IN THE INCOME-TAX APPELLATE TRIBUNAL "F" BENCH MUMBAI

BEFORE SHRI G.S. PANNU, VICE-PRESIDENT AND

SHRI PAWAN SINGH JUDICIAL MEMBER

ITA No. 701/Mum/2018 (Assessment Year 2011-12)

M/s JBF Industries Ltd. 8th Floor, Express Towers Nariman Point, Mumbai-400213. **PAN: AAACJ2575J**	Vs.	PCIT-4, Aayakar Bhavan, M.K. Road, Mumbai-400020.
Appellant		Respondent

ITA No. 702/Mum/2018 (Assessment Year 2012-13)

M/s JBF Industries Ltd. 8th Floor, Express Towers Nariman Point, Mumbai-400213. **PAN: AAACJ2575J**	Vs.	PCIT-4, Aayakar Bhavan, M.K. Road, Mumbai-400020.
Appellant		Respondent

Appellant by : Shri D.B. Shah with
Shri Arun Shah (AR)

Respondent by : Shri S. Padmaja (DR)

Date of Hearing : 09.10.2018
Date of Pronouncement : 16.11.2018

ORDERUNDER SECTION 254(1)OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. These two appeals by assessee under Section 253 of Income-tax Act are directed against the two separate order of ld. Principal Commissioner of Income Tax-4 (PCIT), Mumbai dated 05.12.2017 passed under section 263 of Income –tax Act (Act) for Assessment Years 2011-12 & 2012-13. In both the appeal, the assessee has raised identical grounds of appeal except variation of figures of business loss, hence, both the appeals were

clubbed, heard together and are decided by common order to avoid the conflicting decision. With the consent of both parties, the appeal for Assessment Year 2011-12 was treated as lead case. In appeal for Assessment Year 2011-12, the assessee has raised the following grounds of appeal:

> 1) On the fact and circumstances of the case as well as in Law, the Learned Principal CIT has erred in passing Revision Order u/s.263 of the Income Tax Act, 1961 for the assessment order u/s. 143(3) r.w.s 144((1) of the Act passed by the Learned Assessing Officer after making adequate enquiries and application of mind without considering the facts and circumstances of the case.
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> 2) On the fact and circumstances of the case as well as in Law, the Learned Principal CIT has erred in considering the order passed u/s. 143(3) r.w.s 144C(1) of the Income Tax Act, 1961 by the Learned Assessing officer as erroneous and prejudicial to the interest of the revenue, without appreciating the facts and circumstances of the case.
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> 3) On the fact and circumstances of the case as well as in Law, the Learned Principal CIT has erred in setting aside Assessment order passed by the Learned Assessing Officer and directing him to make fresh assessment, without appreciating the facts and circumstances of the case.
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> 4) On the fact and circumstances of the case as well as in Law, the Learned Principal CIT has erred in giving direction to the Learned Assessing Officer to verify appellant's claim of business loss of Rs.84,09,36,466/- on account of currency swap, without appreciating the facts and circumstances of the case.

2. Brief facts of the case as gathered from the record of lower authorities are that the assessee-company is engaged in the business of Manufacturing and Trading in partially oriented yarn (POY) and Bulk Drugs, filed its return of income for Assessment Year 2011-12 on 25.11.2011 declaring total income of Rs. 1,49,25,68,140/-. The return of income was selected for scrutiny and the assessment was completed under section 143(3) r.w.s 144C on 29.01.2016. The Assessing Officer while passing the assessment

order made various additions/ disallowance including the adjustment of Rs. 13.52 Crore on account of Transfer Pricing Adjustment, disallowed Rs. 12.24 Crore under section 14A, disallowed Rs. 3.28 Crore on account of Employee Stock Option Scheme.

3. The assessment order was revised by ld. PCIT vide its order dated 05.12.2017. The ld. PCIT issued notice under section 263 dated 17.10.2017 to the assessee as to why assessment order passed under section 143(3) r.w.s 144C dated 29.1.2016 should not be revised. In the show cause notice the ld PCIT raised the issue that in the return of income the assessee claimed business loss on currency swap of Rs. 84.09 Crore debited to Profit & Loss Account, which was allowed by Assessing Officer. The Assessing Officer while allowing the loss not followed the decision of Hon'ble Supreme Court in case of M/s Sutlej Cotton Mills vs. CIT [1979] 116 ITR 1 and therefore the order passed by Assessing Officer is erroneous and prejudicial to the interest of Revenue as per clause (d) of Explanation 2 to section 263(1) of the Act.

