IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH KOLKATA

BEFORE SHRI S.S.GODARA, JM &DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.1073/Kol/2018

(निर्धारणवर्ष / Assessment Year:2011-12)

JKS Infrastructure Pvt. Ltd. **C/o, JKS Infrastructure Pvt. Ltd., P-4, Black Burn Lane, Kolkata-700012.**	**Vs.**	**Pr. CIT, Central-1, Kolkata**
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AABCJ 3408 M**		
(Assessee)	**..**	**(Revenue)**

Assesseeby : Shri Miraj D. Shah, AR
Respondent by :Shri Radhey Shyam, CIT DR

सुनवाईकीतारीख/ **Date of Hearing** : **12/09/2019**

घोषणाकीतारीख/**Date of Pronouncement** : **09/12/2019**

आदेश / O R D E R

Per Dr. A. L. Saini:

The captioned appeal filed by the Assessee, pertaining to assessment year 2011-12, is directed against the order passed by the Pr. Commissioner of Income Tax, Kolkata, under section 263 of the Income Tax Act, 1961 (in short the 'Act') dated 23.03.2018.

2. Grounds of appeal raised by the assessee are as follows:

> *1. For that in the facts and circumstances of the case the notice u/s 263 of the Income Tax Act 1961 issued by the learned Principal Commissioner of Income Tax was without jurisdiction and the order passed on the basis of such notice was bad in law hence the same be quashed and or annulled.*

2. For that in the facts and circumstances of the case the Learned Principal Commissioner of Income Tax erred in holding that the assessment order passed by the learned assessing officer in the case of the appellant was erroneous and prejudicial to the interest of revenue and thereby setting aside the said assessment order by invoking the provisions of section 263 of the Income Tax Act 1961.

3. For that on the facts and in the circumstances of the case, the learned Principal Commissioner of Income Tax erred in holding that the AO did not make any enquiry regarding assessment of allowability of interest paid to bank against income computed under the head 'income from house property'. Such finding of the learned Principal Commissioner of Income Tax was perverse and therefore the order passed u/s.263 of the Income Tax Act, 1961 is based on wrong appreciation of facts of the case and hence bad in law.

4. Without prejudice to the above the learned AO could not have entered into the issue of allowability of interest in the assessment order passed u/s. 153A /143(3) of the Income Tax Act, 1961 in absence of any incriminating material found in the course of search. Hence the order passed u/s. 263 of the Income Tax Act, 1961 was bad in law and deserves to be quashed.

5. Without prejudice to the above, the view of the learned AO with respect to allowing the interest against house property was a possible view. Hence, the learned Principal Commissioner of Income Tax erred in invoking provisions of section 263 of the Income Tax Act, 1961.

6. For that in the facts and circumstances of the case the order passed by the learned Commissioner of Income Tax u/s 263 of the Income Tax Act, 1961 is based on wrong appreciation of facts of the case and is bad in law.

7. For that in the facts and circumstances of the case the order passed by the learned Commissioner of Income Tax u/s 263 of the Income Tax Act, 1961 is without any basis and hence the same be quashed.

8. The appellant craves leave to press new, additional grounds of appeal or modify, withdraw any of the above grounds at the time of hearing of the appeal.

3. Brief facts qua the issue are that in the assessee`s case under consideration the AO framed the assessment under section 143(3) of the Income Tax Act, 1961, for A.Y. 2011-12 vide order dated 31.03.2016 determining assessed income at Rs. 3,80,22,150/- as against the returned income of Rs. 2,86,69,913/- after making two additions viz: one of unexplained cash credit u/s 68 of Rs. 55,13,750/- and second addition of Rs. 38,38,484/- u/s 14A r.w. Rule 8D of the Rules.

Later on, Ld Principal Commissioner of Income Tax (PCIT) has exercised his jurisdiction under section 263 of the Act. The ld PCIT noticed that the A.O has allowed deduction for interest paid by JKS Infrastructures Pvt. Ltd. u/s 24(b) at Rs. 3,51,12,845/- after disallowing the interest of Rs. 38,38,484/- u/s 14A of the Income Tax Act out of total interest amount of Rs. 3,89,51,333/- claimed by the assessee u/s 24(b) while computing the income under the head "Income From House Property" on account of rent received from go down. The ld PCIT noticed that during the course of assessment proceeding, before allowing the interest u/s 24(b) of the Act, the A.O has not examined whether the income from go-down is to be assessed as "Business Income" or as "House Property Income" and interest of Rs. 3,51,12,845/- has been allowed without examining whether such interest was paid on the loans, if any, taken by the assessee for constructing or acquiring go-down from which rental income has been shown.

