

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकरअपीलसं./ITA No.95/SRT/2020

(निर्धारणवर्ष / Assessment Years: (2010-11))

(Virtual Court Hearing)

Nilkanth Developers, C/o. Shri Rajivbhai Kheni, 9C, Bidhivan Apart, Opp. Umrigar School Athwaliners, Surat,	Vs.	The PCIT-3, Surat.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AAGFN6577M		
(Assessee)		(Respondent)

Assessee by : Shri Rasesh Shah, CA

Revenue by : Shri O. P. Vaishnav, CIT(DR)

सुनवाईकीतारीख/ Date of Hearing : 05/04/2021

घोषणाकीतारीख/Date of Pronouncement: 12/05/2021

आदेश / ORDER

PER DR. A. L. SAINI, ACCOUNTANT MEMBER:

Captioned appeal filed by the assessee, pertaining to Assessment Year (AY) 2010-11, is directed against the order passed by the Learned Principal Commissioner of Income Tax -3, Surat [in short “the Id. PCIT”] dated 16.03.2020, under section 263 of the Income Tax Act, 1961 [hereinafter referred to as the ‘Act’]. The grievances raised by the assessee are as follows:

“1. On the facts and in circumstances of the case as well as law on the subject, the learned Pr. CIT has erred in passing the order u/s. 263 by invoking Explanation 2 of Section 263 of the Act, although the assessment order passed u/s. 143(3) of the I.T. Act, 1961 was neither erroneous nor prejudicial to the interest of the revenue.

2. On the facts and in circumstances of the case as well as law on the subject, the learned Pr. CIT has erred in setting aside the assessment with the direction to frame the assessment after inquiring into claim of deduction u/s 80IB(10).

3. Even otherwise, order passed by PCIT directing the assessing officer to inquire into the claim of deduction u/s 80IB(10) to the tune of Rs.2,80,64,646/- is not justified in law, because the order sought to be revised was subject matter of appeal before CIT(A) in the appeals filed against the orders passed u/s. 143(3) and 143(3) r.w.s. 147.

4. *Even otherwise, ld. CIT(A) has passed the order u/s 263 after the limitation period as he revised the original assessment made on 26.03.2013 and not the reassessment made u/s 147 on 22.09.2017. This is because the subject matter of revision u/s 263 of the I.T. Act, 1961 was un-connected with the issues which were subject matter of the issuance of notice u/s 148.*

5. *It is therefore prayed that above order passed by Pr. CIT u/s. 263 may please be quashed or modified as your honors deem it proper.*

6. *Appellant craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal."*

2. Succinct facts are that the assessee has filed its return of income for Assessment Year 2010-11 on 13.09.2010 declaring income at Rs.78,870/-, after claiming deduction of Rs.2,80,64,646/-, under section 80IB(10) of the Act. However, in the assessment order u/s 143(3) of the I.T Act, 1961 (herein after referred to "the Act") passed on 26.03.2013, by the ld. Assessing Officer (hereinafter referred to "AO") assessed the total income at Rs.1,25,78,872/- and treated the amount of disclosure of Rs.1,25,00,000/- (made during the survey) as income from 'Other sources' and as such, he has stated that assessee is not eligible to claim deduction u/s 80IB(10) of the Act in respect of the amount of Rs.1,25,00,000/- which was disclosed by the assessee during the survey.

3. Thereafter, the Ld. AO had reopened assessee's case and issued statutory notice u/s 148 of the I.T. Act and finalized the assessment on 22.09.2017, u/s 143(3) r.w.s, 147 of the Act wherein, she has disallowed a sum of Rs.1,38,40,049/- towards excess deduction claimed u/s 80IB(10) of the I. T. Act.

