision for standard assets are in fact deductible under section 36(1)(viia), subject to the limits prescribed in the said section. In light of above, it is submitted that the Company is eligible to claim deduction under section 36(1)(viia)(c) in respect of the provision made for standard assets. Accordingly, the amount of provision for standard assets should also be included for the purposes of computing deduction under Section 36(1)(viia) and he further relied on the following judgments.

(i) The Little Kancheerpuram Co-Operative Urban Bank Ltd, in ITA Nos.23 & 24/Mds/2013, Dated 21.03.2013
(ii) M/s. The Mayurbhanj Central Co-operative Bank Ltd in ITA No.385/CTK/2012, Dated 30.10.2012.
(iii) M/s. Tamilnadu State Apex Co-Operative Bank Ltd in ITA No.948/Mds/2013, Dated 21.01.2014.
(iv) The Vellore Dist. Central Co-operative Bank Ltd in ITA No.914/Mds/2013, Dated 17.07.2013.

23. We have heard both parties and perused the material on record. The Assessee had made a provision of ₹15,51,21,484/- on its standard assets and claimed deduction u/s.36(1) (viia) of the Act. At this juncture, a look at Section 36(1)(viia) is necessary and this is reproduced hereunder, for brevity:-

> "36(1)(viia) a scheduled bank [not being a bank incorporated by or under the laws of a country outside India] or a non-scheduled bank [or a co-operative bank other than a primary agricultural credit society or a primary cooperative agricultural and rural development bank], an amount [not exceeding seven and one-half per cent] of the

> total income (computed before making any deduction under this clause and Chapter VIA) and an amount not exceeding [ten] per cent of the aggregate average advances made by the rural branches of such bank computed in the prescribed manner."

It is clear from the above that it is not a standard allowance which is given, but, the allowance is subject to the actual provision made by the assessee, which in no case shall exceed 7.5% of the gross total income. Therefore, the argument of the assessee that whatever the provision it had actually made in its books, a provision of 7.5% of the gross total income had to be allowed, is not in accordance with law. Now considering the second aspect, whether provision for standard assets could be considered as provision for bad and doubtful debts, admittedly a provision on standard assets is not against any debts which had become doubtful. Standard assets are always considered recoverable, in the sense, assessee has no doubt of recoverability. When the assessee itself has treated such assets as good and recoverable, any provision made on such assets cannot be considered as a provision for bad and doubtful debts. The debt itself being good, a provision made on good debt cannot be considered as a provision for bad and doubtful debts. May be, the RBI has made a regulation for 10% provision for standard assets also a prudential norm. This can however be considered as a measure prescribed in abundant caution, to deal with a situation where banks are not to suffer shock of sudden

delinquency that could happen in future. There is always a possibility that an asset, which is fully recoverable, may not be so at future date. Nevertheless, possibility of happening of such a contingency cannot be a sufficient reason to consider a provision made on standard assets also as a provision for bad and doubtful debts. Therefore, claim of the assessee that provision for standard assets also has to be considered for applying the condition set out under Section 36(1)(viia) is not in accordance with law. If the provision for standard assets is not considered as provision for bad and doubtful debts, the actual provision for bad and doubtful debts made by the assessee in its books fall much below the allowed by the Assessing Officer. In any case, a look into the original assessment order clearly show that but for the deduction allowed to the assessee as claimed by it in its return, there was no discussion as to how Section 36(1)(viia) was applied and whether the limits were corrected worked out. Admittedly, no question was asked to the assessee during the course of assessment proceedings also with regard to the claim made by it under Section 36(1)(viia), insofar as it concerns the quantum of such claim. This obviously show that there was no application of mind by the Assessing Officer at the time of assessment. Assessing Officer had not come to any conclusion at all having not considered the claim in the light of the

conditions set out in Section 36(1)(viia) of the Act. We cannot say that he had taken a view which was in accordance with law. It is not a case where the Assessing Officer had adopted one of the courses possible in law. Of course, a cryptic order of the Assessing Officer by itself may not show that there was no thought given by him on a claim of the assessee. However, here there was no enquiry made during the course of assessment proceedings. Therefore, the order which was silent on the claim made by the assessee, and allowing such claim, without any discussion, will definitely render it erroneous and prejudicial to the interests of Revenue. As held by *Hon'ble Apex Court in the case of Malabar Industrial Co. Ltd. v. CIT (243 ITR 83)*, "prejudicial to the interests of the Revenue" is a term of wide import and not confined to loss of tax. An order without application of mind is definitely prejudicial to the interests of the revenue. We are in agreement with ld. CIT that the order of Assessing Officer was erroneous insofar as it was prejudicial to the interests of Revenue. No interference is required.

24. The next ground raised by the assessee is with regard to the Commissioner of Income Tax erred in not appreciating the fact that the interest on debentures should be included to arrive at the eligible

receipts for the purpose of deduction u/s.36(1)(viii) of the Act.