4. The assessee filed its reply vide reply dated 21.11.2017. In the reply, the assessee contended that the decision of M/s Sutlej Cotton Mills (supra) is not applicable to the fact of the assessee's case. The assessee further contended that the Hon'ble Supreme Court in said case stated that the principle of law that where any profit or loss arises to assessee on account of depreciation in foreign currency from such profit and loss would

ordinary be treated as loss, if the foreign currency held by assessee on Revenue's account as trading asset or as a part of circulating capital embargo in business. However, if foreign currency is held to be a capital asset, the loss should be capital in nature. In the present case the assessee obtained certain loan from European Central Bank (ECB) in Japan Currency /Yen (JPY) vide agreement dated 04.06.2007. The assessee under advice from Lehman Bros, Bank of India and other lenders to convert this loan into U.S. Dollar (USD). The reason given was that JPY was very fluctuating currency vis-à-vis US Dollar. Thus, the assessee entered into currency swap derivative on 18.07.2007 by which half of the amount i.e. 20 million equivalent of JPY loan was converted into USD. The business loss claimed by assessee during the year on account of this currency swap transaction. The assessee further contended that the transaction of borrowing money in foreign currency (JPY) for acquiring capital asset and transaction of conversion of such currency into another currency, by entering into currency swap derivative not to reduce its cost of borrowing is entirely and distinct and independent transaction and has no bearing on the transaction of acquisition of asset out of said loan amount borrowed. The main purpose of assessee was to reduce its effective cost of borrowing due to currency fluctuation. The swap contract transaction is not in the nature of hedging transaction to hedge against the currency fluctuation and is to reduce the cost of borrowing. The

fluctuation loss suffered by assessee has no nexus or relation to acquisition of asset. The underline objection was to reduce the cost of borrowing which is revenue in nature and deductable loss. The assessee also relied upon the decision of Pune Bench in case of Cooper Corporation Pvt. Ltd. vs. DCIT [(2016) 159 ITD 165 (Pune). The assessee finally contended to drop the proceeding.

5. The reply of assessee was not accepted by ld. PCIT. The ld PCIT concluded that the assessee-company availed loan for acquiring capital asset and that prima facie the decision of Hon'ble Supreme Court in M/s Sutlej Cotton Mills (supra) is applicable on the facts of the assessee's case. The Assessing Officer has not examined the claim of business loss on currency swap of Rs. 84.09 Crore debited to Profit & Loss Account and allowing it to render orders erroneous and prejudicial to the interest of revenue. The ld. PCIT directed the Assessing Officer to examine the allowable claim of business loss in its order dated 05.12.2017. Before revising the assessment order the ld. PCIT concluded that the assessee claimed business loss on currency swap of Rs. 84.09 Crore, debited to Profit & Loss Account was allowed by Assessing Officer. The Assessing Officer while allowing the loss not followed the decision of Hon'ble Supreme Court in case of M/s Sutlej Cotton Mills vs. CIT [1979] 116 ITR 1. Thus, the order passed by Assessing Officer is erroneous and prejudicial to the interest of Revenue as per clause (d) of Explanation 2 to section

263(1) of the Act. Aggrieved by the order of ld. PCIT, the assessee has filed the present appeal before us.

6. We have heard the submissions of the ld. Authorized Representative (AR) of the assessee and ld. Departmental Representative (DR) for the Revenue and perused the material available on record. The ld. AR of the assessee submits that during the financial year 2007-08 vide agreement dated 04.06.2007. The copy of loan agreement is placed on record as page No. 1 to 95 of paper book (PB). The assessee received External Commercial Borrowings (ECB) in JPY worth 40 million USD, out of which the assessee invested 17.5 million USD in Subsidiary abroad Balance of ECB was brought to India which was used for acquiring fixed asset for assessee's plant at Sarigam (Silvassa). The assets were put to use during the year. The assessee claimed depreciation on those assets which was allowed. The assessee under legal advice by Bankers entered into currency swap agreement on 18.07.2007 to hedge the "foreign exchange fluctuation risk". The copy of the Bank of India's swap letter dated 18.07.2007 is also placed on record at page No. 96 to 99 of PB. The Foreign Exchange Fluctuation Loss was debited to Profit & Loss Account in line with AS-11 as per provisions Companies Act. The figures of currency swap loss were specifically mentioned in annual accounts in note no.25(c). Further, details were furnished during the course of assessment proceeding. The Assessing Officer after examining the details completed the assessment under section