The ld PCIT noticed that as per M/s JKS Infrastructures Pvt. Ltd.'s balance sheet, it has shown "Opening Balance" on secured loan from State Bank of India of Rs. 29,35,00,000/- as on 01.04.2010 and Closing Balance of secured loan from State Bank of India of Rs. 22,83,97,247/- as on 31.03.2011. Further, it has been shown that there is balance of Capital Work in Progress of Rs. 32,47,46,813/- at the beginning of the year and Rs. 16,11,87,956/- at the end of the year. It has also been found from Para-VI of accounting policies and notes on accounts that capital work in progress was for Panvel Project and in Part-VII, it was stated that secured loan was taken for Panvel Project.

In view of above details of loan outstanding and work in progress shown in the balance sheet and the interest expenditure debited by the assessee company in the Profit & Loss account after disallowance of Rs. 38,38,448/- u/s 14A, the balance amount of interest of Rs. 3,51,12,845/- was found to be incurred for Capital work in progress (Panvel Project) and hence, the interest expenses incurred for capital investment was required to be capitalized being capital expenditure and required to be disallowed and added back to the total income in view of proviso to section 36(1)(iii). However, the A.O has allowed the above interest amount to M/s JKS

Infrastructures Pvt. Ltd u/s 24(b) without examining the nature of interest paid and also he has not examined whether the rental income earned by JKS Infrastructures form go-down is liable to be taxed under the head ""Business" or "House Property" and he has wrongly allowed "Standard deduction" of 30% u/s 24(a) by accepting JKS Infrastructures Pvt. Ltd claim of such income to be taxed under the head "Income from House Property" without making any requisite examination about the business being carried out by M/s JKS Infrastructures Pvt. Ltd which was mentioned in the form 3CD as 'Construction' and 'Development'. In view of the above error committed by the A.O due to not making requisite investigation and enquiries in respect of M/s JKS Infrastructures Pvt. Ltd's business and also not examining the nature of interest claimed by JKS Infrastructures Pvt. Ltd, excess deduction of Rs.7,90,69,892/- has been allowed to JKS Infrastructures Pvt. Ltd consisting of Standard deduction by Rs. 4,39,57,047/- u/s 24(a) and deduction for interest on borrowed capital u/s 24(b) of Rs. 3,51,12,845/-. Because of the above error committed by the A.O in the above mentioned assessment order dated 31.03.2016, it has become erroneous as prejudicial to the interest of revenue. Therefore, ld PCIT issued a show cause notice under section 263 of the Act to the assessee company asking it to explain as to why a revisionary order under section 263 should not be passed to correct the error as discussed above.

4. In response to the notice u/s 263 of the Act, the assessee filed written submission before the ld PCIT, which is reproduced below:

In your notice you have stated that the AO has not examined whether the godown income is to be assessed as business income or house property income. Further, you have stated that the interest of Rs.3,51,12,845/- has been allowed without examining whether the interest was paid for constructing or acquiring a godown. You have stated that the AO committed an error by not making enquiries on this respect and allowed excess deduction of Rs.4,39,57,047/- u/s.24(a) of the Income Tax Act, 1961 and Rs.3,51,12,845/- u/s.24(b) of the Income Tax Act, 1961. You have stated that due to the above facts, there was an error in the order passed by the AO and hence you propose to invoke the powers under the provisions of Section 263 of the Income Tax Act, 1961 in this regard.

At the outset, we submit that the assessment order passed by the AO for the AY 2011-12 dated 31/03/2016 was made u/ s.153A/ 143(3) of the Income Tax Act, 1961 which is to be passed considering the scope and limitations of the provisions of section 153A of the Income Tax Act,1961.The AO, thus, passed the order keeping in mind the scope of the assessment as explained by various courts u/s.153A of the Income Tax Act, 1961 and therefore, the Ld. AO passed the order which was legally correct and such order could not be held to be erroneous or prejudicial to the interest of the revenue.