25. The ld. Authorised Representative submitted that the explanation in Section 36(1)(viii) of the Act, defines the phrase "long term finance" as any loan or advance where the terms under which moneys are loaned or advanced provide for repayment along with interest thereof during a period of not less than five years . The assessee has earned interest on debentures issued by companies engaged in infrastructure development, the term 'debenture' is not defined in the Act. The dictionary meaning of the term 'debenture' is a written acknowledgement of a debt; a security issued by a company for money borrowed on the company's property, having a fixed rate of interest, and usually fixed redemption rates. It may further be noted that the debentures in which the assessee invested are unlisted, non tradable debentures whose tenure is of more than 05 years. Further, the ‘’Non-Banking Financial (Deposit Accepting or Holding) companies Prudential Norms (Reserve Bank) Directions, 2007 define 'infrastructure loan' means a credit facility extended by non- banking financial companies to a borrower, by way of term loan, project loan subscription to bonds/debentures/ preference shares/equity shares in a project company acquired as a part of the project finance package

such that such subscription amount to be "in the nature of advance" or any other form of long term funded facility provided to a borrower company engaged in:

> Developing or
> Operating and maintaining or
>
> Developing, operating and maintaining any infrastructure facility.

Even in the balance sheet, these debentures have been reflected under the head 'infrastructure loans' and not investments . Further, the fact that the loans in form of debenture have been utilized for financing infrastructure projects can be substantiated by from the loan agreements (Debenture is merely the form in which "infrastructure loan" has been given. He relied on the judgment of *Tourism Finance Corporation of India vs. JCIT, Spl. Range -20, New Delhi 31 SOT 495 (Delhi).*

26. On the other hand, the ld. Departmental Representative submitted that the interest received on debentures was considered by the Assessing Officer as eligible for deduction u/s.36(1)(viii) of the Act. According to him, inclusion of interest received on debentures cannot be considered for eligible u/s.36(1)(viii).

27. We have heard both the parties and perused the material on record. This issue was covered by the order of the Tribunal in the case of *Tourism Finance Corporation of India Ltd vs. JCIT, (2009) 31 SOT 495 (Delhi Benches*) wherein it was held as follows:-

> " 21. We have heard the rival submissions and perused the material available on record and have gone through the orders of the authorities below. We find that the provisions of section 36(1)(viii) are relevant for this issue and hence we reproduce the same herein below":-
>
> > ''36(1)(viii) in respect of any special reserve created and maintained by a specified entity, an amount not exceeding twenty percent of the profits derived from eligible business computed under the head ''profits and gains of business or profession'' (before making any deduction under this clause) carried to such reserve account''.
>
> 22. From the above, it is seen that for the purpose of allowing deduction under this section, we have to consider profits derived from business of providing long term finance computed under the head profits & gains of business or profession. The long term finance is defined under clause (h) to Explanation to section 36(1)(viii) as per which, the long term finance means any loan or advance where the terms under which moneys are loaned or advanced provided for repayment along with interest there on during the period of not less than five years. From the above, it is clear that profits derived from long term finance only can be considered for the purpose of allowing deduction under section 36(1)(viii) and hence these receipts as interest on deposits, lease rental, consultancy and other professional charges, legal fees, guarantee commission, appraisal fees, financial charges, interest on guarantee commission and misc. income etc. are not in the nature of income from long term finance and hence these receipts cannot be included in total income for the purpose of computing deduction allowable to the assessee under section 36(1) (viii) of the Act. These receipts can be attributed to the income of business of providing long term finance but it cannot be said that these are income derived from the business o providing long term finance because the business of providing long term finances, can be carried out even without these activities such as consultancy legal service, appraisal etc. In

> leasing there is no finance and hence lease rental is not income from providing long term finance. Other interests and financial charges are not shown to be out of providing long term finance and hence no eligible deduction under section 36(1)(viii). Regarding interest on debentures, we are in agreement with ld. Authorized Representative of the assessee **that this income is in the nature of interest on loans because debenture is nothing but loan but whether the same is for long term or not, this fact is not available on record and hence, this aspect of the matter should go back to the file of the Assessing Officer for a fresh decision after examining this factual aspect regarding the period of repayment of these debentures alongwith interest and if the same is found to be as per Explanation (h) to section 36(1)(viii) interest on debentures should be considered for the purpose of allowing deduction under section 36(1)(viii). The assessee is also claiming deduction under this section on receipts on account of dividends and profits on sale of investment. As per the above discussion, these two receipts are also not in the nature of income from long term fiancé and hence this cannot be considered for allowing deduction under section 36(1)(viii)**. Both these grounds of the assessee are partly allowed for statistical purposes'.

28. In view of the above order of the Tribunal, we are inclined to hold that interest on debentures to be considered eligible for deduction u/s.36(1)(viii) of the Act, if the conditions laid down in explanation (h) to Sec 36(1) (viii) has fulfilled and accordingly the Assessing Officer is directed to examine in the light of the above order of the Tribunal. In our opinion, the Commissioner of Income Tax has given direction on this issue to examine all the relevant facts before deciding whether the interest on debentures partake the character of receipts within the meaning of eligible business u/s.36(1) (viii) of the Act. Being so, we

do not find any infirmity in the order of the Commissioner of Income Tax and uphold the same.

29. In the result, the appeal of the assessee in ITA No.1197/Mds/2012 is dismissed.

Order pronounced on friday, the 22nd day of May, 2015, at Chennai.

Sd/-	Sd/-
(वी. दुर्गा राव)	**(चंद्र पू जारी)**
V. DURGA RAO	**(CHANDRA POOJARI)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य/ ACCOUNTANT MEMBER**

चेन्नई/Chennai.
दिनांक/Dated:22.05.2015.
KV
आदेश की प्रतिलिपि अग्रेषित/Copy to: 1. अपीलार्थी/Appellant 2.प्रत्यर्थी/ Respondent 3. आयकर आयुक्त (अपील)/CIT(A) 4. आयकर आयुक्त/CIT 5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.