143(3). The assessing officer has passed assessment order which is legally sustainable order. The assessment order can be revised if it is erroneous or prejudicial to the interest of revenue. The order passed by assessing officer is not erroneous. Though the Assessing Officer has examined the issue. However, there is no reference in the assessment order. The ld. PCIT revised the order by referring the decision of Hon'ble Supreme Court in M/s Sutlej Cotton Mills (supra), though the facts of the decision are totally different and distinguishable. In the said case the fluctuation loss was in relation to a foreign currency asset, whereas the assessee has entered in to foreign currency swap agreement to hedge foreign exchange fluctuation risk of liability of foreign currency. The ld. PCIT has not given any finding how the order is erroneous; therefore, the order is not valid being bad in law. The amendment of Explanation inserted in section 263 is not applicable for the year under consideration, which may be applicable from Assessment Year 2015-16 onward.

7. In support of his submission, the ld. AR of the assessee relied upon the decision of Hon'ble Apex Court in Malabar Industrial Co Vs CIT [243 ITR 083], Hon'ble Gujarat High Court in Quality Steel Suppliers vs. CIT [2014(141 Taxman 177 (Guj.), decision of Tribunal in Cooper Corporation (P.) Ltd. vs. DCIT [(2016) 69 taxmann.com 244 (Pune Trib.), decision of Hon'ble Supreme Court in Oil & Natural Gas Corporation. Ltd. [2010] 189 Taxman 292 (SC), in CIT vs. Woodward Governor India

(P.) Ltd. [2009] 179 Taxman 326 (SC), decision of Tribunal in Vardhman Industries Ltd. vs. DCIT [2017] 82 taxmann.com 118 (Chandigarh Trib.), Reliance Industries Ltd. vs. CIT (LTU) [2013] 40 taxmann.com 431 (Mum. Trib.). On merit, the ld. AR of the assessee relied upon the decision of Hon'ble Supreme Court in M/s Indus Best Hospitality & Realtors Pvt. Ltd. vs. PCIT in ITA No. 3125/Mum/2017 dated 19.01.2018.

8. On the other hand, the ld. CIT-DR for the Revenue supported the order of ld. PCIT. The ld. DR further submits that there is no reference in the assessment order whether the issue was examined by the Assessing Officer during the assessment or not. The ld. DR further submits that the present case is squarely covered by Explanation 2 to section 263(1) of the Act. The Assessing Officer allowed the relief without enquiring the claim and making enquiries and verification of claim. Further, the order passed by Assessing Officer is not in accordance with the decision of Hon'ble Supreme Court in M/s Sutlej Cotton Mills (supra). Moreover, the fact may be examined by Assessing Officer as per the direction of ld. PCIT. The ld. DR for the Revenue prayed for dismissal of the appeal.

9. We have considered the rival submission of the parties and have gone through the orders of authorities below. The Hon'ble Supreme Court in Malabar Industrial Co Ltd (supra) has laid down the following principal;

> *" A bare reading of section 263 of the Act 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the CIT suo moto under it, is*

that the order of ITO is erroneous, so far as it is prejudicial to the interest of revenue. The CIT has to be satisfied twin conditions, namely (1), the order of AO sought to be revised is erroneous and (2) it is prejudicial to the interest of revenue. If one of them is absent- if the order of ITO is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue – recourse cannot be had to section 263 (1) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the AO, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of fact or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principle of natural Justice or without application of mind. The 'phrase prejudicial to the interest of revenue' is not an expression of art and is not defined in the Act. Understood it is ordinary meaning it is of wide import and is not confined to loss of tax. The scheme of the act is to levy and collect tax in accordance with the provision of the act and this task is entrusted to the revenue. If due to an erroneous order of the ITO, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interest of revenue. The phrase prejudicial to the interest of revenue has to be read in conjunction with an erroneous order passed by the AO. Every loss of revenue as a consequence of an order of AO, cannot be treated as prejudicial to the interest of revenue, for example, when an ITO, adopted one of the course permissible in law and it has resulted in loss of revenue, or where two views are possible and the ITO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of revenue. Unless the view taken by ITO is unsustainable in law."