In this regard, we submit that in the assessment proceedings we have rather submitted before the AO vide our submissions dated 15/03/2016 that the income from commercial godown should be treated as business income. Copy of such submissions made before the AO is enclosed herein and marked as ***Annexure-A.*** *On perusal of this, you shall find that we had in fact asked for the AO to consider our income as business income and allow the interest as business expenditure u/s.36(1)(iii) and further, we had requested that the income being assessed as business income will lead to the property being treated as a business asset and on this amount we shall be entitled to depreciation which was originally not claimed as the income was treated as house property income. We had requested the AO to allow depreciation on the business asset in terms of Explanation 5 to section 32 of the Income Tax Act, 1961 and as such a revised depreciation as claimed in the letter was Rs.4,40,49,176/-. The AO, however, after considering the submissions and also the scope of provisions of section 153A, did not change the head of income thereby did not allow depreciation. We submit that the AO has made due enquiries on this issue, called for explanations and then applied his mind and taken a possible view. Once the AO has applied his mind and made enquiries then, the order cannot be held to be a case of lack of enquiry. Further, the view of the AO was one possible view, therefore, the same cannot be considered to be erroneous. Therefore, on this aspect, the powers u/ s.263 of the Income Tax Act, 1961 cannot be invoked.*

With respect to the deduction of the interest of Rs.3,51,12,845/-, we submit that this part of the interest is relating to the Panvel project which has been completed and has already been given out on rent. You will find that the assessee has earned substantial amount of rent running in crores from various parties. It is quite logical that the rent will not be earned unless the godowns are ready and used by the parties for which they are paying rent. The AO had also made enquiries in this regard and called for the working of interest. A copy of the same is enclosed herein marked as ***Annexure-B.***

The total interest for the year for Panvel project was Rs. 3,89,51,332.85 out of which Rs. 3,89,51,332.85 was for the part of the Panvel project which was completed and in operation. The Panvel project was being developed in various phases and the interest debited and claimed as deduction in income tax return related only to the phase completed. All these issues were examined by the AO in details and after examining the same, the AO allowed this claim. Further, the AO kept in mind the scope of section 153A of the Income Tax Act, 1961 and passed the order. We submit that the AO has made due enquiries on this issue, called for explanations and then applied his mind and taken a possible view. Once the AO has applied his mind and made enquiries then, the order cannot be held to be a case of lack of enquiry. Further, the view of the AO was one possible

view, therefore, the same cannot be considered to be erroneous. Therefore, on this aspect, the powers u/s.263 of the Income Tax Act, 1961 cannot be invoked.

Without prejudice to the above, in case you direct the AO to reconsider the issue of taxability under the head Business, then you may also direct the AO to allow depreciation on the same u/s.32 Explanation 5 of the Income Tax Act, 1961 which mandates depreciation to be allowed even if not claimed in return.

5. However, the ld PCIT, rejected the contention of the assessee and held as follows:

"4. I have considered the above written submission. As the A.O has decided to tax the income from renting of Ware House under the head "Income from House Property" after making enquiries and applying his mind taking one possible view, no further change in the Head of Income under which the rental income from Ware Houses is to be taxed, can be done by passing order u/s 263. However, allowability of deduction of the interest by the A.O against the House Property income can be very well examined. The assessee had contended that the interest paid is relating to Panvel Project that is partly completed and deduction of interest is computed for the past of the Panvel Project that is completed and this issue was examined by the A.O during assessment proceeding but no such query raised by the A.O on allowability of interest and details of examination of interest paid on loans utilized for construction of go-down in Panvel Project, has been found. Therefore, it is clearly found form the record that issue of allowability of interest paid to bank against the income completed under the head "Income from House Property" was not examined. It was not examined as to what part of interest pertain to the part of the Panvel Project that was given on rent after being completed. In the written submission, it is stated that total interest paid for the year for Panvel Project was Rs. 3,89,51,332/- out of which Rs. 3,89,51,332/- was paid for the part of the Panvel Project which was completed and in operation. It has been further explained that Panvel Project was being developed in various phases and interest debited and claimed as deduction in Income Tax return is related only to the phase that is completed. There is inherent contradiction in the above explanation of the assessee. If total interest for the year for Panvel Project was Rs. 3,89,51,332/- and Panvel Project was still not completed as clear from the work-in-progress shown in Balance Sheet, how it can bepossible that out of total interest paid for Panvel Project of the amount Rs. 3,89,51,332/-, the Interest paid for part of completed Panvel Project would also be Rs. 3,89,51,332/-. Therefore, the A.O is directed to collect the entire detail of Panvel Project being developed by the assessee and its cost of construction and amount of bank loans taken for constructing this project. Then, find out as to how much part of this Panvel Project is completed during the year under consideration and how this completed part was utilized by the assessee for earning of rental income. Then find out as to out of total interest paid, how much amount of interest was paid pertaining to the part of Panvel Project completed during the year under consideration and utilized for earning of rental income. As directed above, after collecting the details and determining the amount of interest paid for part of Panvel Project completed during the year and used for earning of rental income,