4. After that, ld. Principal Commissioner of Income Tax ("ld. PCIT") has exercised his jurisdiction under section 263 of the Act. On verification of the records of the Income-tax assessment proceedings in the assessee's case for the assessment year 2010-11, it was noted by ld. PCIT that the assessee firm has claimed deduction u/s 80IB(10) of Rs.2,80,64,646/- in respect of developing and building housing project. It was observed by ld. PCIT that the housing project in respect of which the assessee firm has claimed deduction u/s 80IB(10) was

approved on 03.02.2009, whereas section 80IB(10) allows deduction of profits from such housing project which has to be approved before the 31st day of March 2008 by a local authority. Therefore, the claim of deduction u/s 80IB(10) allowed by assessing officer was not found to be correct.

5. Therefore, ld. PCIT issued show cause notice to the assessee, which is reproduced below:

“2. On verification of the records of the Income-tax assessment proceedings in your case for the assessment year 2010-11, it is noticed that the assessment made by the Assessing Officer u/s 143(3) r.w.s 147 of the I.T. Act dated 22.09.2017, is erroneous in so far as it is prejudicial to the interest of revenue on the following ground:

3. It is seen from the records that you have claimed deduction u/s 80IB(10) of Rs.2,80,64,646/- in respect of developing and building housing project. It is seen that the housing project in respect of which you have claimed deduction u/s 80IB(10) was approved on 03.02.2009 whereas section 80IB(10) allows deduction of profits from such housing project which has to be approved before the 31st day of March 2008 by a local authority; Therefore, the claim of deduction u/s 80IB(10) allowed is irregular and not disallowing the same has rendered the assessment so completed as erroneous in so far it is prejudicial to the interest of Revenue.

*4. The undersigned, therefore, proposes to pass an order u/s 263 of the Act against the assessment order passed u/s 143(3) r.w.s. 147 dated 22.09.2017 by the Assessing Officer for the AY.2010-11 in so far as it is erroneous as well as prejudicial to the interest of revenue more particularly as per explanation 2(a) & 2(b) of section 263(1) of the I.T. Act. You are therefore requested to show cause as to why the order u/s.143(3) r.w.s 147 of the Act passed by AO vide order dated 22-09-2017 may not be revised u/s 263 of the Act. In this regard, you are hereby given an opportunity of being heard on **11-03-2020 at 11.30 a.m.** at the above mentioned office of the undersigned. You are requested to attend the same either personally or through an authorized representative or you may file your written submission by the same date. In case of non-attendance/non-compliance or in absence of any written reply in this regard within above stated time limit, it will be presumed that you have no objection to the proposed revision and your case will be taken up for decision based on material available on record. Please note that this being time barring matter, no adjournment shall ordinarily be granted.”*

6. In response to the above show cause notice, the assessee submitted its reply, which is reproduced below:

“Dear Sir,

1. Please refer to your show cause notice issued u/s. 263 dated 03.03.2020 proposing to revise the assessment made u/s. 147 on 22.09.2017 on the ground that the housing project of the assessee was not approved before 31.03.2008 and therefore deduction u/s. 80IB(10) was not available. On issues of the proposed revision, we submit as under on behalf of the assessee client.

Facts:

2. Assessee purchased the land on 26.03.2008 for developing and construction of the housing project. On 26.03.2008 when the assessee has undertaken and commenced the development and construction of the housing project, the project was already approved on 30.03.2007. The revised application for development was made by assessee on 19.04.2008 which was approved on 03.02.2009. The whole project was completed by the assessee during the F.Y. 2010-11 and building completion certificates (BUG) dated 24.08.2009, 14.10.2009 and 19.07.2010 were received by the assessee from Town Planning Department of Surat Municipal Corporation.

3. Assessee filed the return of income for A.Y. 2010-11 on 13.09.2010 declaring total income at Rs. 78,870/- after availing the deduction u/s.80IB(10) of Rs.2,80,64,646/-. The return of income was supported by the tax audit report u/s. 44AB of the Income Tax Act, 1961 and audited financial statements. In support of the claim of deduction u/s. 80IB(10), assessee also filed Form No. 10CCB being certificate from Chartered Accountant for claim of deduction u/s. 80IB(10).