10. Hon'ble Jurisdictional High Court in case of CIT Vs Gabriel India Ltd 203 ITR 108 (Bom), held that the power of *suo moto* revision under subsection (1) of section 263 of the Act is in the nature of supervisory direction and can be exercised only if the circumstances specified therein

exist. Two circumstances must exist to enable the CIT to exercise the power of revision under this sub section viz (1) the order should be erroneous and (2) by virtue of the order being erroneous prejudice must have been caused to the interest of the revenue. And order cannot be termed as erroneous unless it is not in accordance with law. If ITO. Act in accordance with law. Make certain assessment; the same cannot be branded as erroneous by the CIT simply because according to him, the order should have been written more celebratory. This section does not visualise a case of substitution of the judgement of the CIT for that of the ITO, who passed the order, unless the decision is held to be erroneous. This is may be visualised where the ITO while making the assessment examines the accounts, makes enquiries, applied his mind to the facts and circumstances of the case and determine the income either by accepting the accounts for by making some estimate himself. The CIT on perusal of records, may be of opinion that the estimate made by the officer concerned was on the lower side and left to the CIT, he would have estimated the income at a higher figure than one determine by the ITO. That would not vest the CIT with power to re-examine the accounts and determine the income himself at the higher figure.

11. Further Hon'ble Delhi High Court in case of ITO Vs DG Housing Projects Ltd [343ITR 329 (Delhi)] held that the order is erroneous if the twin condition must be satisfied for exercise of jurisdiction under section

263 of Income-tax Act. The matter cannot be remitted back for fresh decision to the assessing officer to conduct further inquires without a finding that order is erroneous. The Commissioner must after recording reasons hold that order is erroneous. The Commissioner cannot direct reconsideration only when the order is erroneous. An order of remit cannot be passed by the commissioner to ask the assessing officer to decide whether the order was erroneous, which is not permissible.

12. In DIT Vs Jyoti Foundation (357ITR 388 Delhi) the Hon'ble Delhi High Court while distinguishing the order passed after proper inquiry and without inquiry held that the orders which are passed without inquiry or investigation are treated as erroneous and prejudicial to the interest of revenue, but orders which are passed after inquiry or investigation on the issues are not *per se* or normally treated as erroneous and prejudicial to the interest of revenue. Because the revisionary authority feels and opines that further inquiry or investigation was required or deeper or further scrutiny should be undertaken, the Commissioner must record a finding that the order made is erroneous. This can happen if an inquiry and verification is conducted by Commissioner and he is able to establish and show the error or mistake made by assessing officer, making the order unsustainable in law. An order of remit cannot be passed by Commissioner to ask the assessing officer to decide if the order is erroneous.

13. In view of the above legal position, now we shall consider the submission of learned AR of the assessee and would examine the facts of the present case. We have noted that the learned PCIT issued show cause notice under section 263 dated 17th of October 2017. In the show cause notice the learned PCIT raised the issue that assessee company claimed business loss of Rs. 84.09 crore incurred on account of currency swap and the same was allowed to the assessee in the assessment order, in allowing the loss the assessing officer has not followed the decision of Hon'ble Supreme Court in Sutlej Cotton Mills Ltd versus CIT (supra). The learned PCIT after considering the reply furnished by the assessee concluded that in the reply the assessee has admitted that loan was availed for acquiring capital asset and prime face the decision of Supreme Court is applicable on the facts of the assessee's case. The learned PCIT has not examined the fact of the case, rather directed the assessing officer to examine the allowability of the claim of business loss on currency swap.

14. The Hon'ble Supreme Court in case of Sutlej Cotton Mills Ltd versus CIT (supra) held that it is well settled that where profit or loss arises to an assessee on account of appreciation or depreciation in the value of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be trading profit or loss if the foreign currency is held by the assessee on revenue account or as a trading asset or as part of circulating capital embarked in the business. But, if on the other hand, the

foreign currency is held as a capital asset or as fixed capital; such profit or loss would be of capital nature. Now, in the instant case, no finding was given by the Tribunal as to whether the sums were held by the assessee in West Pakistan on capital account or revenue account and whether they were part of fixed capital or of circulating capital embarked and adventured in the business in West Pakistan. If the amounts in question were employed in the business in West Pakistan and formed part of the circulating capital of that business, the loss resulting to the assessee on remission of those two amounts in India, on account of alteration in the rate of exchange, would be a trading loss, but if, instead, those amounts were held on capital account and were part of fixed capital, the loss would plainly be a capital loss. The question whether the loss suffered by the assessee was a trading loss or a capital loss could not, therefore, be answered unless it was first determined whether the amounts in question were held by the assessee on capital account or on revenue account or, to put it differently, as part of fixed capital or of circulating capital.