the A.O shall allow only that part of interest u/s 24(b) that was paid relating to loan utilized for completed part of Panvel Project and also used earning of rental income during the year under consideration. Therefore, the assessment order passed u/s 153A read with section 143(3) dated 31.03.2016 is set aside and restored to the file of the A.O to pass a fresh assessment order to the extent of deciding the allowability of deduction of interest u/s 24(b) against the House Property Income from Ware Housing rental income as per my direction given in this para. Other additions made in the original order shall remain intact.

5. In the result, the assessment order u/s 153A r.w.s. 143(3) dated 31.03.2016 is set aside and restored to the file of the A.O for passing of fresh assessment order to the extent of determining the correct amount of interest to be deducted u/s 24(b) against the House Property Income from Ware House rental income as directed by me in previous para."

6. Aggrieved by the order of the Ld PCIT, the assessee is in appeal before us.

7. Shri Miraj D. Shah, ld. Counsel for the assessee begins by pointing out that during the assessment stage u/s 153A/143(3) of the Act, the assessee furnished written submissions, vide dated 15.03.2016, before the AO wherein the assessee stated that income from commercial go-down should be treated as business income. However, the AO rejected the contention of the assessee and treated the income from commercial go-down under the head "Income from house property". Therefore, AO has examined the issue relating to income from commercial go-down and then took a possible view, hence order passed by AO u/s 153A/143(3) of the Act, dated 31.03.2016 is not erroneous.

Apart from this, the ld. Counsel also pointed out that in assessee`s case a search and seizure operation was conducted under section 132 of the Income Tax Act on 13.03.2014. The assessee`s case for assessment year 2011-12 was not pending at the time of search and seizure and there was no incriminating material unearthed during the search proceedings. Therefore, in case of unabated assessment the addition should not be made without any incriminating material. Hence, the order passed by the Assessing Officer is neither erroneous nor prejudicial to the interest of the revenue.

8. On the other hand, the ld. DR has primarily reiterated the stand taken by the ld PCIT which we have already noted in our earlier para and the same is not being repeated for the sake of brevity.

9. We heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the ld CIT(A) and other materials available on record. First of all, we have to see whether the requisite jurisdiction necessary to assume revisional jurisdiction is there existing before the Pr. CIT to exercise his power. For that, we have to examine as to whether in the first place the order of the Assessing Officer found fault by the Principal CIT is erroneous as well as prejudicial to the interest of the Revenue. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordship have held that twin conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii)Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him; then the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. "prejudicial to the interest of the revenue'' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer

adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue "unless the view taken by the Assessing Officer is unsustainable in law".

10.Taking note of the aforesaid dictum of law laid down by the Hon'ble Apex Court, let us examine whether order passed by the AO under section 153A/143(3) of the Act, dated 31.03.2016 is erroneous. We note that the assessee filed its return of income u/s 139(1) on 30.09.2011. The time limit for issue of scrutiny notice u/s 143(2) expired on 30.09.2012. The search was initiated in the assessee's case on 13.03.2014. Therefore, we note that at the time of search and seizure the assessment for A.Y.2011-12 was not pending. Therefore, in case of assessee, the assessment year 2011-12 is an unabated assessment. It is settled position of law that in case of unabated assessment, the addition cannot be made by AO without incrementing documents unearthed during search. In assessee`s case, during search operation, the search team did not find and incrementing material.