4. The survey was conducted in the case of the assessee on 20.08.2009 and assessee disclosed Rs.1,25,00,000/- for A.Y.2010-11 for unaccounted income. In reply to Q. No. 16, assessee stated that the income disclosed pertains to assessee's firm for the project Nilkanth Heights and he will not claim the deduction of the same u/s. 80IB(10). So the survey action was in the nature of inquiry made by the assessing officer and in the course of survey proceedings, assessee produced the books of accounts and also the materials in support of the deduction u/s. 80IB(10). Looking to the materials on record including survey materials it is clear that there is unanimity for claim of deduction u/s. 80IB(10) except in regard to the amount of Rs1.25 crores disclosed at the time of survey.

5. After the survey, the assessment of the assessee was taken up under scrutiny and the assessment u/s 143(3) was completed on 26.03.2013 determining total income at Rs.1,25,78,872/- by disallowing the deduction of Rs.1,25,00,000/- u/s 80IB(10) on income disclosed during the course of survey u/s 133A by treating it as income from other sources. In the course of assessment proceedings, assessee filed the detailed explanation in response to notice issued on 20.03.2013 by filing the audit report in Form No. 10CCB and stating that all the conditions for deduction u/s. 80IB(10) were complied by the assessee. The assessing officer allowed the deduction of Rs.1,55,64,646/- after complete application of the mind taking also into consideration the past records of A.Y. 2009-10.

6. The action of the assessing officer in disallowing the deduction u/s. 80IB(10) in respect of the disclosure of Rs. 1.25 crores made during the survey was confirmed by the CIT(A). However on further appeal, the deduction u/s. 80IB(10) was allowed by Honourable Tribunal vide their order dated 19.12.2014.

7. The assessing officer issued notice u/s. 148 in the case of the assessee on 31.03.2017. The notice u/s. 148 was issued for proposing to reduce the deduction u/s. 80IB(10) by the amount of interest and remuneration payable to partners on notional basis. In the course of reassessment proceedings u/s. 147, assessing officer issued show cause notice on 10.07.2017 which was replied by the assessee on 17.07.2017 stating that there was no compulsion to provide the interest and remuneration to partners.

8. The first claim of the assessee was made in the year relevant to A. Y. 2009-10, The conditions for allowing the deduction u/s.80IB(10) were thoroughly examined by assessing officer in the course of assessment proceedings for A. Y. 2009-10 and he has given the detailed finding in the assessment order as per para no. 3 & 4 as reproduced:

"3. Assessee is a partnership firm engaged in the business of developing and building of housing project. The assessee has constructed a project named " Nilkanth Heights" on plot No. 11, Opp: S.K. Nagar, Dumbhai, Surat. Details of built up area of the flat provided in the plan has been produced for verification. The assessee firm consists of 4 partners. They all are separately assessed to tax. A copy of the partnership deed is filed by the assessee. Assessee has claimed deduction under section 80IB of the Act. In Support of the same, the assessee has furnished a copy of audit report in form IOCCB, abstract of section 80IB(10)satisfying all conditions laid down therein for verification.

4. In order to verify the genuineness of the project and to verify as to whether assessee has followed the conditions laid down in section 80IB of the Act, the assessee was requested to furnish a copy of approval letter from local authority, copy of plan of the project, size of the land, maximum built up area in sq. Ft, whether more than one residential unit allotted to a person etc. The assessee has furnished the same which are verified and placed on record. From the details furnished, it is seen that the residential project is constructed on the land of 5333 sq. Meter equivalent to 1.333 acre. The residential project is situated at Surat where as per the conditions laid down in the section 80-IB, the area of the flats should not exceed 1,500 sq.ft. This has been verified from the copy of the plan furnished during the course of assessment proceedings. As per the plan furnished, it was seen that area of the flats are measuring 779 sq. ft., 897sq. ft., 945 sq. ft., and 936 sq. ft. A copy of the sale deed seen that the project approved by local authority on 30.03.2008 and the project was completed during F. Y 2010-11 for which building User certificate [BUG] is furnished. Assessee has also furnished copy of purchase deed of land, approved planned development permission dated 30.03.2007, and certificate from architect for verification. Considering the totality of the facts and circumstances of the case and the assessee is fulfilling the condition stipulated in section 80IB of the Act, the claim of deduction u/s 80IB of the Act is accepted."