15. We have noted that the Hon'ble Apex Court in Sutlej Cotton Mills Ltd (supra) also held that, if, the foreign currency is held as a capital asset or as fixed capital; such profit or loss would be of capital nature. We have further noted that figures of currency swap loss has been specifically mentioned in the annual accounts for the assessment year under consideration and explained in note no. 25(c) and 28(3), copy of which is

placed on record at page number 176 &170. The assessee has debited foreign exchange fluctuation loss in profit and loss account in line with a AS-11, which is mandatory for the assessee to follow as per section 209 of the Companies Act.

16. Further the Hon'ble Supreme Court in Oil and Natural Gas Corporation versus CIT (supra) held that forex loss is allowable deduction under section 37(1) notwithstanding whether it is actually paid. Similarly in CIT versus Woodward Governor India private Ltd (312 ITR 326 SC), it was held that where the provision of section 43A are not attracted, forex loss suffered on account of foreign exchange difference is allowable as deduction under section 37(1) of the Act.

17. The coordinate bench of Pune Tribunal in Cooper Corporation Private Ltd Vs DCIT (supra) held that where assessee's act of conversion of Indian currency loan availed for acquisition of assets etc, into foreign currency loan was dictated by revenue consideration towards saving interest cost et cetera, foreign exchange fluctuation loss being on revenue account was allowable expenditure under section 37 of the Act. The relevant part of the decision is extracted below:

> "**10.5** Before we delineate on the allowability of loss based on generally accepted accountancy principles, it may be pertinent to examine whether the increased liability due to fluctuation loss can be added to the carrying costs of corresponding capital assets with reference to S. 43(1) of the Act. Section 43(1) defines the expression 'actual cost'. As per S. 43(1), actual cost means actual cost of the assets to the assessee, reduced by that portion of the costs

as has been met directly or indirectly by any other person or authority. Several Explanations have been appended to S. 43(1). However, the section nowhere specifies that any gain or loss on foreign currency loan acquired for purchase of indigenous assets will have to be reduced or added to the costs of the assets. Thus, viewed from this perspective also, such increased liability cannot be bracketed with cost of acquisition of capital assets save and except in terms of overriding provisions of S. 43A of the Act.

10.6 We also simultaneously note here that the Hon'ble Supreme Court in the case of *CIT* v. *Tata Iron and Steel Co. Ltd.* [1998] 231 ITR 285/98 Taxman 459 held that cost of an asset and cost of raising money for purchase of asset are two different and independent transactions. Thus, events subsequent to acquisition of assets cannot change price paid for it. Therefore, fluctuations in foreign exchange rate while repaying instalments of foreign loan raised to acquire asset cannot alter actual cost of assets. The relevant operative para is reproduced hereunder.

> "Coming to the question raised, we find it difficult to follow how the manner of repayment of loan can affect the cost of the assets acquired by the assessee. What is the actual cost must depend on the amount paid by the assessee to acquire the asset. The amount may have been borrowed by the assessee, but even if the assessee did not repay the loan it will not alter the cost of the asset. If the borrower defaults in repayment of a part of the loan, the cost of the asset will not change. What has to be borne in mind is that the cost of an asset and the cost of raising money for purchase of the asset are two different and independent transactions. Even if an asset is purchased with non-repayable subsidy received from the Government, the cost of the asset will be the price paid by the assessee for acquiring the asset. In the instant case, the allegation is that at the time of repayment of loan, there was a fluctuation in the rate of foreign exchange as a result of which, the assessee had to repay a much lesser amount than he would have otherwise paid. In our judgment, this is not a factor which can alter the cost incurred by the assessee for purchase of the asset. The assessee may have raised the funds to purchase the asset by borrowing but what the assessee has paid for it, is the price of the asset. That price cannot change by any event subsequent to the acquisition of the asset. In our judgment, the manner or mode of repayment of the loan has nothing to do with the cost of an asset acquired by the assessee for the purpose of his business. We hold that the questions were rightly answered by the High Court. The appeals are dismissed. There will be no order as to costs. "

Thus, it is evident the variation in the loan amount has no bearing on the cost of the asset as the loan is a distinct and independent transaction as in comparison with acquisition of assets out of said loan amount borrowed. Actual cost of the corresponding fixed asset acquired earlier by utilizing the aforesaid loan will not undergo any change owing to such fluctuation.