We note that the assessment order u/s 153A /143(3) was passed on 31.03.2016 and the ld. PCIT has issued notice u/s 263 of the Act on 08.12.2017. Therefore, we note that assessment year 2011-12 under consideration, was not pending on the date of search, hence it is an unabated proceedings. Without incriminating material in case of unabated assessment, the addition could not be made therefore, order passed by the AO is not erroneous. For that we rely of the judgment of the Coordinate Bench of ITAT Kolkata,in the case of M/s Indian Roadways Corporation Ltd. in ITA No.787/Kol/2018, for A.Y.2009-10, wherein the coordinate Bench held as follows:

> *"19. We have given a careful consideration to the rival submissions and perused the material available on record, we note that the law with regard to exercise of jurisdiction u/s.263 of the Act on the ground that the AO failed to make enquiries which he ought to have made in the given circumstances of a case is well settled. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return and he should examine the disallowance made in the original assessment passed under section 143(3) of the Act. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is*

apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an enquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct. We derive support for the proposition as stated above from the decision of the Hon'ble Delhi High Court in the case of Gee Vee Enterprises 99 ITR 375 (Del).

We note that in the assessee`s case under consideration the present appeal pertains to assessee`s objection against the order dated 26.03.2018 passed by the Ld. Principal CIT, Central-1, Kolkata, u/s 263 of the Act holding the assessment order passed u/s 153A/143(3) of the Act on 31.03.2016 for A.Y. 2009-10 erroneous and prejudicial to the interests of revenue. We note that assessee company filed its original return of income on 25/09/2009, declaring a total income of Rs.2,73,270/-. Subsequently, the return was revised by the assessee on 10/06/2010 declaring a total income of Rs.36,23.652/-. Thereafter, assessment order u/s. 143(3) of the Act was passed vide order dated 27/12/2011 showing assessee company income to the tune of Rs.49,59,590/-. Subsequently, a search & seizure operation was conducted at different locations of the assessee company on 13/03/2014. Subsequent to search and seizure operation, assessee company filed its return of income on 30/05/2015 declaring the total income of Rs.36,23,652/- as shown in the revised return filed subsequent to original return of income. Assessment u/s.143(3)/153A was completed on 31/03/2016 by the AO assessing the total income at Rs.52,63,710/-.

The ldPr.CIT exercised his jurisdiction under section 263 of the Act to revise the assessment order passed by the assessing officer, u/s.143(3)/153A of the Act, which was passed by the AO after search and seizure action on dated 13.03.2014.

20. We note that in the assessee`s case under consideration, the ldPr.CIT exercised his jurisdiction under section 263 of the Act in respect of the assessment year 2009-10. The original assessment order u/s. 143(3) of the Act, in relation to assessment year 2009-10, was passed by ld AO on 27/12/2011. Subsequently, a search & seizure operation was conducted at different locations of the assessee company on 13/03/2014. Therefore, admittedly the assessment year 2009-10 is an unabated assessment, as the original assessment order u/s. 143(3) of the Act, in relation to assessment year 2009-10, was passed by ld AO on 27/12/2011 which is much prior to the search& seizure operation conducted on the assessee company on 13/03/2014. It is a settled position of law that addition in case of unabated assessment can be made only based on the incriminating material/documents unearthed during the search and seizure.

21. Based on the facts narrated above, let us analyze whether the requisite jurisdiction necessary to assume revisional jurisdiction u/s 263 of the Act is existing before the Ld. Pr. CIT to exercise his power, in the assessee`s case under consideration. First of all, it is worthwhile to go through the provisions of section 263 of the Income Tax Act, 1961 which reads as follows:

> *"263. Revision of orders prejudicial to revenue-(1) The 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, the assessment or cancelling the assessment and directing a fresh assessment"

A bare reading of the foregoing provision makes it clear that the power of suo moto revision can be exercised by the Principal Commissioner only if, on examination of records of any proceedings under the Income Tax Act, 1961, he holds the opinion that any order passed by the Assessing Officer is 'erroneous in so far as it is prejudicial to the interests of the revenue'. Thus, as per the provision of section 263, the Pr. CIT has to be satisfied of the following twin conditions, in order to exercise his powers of revision:

(i) the order of the Assessing Officer sought to be revised is erroneous; and

(ii) the order of the Assessing Officer sought to be revised is prejudicial to the interests of the Revenue.