7. It is to be noted that the issue mentioned in your notice u/s. 263 was first time arose for A.Y. 2013-14 which was completed on 11.02.2016. In the course of assessment proceedings for A.Y. 2013-14, assessee filed a detailed reply in response to the questionnaire issued by assessing officer the extract of which is reproduced at Para no. 4 of the Assessment Order [Page no. 2 to 4]. In support of the deduction claimed u/s. 80IB(10), assessee filed the following details along with the said reply:

1. Audit Report u/s. 10CCB of the Act.
2. Purchase deed of land
3. Approved plan and development permission of the Project dated 30.03.2007.
4. BUG dated 24.08.2009. 14.10.2009 & 19.07.2010.

8. The assessing officer was not satisfied with the reply of the assessee and he disallowed the entire deduction u/s. 80IB(10) for A.Y. 2013-14. The action of the assessing officer was confirmed by the CIT(A). However, it was reversed by the Honourable Tribunal vide order dated 08.10.2018. When the assessment for A.Y. 2010-11 u/s.147 was completed on 22.09.2017, the assessment records for A.Y. 2013-14 were also available with assessing officer including the order of the Honourable Tribunal.

Arguments:

1. From the above discussions it is clear that assessing officer made due inquiry necessary for assessment and therefore the assessment order cannot be termed as erroneous or prejudicial to the interest of the revenue.

2. The inquiry was conducted not during the assessment year under consideration but also for preceding A.Y. 2009-10 and A.Y. 2013-14. In fact for A.Y. 2013-14, the deduction u/s. 80IB(10) was totally denied which was ultimately allowed by Honourable Tribunal. The assessment records for A. Y. 2013-14 including the order of Honourable Tribunal were available with assessing officer at the time of framing the assessment u/s. 147 on 22.09.2017. Because of this the assessing officer didn't disallow the deduction u/s. 80IB(10) in the reassessment order passed on 22.09.2017.

3. Even otherwise, the doctrine of merger will apply as the issue has been merged with the order of CIT(A) passed for A.Y. 2010-11 & 2013-14. The clause (c) of Explanation 1 is not applicable as the same issue of deduction u/s. 80IB(10) was considered by the CIT(A). The reliance is placed on the decision of Honourable Gujarat High Court in case of CIT v/s. Shashi Theatre Pvt. Ltd. - 248 ITR 126 (Guj.)(HC). In the said case, the assessee claimed investment allowance under S. 32A of Rs. 5,35,424/- on certain fixed assets. However, the assessing officer allowed the claim only in respect of certain fixed assets. On appeal before the CIT(A), the issue was decided in favour of the assessee. Thereafter, the Commissioner invoked the provision of S. 263 on the ground that the action of the assessing officer in granting deduction u/s. 32A on certain fixed assets was erroneous. The Honourable Gujarat HC held that "once the Commissioner (Appeals) allowed the assessee's claim on certain fixed assets, the order of the Assessing Officer stood merged with that of the Commissioner (Appeals) and hence, no part of the order of the Assessing Officer could have been revised by the Commissioner under S. 263." Here also

the assessing officer partly allowed the deduction u/s.80IB(10) of Rs. 1,42,24,597/- as against the claim of deduction by the assessee of Rs. 1.38,40,049/-.

4. This issue is not the part of the reasons recorded u/s.148(2). The subject matter of revision u/s.263 of the I.T. Act, 1961 unconnected with the issues which were subject matter of issuance of notice u/s. 148 and completion of reassessment u/s.143(3) r.w.s. 147 of the I.T. Act,1961. By exercising the jurisdiction u/s.263 in fact your honour wants to revise the original assessment made on 26.03.2013 for which the action has become time barred."