10.7 The issue is also tested in the light of provision of S. 36(1)(iii) governing deduction of interest costs on borrowals. As stated earlier, manner of utilization of loan amount has nothing to do with allowability of any expenditure in connection with loan repayment. Both are independent and distinct transactions in nature. Similar analogy can be drawn from S. 36(1)(iii) of the Act which also reinforces that utilization of loan for capital account or revenue account purpose has nothing to do with allowablity of corresponding interest expenditure. A proviso inserted thereto by Finance Act, 2003, also prohibits claim of interest expenditure in revenue account only upto the date on which capital asset is put to use. Once the capital asset is put to use, the interest expenditure on money borrowed for acquisition of capital asset is also treated as revenue expenditure. As also noted, S. 43A specifically and categorically calls for adjustments in cost of assets for loss or gain arising out of foreign currency fluctuations in respect of funds borrowed in foreign currency for acquisition of foreign assets. However, the same rationale of a deeming provision of S. 43A cannot be applied to loss or gain arising from foreign currency loss utilized for purchase of indigenous assets. Needless to say, impugned currency fluctuation loss has emanated from foreign currency loans. Besides AS-11, the claim of exchange fluctuation loss as revenue account is also founded on the argument that the aforesaid action was taken to save interest costs and consequently to augment the profitability or reduce revenue losses of the assessee. The impugned fluctuation loss therefore has a direct nexus to the saving in interest costs without bringing any new capital asset into existence. Thus, the business exigencies are implicit as well explicit in the action of the Assessee. The argument that the act of conversion has served a hedging mechanism against revenue receipts from export also portrays commercial expediency. Thus, we are of the opinion that the plea of the assessee for claim of expenditure is attributable to revenue account has considerable merits."

18. Further the Coordinate Bench of Mumbai Tribunal in Reliance Industries Ltd versus CIT (supra) held that the forex loss due to fluctuation in exchange rate is not notional loss and is allowable as deduction and in such situation the order under section 263 was held as not justified.

19. We have further noted that admittedly the loss on currency swap is an event subsequent to the acquisition and put to use of the asset for business and therefore, following the ratio of the Supreme Court decision in Tata Iron Steel Co. Ltd (supra), which has been relied by coordinate bench of Pune Tribunal in Cooper Corporation (P) Ltd (supra), such loss cannot alter the cost of asset and is rather allowable as revenue expenditure. Thus, the ratio of the judgment of Hon'ble Sutlej Cotton Mills Ltd (supra) is not applicable in the instant case and the assessment order cannot be erroneous in law.Therefore, clause (d) of *Explanation* 2 of section 263 is not fulfilled. Considering the all above referred case law, we find that the loss claimed by assessee on account of fluctuation loss is revenue loss and the assessee is entitled for its deduction. Therefore, the order passed by assessing officer is not erroneous. Considering the fact that the twin condition as enunciated by Hon'ble Apex Court in case of Malabar industrial companies Ltd (supra) are not fulfilled, therefore, the order passed by assessing officer cannot be subject matter of revision. Therefore, the revision order passed by learned PCIT is not sustainable in

the eyes of law, which we hold that such. In the result the grounds of appeal raised by assessee are allowed.

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

ITA No. 702/Mum/2018 for AY 2012-13 by assessee.

21. The assessee has raised identical grounds of appeal except the variation of figure as raised in appeal for AY 2011-12, which we have already allowed. Therefore, considering the principal of consistency the grounds of appeal raised in the appeal for the year under consideration is also allowed with similar observation.

22. In the result the appeal of the assessee is allowed.

Order pronounced in the open court on 16/11/2018.

Sd/-	**Sd/-**
G.S. PANNU	**PAWAN SINGH**
VICE-PRESIDENT	**JUDICIAL MEMBER**

Mumbai, Date: 16.11.2018
SK

Copy of the Order forwarded to :
1. Assessee
2. Respondent
3. The concerned CIT(A)
4.The concerned CIT
5. DR "F" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,
Dy./Asst. Registrar
ITAT, Mumbai