Therefore, it stands clear that recourse to Section 263(1) of the Income Tax Act, 1961 cannot be taken by the Principal Commissioner if either of the above conditions are not satisfied, i.e. if the impugned assessment order is erroneous but not prejudicial to the interest of the revenue, or if the impugned assessment order is prejudicial to the interest of the revenue but not erroneous. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in the case of Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordship have held that twin conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii)Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him; then the order passed by the Assessing Officer can be termed as erroneous order.

22. Coming next to the second limb, which is required to be examined as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue. When this aspect is to be examined, one has to understand that what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. "prejudicial to the interest of the revenue'' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue "unless the view taken by the Assessing Officer is unsustainable in law".

23. Taking note of the aforesaid dictum of law laid down by the Hon'ble Apex Court, in the case of Malabar Industries (supra), let us examine whether the order passed by the Assessing Officer u/s 153A/143(3) dated 31.03.2016, in the assessee`s case under consideration, is erroneous as well as prejudicial to the interest of the revenue. It is an admitted fact that in the assessee`s case under consideration the original assessment u/s 143 (3) was completed on 27.12.2011 and search and seizure action was conducted on 13.03.2014. Therefore, undisputedly, the assessment year under question i.e. Assessment Year 2009-10 which was not pending before the Assessing Officer on the date of search on 13.03.2014 , therefore, the assessment which is not pending before the Assessing Officer is an unabated proceeding and the Assessing Officer is empowered to make any addition only based on incriminating materials found/unearthed during search. This is a settled position of law and is no longer res integra. The following judgments are given in support of the above proposition of law:-

The Hon'ble Delhi High Court in Kabul Chawla (supra) has laid down the law which spells out the power of the AO while exercising power u/s 153A after search u/s 132 of the Act was conducted by the Revenue. The same is reproduced as under:

"Summary of legal position
37.On a conspectus of Section 153A(1) of the Act, read with provisions thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:
i. Once a search takes place under Section 132 of the Act, notice under Section 153 A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and re-assessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the `total income' of the aforementioned six years in separate will be only one assessment order in respect of each of the six `AYs " in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

v) In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word `assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word `reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record the AO.

vii. Completed assessment can be interfered with by the AO while making the assessment under Section 153A only on the basis of some incriminating material unearthed during the course of property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

24. The Hon'ble Jurisdictional Calcutta High Court in Veerprabhu Marketing Ltd though in the context of section 153 of the Act has held as under:

> *"We agree with the view expressed by the Delhi High Court that incriminating material is pre-requisite before power could have been exercise u/s 153(C) R.W. Section 153(A). In the case before us, the AO has made a disallowance of the expenditure, which was held disclosed, for one reason or the order, but such disallowances made by the AO were upheld by the L.D.CIT (A) but the Ld. Tribunal deleted these disallowance. We find no infirmity in the aforesaid Act of the Ld. Tribunal. The appeal is therefore, dismissed.*

25. In view of the aforesaid ratio decidendi of the Hon'ble High Court as well as Hon'ble Supreme Court's decisions cited above, since assessment for Assessment Year 2009-10 was not pending before the Assessing Officer on the date of search i.e. on 13.03.2014, no addition can be made by the Assessing Officer without the aid of incriminating material unearthed during the search conducted on 13.03.2014. Therefore, we have to examine whether there was any incriminating materials unearthed by the Department during search conducted on 13.03.2014. We have gone through the assessment order of Assessing Officer in all the counts before us and we find that the Assessing Officer has not made a whisper of any incriminating material which has been unearthed/seized during the search on 13.03.2014. The Assessing Officer having no incriminating materials unearthed during the search on 13.03.2014 against the assessee company, did not make any additions (with the aid of any incriminating material) against the assesses, before us, for Assessment Year 2009-10.

We note that in the assessee`s case under consideration the information and documentary evidence about the amount of Rs. 72,31,592/- as "debit balances" being in the nature of "loan and advances written off" and "fixed assets written off", of Rs.13,68,447/- and for other two balances of Rs. 1,27,033/- and Rs. 4,200/-, nature of 'sundry balances written off', were available before the assessing officer when he was making assessment under section 143 (3) of the Act on 27.12.2011. Therefore, during the search and seizure on dated 13.03.2014, the search team did not find any incrementing material or new documents. The ldPr.CIT exercised his jurisdiction based on the information/documents already available on record during the assessment under section 143(3) of the Act, dated 27.12.2011.