7. However, the Id. PCIT has rejected the contention of the assessee and held that the assessee has claimed deduction of Rs.2,80,64,646/- u/s 80IB(10) of the Act, and it was noticed that, the Housing Project in respect of which, deduction u/s 80IB(10) has been claimed by assessee was approved by the local authority on 03.02.2009. However, for the Housing Project to be eligible for deduction under the said section, the same should be approved before 31st March, 2008, by the local authority. As the said project was not approved by local authority before 31.03.2008 and the assessing officer has not examined this fact. The permission granted on 30.03.2007 got lapsed on 29.03.2008. M/s Nilkanth Developers (i.e. assessee) acquired the land on 26.03.2008 and applied for fresh approval on 19.04.2008, which was approved by the local authority on 03.02.2009. In these facts, it is clear that the application for approval itself was made only after 30.03.2008 which was beyond the permissible date for claiming of deduction u/s 80IB(10) of the Act. In view of the facts and circumstances of the case and discussions herein above, particularly non-consideration of the fact that the questioned Housing Project was approved only on 03.02.2009, whereas, the provisions of section 80IB(10) permits deduction from Housing Projects which, have been approved before 31.03.2008 by the local authority, the Id. AO failed to disallow the deduction claimed u/s 80IB(10) of the Act, claimed by the assessee to the tune of Rs.2,80,64,646/-. Failure to do so, such assessment order passed by the Id. AO has rendered as erroneous in so far as it is prejudicial to the interest of Revenue within the meaning of section 263(1) of the Act, more particularly clause (b) of Explanations of the said section. Accordingly, and in the facts and circumstances of the case, the Id. PCIT has

directed the AO to inquire into claim of deduction u/s 80IB(10) of the Act to the tune of Rs. 2,80,64,646/- claimed by the assessee.

8. Aggrieved by the order of ld. PCIT, the assessee is in appeal before us.

9. The learned counsel for the assessee relied on the submissions made during the 263 proceedings.

10. On the other hand, the Learned Departmental Representative (in short “the ld. DR”) for the Revenue relied on the para no.5 of the ld. PCIT order.

11. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the ld. PCIT and other material brought on record. We note that in assessee’s case, original assessment was framed under section 143(3) of the Income Tax Act, 1961 on 26.03.2013 wherein the matter relating to the deduction under section 80IB(10) of the Income Tax Act has been discussed and adjudicated by the assessing officer. The order framed under section 143(3) of the Act, is reproduced below:

“3. The assessee is a partnership firm, engaged in the activity of developing and building housing projects approved by the local authority. The assessee firm commenced its residential project in FY 2009-10 called Nilkanth Heights, Block A, B & C at Dumbhai, Surat. During the year under consideration the assessee has not completed the said project but booked receipt from sale of flats during the year for which sale documents have been executed and shown net profit at Rs.78,870/- after claiming deduction 80IB of the Act.

4. In this case survey was carried out on 27.08.2009. During the course of survey proceedings, certain incrementing documents were found. Then the statement of Shri Rajivbhai B, Kheni, partner of the assessee firm, was recorded u/s 133A of the I.T. Act. In his statement, he has stated that the entries made on page no. 59 and 60 were out of books of accounts. On the basis of said documents, he had disclosed unaccounted money of Rs.1,25,00,000/-. Further, he has also stated that they will not claim deduction u/s 80IB of the I.T. Act on this undisclosed income of Rs.1,25,00,000/-.

5. During the course of assessment proceedings details of flat holders, date of agreement and amount received in respect of sales shown have been called for, As per the details submitted by the AR of the assessee total receipt on

sale of flats/shops shown at Rs.7,09,17,500/- for which documents have been executed. The assessee has also added Rs.1,25,00,000/- being amount disclosed by them during the course of survey proceeding on 27.08.2009. Accordingly, during the year under considering total receipt is shown at Rs.8,34,17,500/- in the P & L account. After considering the expenditure of Rs.5,53,38,454/-, net profit for the year under consideration is shown at Rs.2,80,79,046/-. After claiming deduction 80IB of the Act, of Rs.2,80,64,646/- total income is shown at Rs.78,870/-.

6. Since the assessee has not given any details regarding income disclosed during the course of survey Rs.1,25,00,000/-, assessee has been asked to give details in prescribed format. Name and complete address of the person from whom amount received, their PANs, Amount with date. In reply Shri Nanish Sutarwala, CA and AR of the assessee vide letter dtd, 24/03/2013, stated as under-

As regards details of unaccounted receipts disclosed during the course of survey, the AR has replied as under:

"We have already given details of receipts of amount in our declaration. Depending up on the "provision or me Income tax Act and various judgments we have claimed deduction u/s.80IB. Kindly consider above fact and allow us our claim for deduction u/s.80IB"

6.1 The submission of the assessee considered but not acceptable. The assessee has stated that detail of receipts of amount is already given in our declaration which is not true. The assessee has not provided details called for vide show cause notice viz. Name and Address from whom the amount were received and also its purpose, neither during the course of survey proceedings or assessment proceedings. Hence it is clear that the assessee firm is not a position to give the details of receipts of Rs.1,25,00,000 being amount disclosed during the course of survey.

6.2. The AR of the assessee has also stated to have relied upon provision of the Income tax Act and various judgement for claiming deduction u/s 80IB of the Act on the amount of Rs.1,25,00,000/-. However, the assessee has failed to explain and also to provide the judgments on which he is relying and the facts which are similar to it. Here in the instant case assessee could not prove that such receipts of Rs.1,25,00,000 as its business receipts of this project.

6.3. Further, the reply of the assessee is also not acceptable particularly in view of the fact that when the assessee claim that the receipt disclosed in survey is a business receipt from the developing and building residential project, it is for the assessee to prove that the same is a business receipt of its project. The assessee could not produce the details of the persons from whom such amount of Rs.1,25,00,000/- is received by it. When the assessee claims that such receipts is a business receipts of its project, primary burden lies on the assessee to prove that same is a business receipt of its project with supporting evidences/details which the assessee is required to do so. In absence of details as called for the amount of Rs.1,25,00,000/- declared during the course of survey as unaccounted income cannot be considered as business receipt of assessee's

project. Having regard to all these facts of the case the amount of Rs.1,25,00,000 disclosed by the assessee is treated as Income from other sources. Since the assessee failed to adduce evidence regarding the amount of Rs.1,25,00,000 and same is treated as income from other sources, assessee is not eligible for deduction u/s. 80IB(10) on this amount as claimed in the return of income. Penalty proceedings u/s 271(1)(C) of the Act are initiated for filing inaccurate particulars.”

12. From the above order under section 143(3) of the Act, it is clear that during the original assessment proceedings, the issue relating to deduction under section 80-IB (10) has been discussed and adjudicated by the assessing officer, therefore, after expiry of two years, ld. PCIT should not have exercised his jurisdiction on the issue which has already been discussed and adjudicated in the original assessment proceedings. Thus, ld PCIT has violated the provisions of sub-section 2 of section 263 of the Act.

13. We also note that the said issue, relating to deduction under section 80-IB (10), has already been adjudicated in favour of assessee in AY 2009-10 *vide* assessment order passed under section 143(3) of the Act dated 27.09.2011 for A.Y. 2009-10, wherein the issue has been discussed in para no. 4 of the assessment order which is reproduced below:

“4. In order to verify the genuineness of the project and to verify as to whether the assessee had followed the conditions laid down in section 80IB of the Act, the assessee was requested to furnish a copy of approval letter from Local Authority, copy of plan of the project, size of the land, maximum built up area in sq. ft., whether more than one residential unit allotted to a person etc. The assessee has furnished the same which are verified and placed on record. From the details furnished, it is seen that the residential project is constructed on the land of 5333 sq. meter equivalent to 1.333 acre. The residential project is situated at Surat where as per the-conditions laid down in section 80IB, the area of the flats should not exceed 1,500 sq. ft. This has been verified from the copy of the plan furnished during the course of assessment proceedings. As per the plan furnished, it was seen that area of the flats are admeasuring 779 sq. ft., 897 sq. ft., 945 sq. ft. and 936 sq. ft. A copy of the sale deed was called for which was furnished for verification. From the documents furnished, it is seen that the project approved by local authority on 30.3.2008 and the project was completed during F.Y. 2010-11 for which Building User Certificate [BUG] is furnished Assessee has also furnished copy of purchase deed of land, approved plan and development permission dated 30.03.2007 and certificate from architect for verification. Considering the totality of the facts and circumstances of the case and the assessee is fulfilling the conditions stipulated in section 80IB of the Act, the claim of deduction u/s. 80IB of the Act is accepted.”