Moreover, the amount of Rs. 10 lakh, was disallowed in the original assessment order u/s 143(3) dated 27.12.2011. However, the said amount of Rs.10 lakh, had

not been disallowed by the assessing officer while making assessment order under section 153A/143(3), dated 31.03.2016. Therefore, the information/documentary evidence about the amount of Rs. 10 lakh was available during the original assessment U/s 143(3) of the Act on 27.12.2011. During the search and seizure, the search team did not find any incrementing material or new documents about the impugned amount of Rs.10 lakh, as this amount was already on record of the assessing officer during original assessment U/s 143 (3) of the Act, dated 27.12.2011. Therefore, without incrementing material, no addition could have been made by the Assessing Officer in the light of the order of the Hon'ble High Court in the case of Kabul Chawla (supra) and the Assessing Officer could have only reiterated the regular assessment made u/s 143(3) of the Act. In case, if Assessing Officer made any mistake while reiterating the assessment as per section 143(3) of the Act, then it can be rectified by the Assessing Officer himself u/s 154 and cannot give rise to revisional jurisdictional to ld. Pr. CIT u/s 263 of the Act.

26. We are aware of the fact that the Assessing Officer's role while framing an assessment is not only an adjudicator. The AO has a dual role to dispense with i.e. he is an investigator as well as an adjudicator; therefore, if he fails in any one of the role as afore-stated, his order will be termed as erroneous. We note that in this case since there was no incriminating material unearthed during the search, the Assessing Officer has not made any additions in his assessment order dated 31.03.2016, based on incriminating material since there was none unearthed. We take note that it is not the case of ld. Principal CIT that AO failed to made any additions/disallowances based on incriminating material seized/unearthed during search. On this finding of fact by us, we cannot term the assessment order passed by the AO u/s 153A/143(3) dated 31.03.2016 as erroneous. It is important here to note that revision u/s 263 of the Income Tax Act, 1961 has to be made within well-defined limits subject to satisfaction of pre-conditions, as explained by us above, and therefore, similar limitation may have to be read in the instant provision. In relation to the years whose assessment is completed, it is laid down by law that in such situations of completed assessment, assessment u/s 153A of the Income Tax Act, 1961 however shall be to the extent of undisclosed income which is found during the course of search with reference to the valuable articles or things found or documents seized during the search which are not disclosed in the original assessment. The power given by the 1st proviso of section 153A of the Income Tax Act, 1961 to 'assess' income for six assessment years has to be confined to the undisclosed income unearthed during search and cannot include items which are disclosed in the original assessment proceedings. Items of regular assessment cannot be added back in the proceedings u/s 153A when no incriminating documents were found in respect of the disallowed amounts in the search proceedings. A search assessment under section 153A should be evidence based. Therefore, we are of the view that assessment order passed by the AO u/s 153A/143(3) dated 31.03.2016 is neither erroneous nor prejudicial to the interest of the Revenue and therefore, ld. Pr. CIT erred in exercising his revisional jurisdiction u/s 263 of the Act and therefore, we quash the impugned order of ld. Pr. CIT passed under section 263 of the Act."

Since, the assessment which is not pending before the Assessing Officer is an unabated proceeding and the Assessing Officer is empowered to make any addition only based on incriminating materials found/unearthed during search.

This is a settled position of law and is no longer *res integra*. In this case, no any incriminating material unearthed by search team therefore Assessing Officer's order is not erroneous. Therefore, we are of the view that the order passed by the ld.AO is neither erroneous nor prejudicial to the interest of the revenue. Hence, we quash the order u/s 263 of the Act.

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

Order pronounced in the Court on 09.12.2019

Sd/-	**Sd/-**
(S.S.GODARA)	**(A.L.SAINI)**
न्यायिकसदस्य / JUDICIAL MEMBER	**लेखासदस्य / ACCOUNTANT MEMBER**

दिनांक/ Date: 09/12/2019
(*SB, Sr.PS*)

Copy of the order forwarded to:
1. JKS Infrastructure Pvt. Ltd.
2. Pr. CIT, Central-1, Kolkata
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), KolkataBenches, Kolkata.
6. Guard File.

True copy

By Order

Assistant Registrar
ITAT, Kolkata Benches