14. From the above assessment order for A.Y. 2009-10, we note that the issue, relating to deduction under section 80-IB (10), has already been adjudicated in in favour of the assessee by the department and department has allowed deduction under section 80IB(10) of the Act, on the same project. The Id PCIT did not revise the order of assessing officer under section 263 of the Act for the assessment year 2009-10. Based on the principle of consistency the claim of the assessee is genuine. The Principle of consistency applies to an order under section 263 of the Act as well, as held by the Hon'ble Punjab & Haryana High Court in the case of H.P. Cotton Textile Mills Ltd, (311 ITR 436).

15. We note that in AY.2009-10 the Auditor in Tax Audit Report *vide* paper book page no.105, and *vide* item no. 23 of the Tax Audit Report, wherein it is mentioned about the said project that the date of approval by local authority is as on 30.03.2007. The Id. Counsel took us through paper book page no. 135 wherein the permission from the Surat Municipal Corporation was obtained on 30.03.2007 and thereafter the said permission has been renewed/revised *vide* development permission of Surat Municipal Corporation dated 03.02.2009 which is placed at paper book page no.112. Therefore, this development permission is not a fresh development permission, it is in continuation of the permission given to the assessee on 30.03.2007 *vide* TDO/DP No.267 which is placed at paper book page no. 135. Therefore, we note that the development permission given by the Surat Municipal Corporation on 03.02.2009 is in continuation of the earlier permission and it is not a fresh permission, therefore we note that said issue has already been discussed in the original assessment proceedings under section 143(3) of the Act and the assessing officer has taken a possible view on the said issue.

16. At the cost of repetition we state that original assessment order under section 143(3) was framed by assessing officer on 26.03.2013, and in the said original assessment order the issue relating to deduction under section 80IB has

been discussed and adjudicated by the assessing officer with proper application of mind. In the said original assessment order, the assessing officer has examined the issue in depth and held that assessee is not eligible to claim deduction under section 80IB in respect of “on money” of Rs.1,25,00,000/-. This clearly shows the Assessing Officer has applied his mind during the original assessment proceedings and denied deduction under section 80IB(10) in respect of “on money” of Rs.1,25,00,000/-. In addition to this, it should also be noted that no order under section 263 shall be made after the expiry of two years from the end of the financial year in which the order sought to be revised was passed. In assessee’s case the original assessment order was framed under section 143(3) of the Act on 26.03.2013, and the said order passed by the Assessing Officer under section 143(3) can be revised under section 263 of the Act, up to 31.03.2015 by the Id PCIT, however, the Id. PCIT has revised the original assessment on 03.03.2020. Therefore, order passed by the Id. PCIT is in violation of the provisions of sub-section 2 of section 263 of the Act; which reads as follows:

“Sec. 263(2)

“No order shall be made under sub-section (1) after the expiry of 2 years from the end of the financial year in which the order sought to be revised was passed.”

Thus, the concluded matter in respect of deduction under section 80IB(10) of the Act in original assessment proceedings u/s 143(3) of the Act, cannot be revised by the Id PCIT after two years from the end of the financial year 31.03.2013. In the assessee’s case, Id PCIT can revise order under section 263 of the Act, up to 31.03.2015, however, the Id. PCIT has revised the original assessment order on 03.03.2020, which is not acceptable in view of the provisions of sub-section 2 of section 263 of the Act, as noted above. Thus, it is abundantly clear that order passed by the Id. PCIT is after the expiry of two years from the end of the financial year 31.03.2013, therefore, Id. PCIT does not have valid jurisdiction to revise the matters which were discussed and concluded in the original assessment order framed by Assessing Officer u/s 143(3) of the Act, on

26.03.2013, therefore order passed by the Id PCIT has to be quashed, on the basis of this very solitary fact. In this regard reliance can be placed on the judgment of the Hon'ble Supreme Court in the case of Alagendran Finance Ltd. (2007) 162 Taxman 465 (SC), wherein it was held as follows:

"14. The Madras High Court in A.K. Thanga Pillai's case (supra), in our opinion, has rightly considered the matter albeit under section 17 of the Wealth-tax Act, 1957 which is in pari materia with the provisions of the Act. Relying on Sun Engg. Works (P.) Ltd.'s case (supra), it was held:

"Under section 17 of the Wealth-tax Act, 1957, even as it is under section 147 of the Income-tax Act, proceedings for reassessment can be initiated when what is assessable to tax has escaped assessment for any assessment year. The power to deal with underassessment and the scope of reassessment proceedings as explained by the Supreme Court in the case of Sun Engg. [1992] 198 ITR 297, is in relation to that which has escaped assessment, and does not extend to reopening the entire assessment for the purpose of redoing the same de novo. An assessee cannot agitate in any such reassessment proceedings matters forming part of the original assessment which are not required to be dealt with for the purpose of levying tax on that which had escaped tax earlier. Cases of underassessment are also treated as instances of escaped assessment.

The order of reassessment is one which deals with the assessment already made in respect of items which are not required to be reopened, as also matters which are required to be dealt with in order to bring what had escaped in the earlier order of assessment, to assessment. An assessee who has failed to file an appeal against the original order of assessment cannot utilize the reassessment proceedings as an occasion for seeking revision or review of what had been assessed earlier. He may only question the extent of the reassessment insofar as the escaped assessment is concerned.

The revenue is similarly bound. . . ." (p.263)

The same principle was reiterated by a Division Bench of the Calcutta High Court in CIT v. Kanubhai Engineers (P.) Ltd. [2000] 241 ITR 665.

15. We, therefore, are clearly of the opinion that keeping in view the facts and circumstances of this case and, in particular, having regard to the fact that the Commissioner of Income-tax exercising its revisional jurisdiction reopened the order of assessment only in relation to lease equalization fund which being not the subject of the reassessment proceedings, the period of limitation provided for under sub-section (2) of section 263 of the Act would begin to run from the date of the order of assessment and not from the order of reassessment. The revisional jurisdiction having, thus, been invoked by the Commissioner of Income-tax beyond the period of limitation, it was wholly without jurisdiction rendering the entire proceeding a nullity."

17. Thus, it is quite clear that Id PCIT has violated the provisions of sub-section (2) of section 263 of the Act. In any event, we note that the Assessing Officer has adopted one of the courses permissible in law and even if it has resulted in loss to the revenue, the said decision of the Assessing Officer cannot be treated as erroneous and prejudicial to the interest of the revenue as held by Hon'ble Supreme Court in Malabar Industries Ltd. vs. CIT (243 ITR83). Since the order of the Assessing Officer cannot be held to be erroneous as well as prejudicial to the interest of the revenue, in the facts and circumstances narrated above, the usurpation of jurisdiction exercising revisional jurisdiction by the Principal CIT is 'null' in the eyes of law and, therefore, we are inclined to quash the very assumption of jurisdiction to invoke revisional jurisdiction u/s 263 by the Principal CIT. Therefore, we quash the order of the Id. Principal CIT, under section 263 of the Act, dated 16.03.2020 being *ab initio void*.

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

Order is pronounced on 12/05/2021 by placing result on Notice Board.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

सूत /Surat
दिनांक/ Date: 12/05/2021
SAMANTA

Copy of the Order forwarded to

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

By Order

// TRUE COPY //

Assistant Registrar/Sr. PS/PS
ITAT, Surat