IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकरअपीलसं./ITA No.76/SRT/2020

(निर्धारणवर्ष / Assessment Year: (2015-16)

(Physical Court Hearing)

Shivam Developers, 141, Khodiyar Residency, Godadra, Surat-395010.	**Vs.**	The Pr. CIT-2, Surat.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **ACFFS4002D**		
(Appellant)		**(Respondent)**

Assessee by	Shri Sapnesh Sheth, CA
Respondent by	Shri Ritesh Mishra, CIT-DR
Date of Hearing	06/10/2022
Date of Pronouncement	11/11/2022

आदेश / ORDER

PER DR. A. L. SAINI, AM:

By way of this appeal, the assessee has challenged the correctness of the order passed by the Learned Principal Commissioner of Income Tax (Appeals)-2, Surat (in short "ld. PCIT"], in Appeal No. ITBA/COM/F/17/2019-20/1024307510(1), dated 27.01.2020, passed under section 263 of the Income Tax Act, 1961 (hereinafter referred to as "the Act").

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

"1. On the facts and circumstances of the case as well as law on the subject, the learned Pr. Commissioner of Income-tax has erred in passing revisionary order u/s 263 of the I.T. Act setting aside the order of ld. assessing officer passed u/s 143(3) of the Act dated 29.09.2017 for the year under consideration although said order is neither erroneous nor prejudicial to the interest of revenue as regards deduction claimed u/s 37 and u/s 40(b) of the I.T. Act on account of service tax paid & remuneration paid to partners.

2. On the facts and circumstances of the case as well as law on the subject, the learned Pr. Commissioner of Income-tax has erred in holding that on money disclosed by assessee has to be taxed u/s 69A of the Act & that the provisions of section 115BBE of the Act are applicable.

3. On the facts and circumstances of the case as well as law on the subject, the learned Pr. Commissioner of Income-tax has erred in holding that assessee is not eligible to claim deduction of Rs.39,33,270/- on account of service tax paid u/s 37 of the I.T. Act and Rs.24,00,000/- on account of partners remuneration u/s 40(b) of the I.T. Act.

4. It is therefore prayed that order passed by the Pr. Commissioner of Income-tax u/s 263 of the I.T. Act setting aside the order of assessing officer and directing assessing officer to make fresh investigation into the claim for deduction of interest income may please be quashed.

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

3. Brief facts *qua* the issue are that in this case, the assessee-firm filed its return of income for the A.Y.2015-16 on 29.03.2016 declaring total income at Rs.10,36,75,230/-. The assessee is engaged in the business of construction.

4. Later on, Ld. PCIT exercised his jurisdiction under section 263 of the Act and noticed from the records that a survey action u/s 133A of the IT Act (herein after referred to "the Act") was carried out on 25.09.2014 and statement of Shri Parvatbhai Muljibhai Kakadia, one of the partners of the firm, was recorded on oath u/s 131 of the Act. In his statement, the partner admitted receipt of unaccounted income of the firm, in the form of 'on money' at Rs.11,00,08,500/-. He disclosed the same as income over and above the regular income of the firm for the FY.2014 - 15 relevant to A Y 2015-16. The firm has shown the amount of Rs.11,00,08,500/- in the P & L account under the head "Income declared during the Survey" and computed the income accordingly. Against the disclosed income of Rs.11,00,08,500/-, the firm has shown total income of Rs.10,36,75,230/- in the return of income for Assessment Year 2015-16, which is less by Rs.63,32,270/-. The assessee has claimed this amount of Rs.62,32,270/- as expenses against the disclosed income, which is irregular in view of the provisions of sec.115 BBE of the Act.

5. The Ld. PCIT noticed that it is stipulated in provisions of sec. 115BBE(2) of the Act that *no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of the Act in computing the income referred to in clause 9(a) of sub section (1)* despite such facts and circumstances

and specific provisions of Law in sec. 115BBE (2) the Assessing Officer (herein after referred to as "ACT") had completed the assessment determining total income at Rs.10,36,75,230/- and thereby allowed assessee's erroneous claim to the tune of Rs.63,32,270/- rendering the assessment so completed as erroneous in so far it is prejudicial to the interest of Revenue. In view of the above facts, a show cause notice u/s 263 of the Act bearing no SRT/Pr.CIT-2/HQ/263/SD/2019-20 dated 01.01.2020 was issued to the assessee-firm requesting to show cause why a sum of Rs.63,32,270/- which is irregular in view of provisions of sec. 115BBE of the Act, should not be disallowed for the Asstt Year 2015-16. The said notice was duly served upon the assessee. The contents of the show cause notice are reproduced below:-

> "..... *It is seen from the records that survey action u/s 133A was carried out in your case on 25. 09.2014. During the course of survey proceedings, statement of Shri Parvatbhai Muljibhai Kakadia partner of the firm was recorded on oath u/s 131 of the Act. In reply to Q no. 21 and 22 of the statement, Shri P M Kakadia had admitted receipt of* unaccounted *income of the firm, in the form of on money of Rs.11,00,08,500/- and disclosed the same as income over and above the regular income of the firm for FY.2014-15 relevant to AY.2015-16. You have shown the amount of Rs.11,00,08,500/- in the P & L A/c under the head ' Income declared in I.T* Survey *and computed the income accordingly. However, against the disclosed income of Rs.11,00,08,500/- the firm has shown total income of Rs.10,36,75,230/- in the return of income for AY 2015-16, which is less by Rs.*63,32,270/-. You *have claimed this amount of Rs.63,32,*270/- *as expenses against the disclosed income, which is irregular in view of provisions of sec. 115 BBE of the Act. As per the provisions of* sec. *115 BBE(2), no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provisions of the Act in computing the income referred to in clause (a) of sub - sec (1). Despite such facts and circumstances and specific provisions of law, in sec. 115BBE(2) of the Act, AO has completed assessment determining total at Rs.10,36,75,230/- and thereby allowing your erroneous claim to the tune of Rs.*63,32,270/- *rendering the assessment so completed as erroneous in so far it is prejudicial to the interest of revenue....*
>
> *Therefore, the undersigned propose to pass an order u/s 263 of the Act against the assessment order passed u/s 143(3) dt 29. 09.2017 by the AO for the AY 2015-16 in so far as it is erroneous as well as prejudicial to the interest of Revenue....."*

6. In response, the assessee submitted its reply and submission. In the submission, the assessee giving facts of the case briefly and submitted following points for consideration:

"a. *The AO has not disputed the fact that the assessee firm had not made proper entry in the books of accounts of Rs.11,00,08,500/- being additional income declared during the survey as income from business.*

b. If the AO was of the view that the income disclosed during survey was not a business income of the current year, the AO should have given reason to dispute the assessee's *version*

c. No material has been brought out on record either by survey party or by the AO to disapprove the assessee's contention regarding the only source of the firm the business income.

d. It has not been brought out on record that the assessee firm is doing some other activities from which such income was earned.

e. It is also not bought on record that the assessee has not included the said income of Rs.11,00,08,500/- in the firm's *taxable income for the year under consideration.*

7. The assessee in their submission also stated that on being asked to provide explanation for the paper found during the survey, for the page no. 75, (Q No 20) in his reply Shri Piyushbhai Chhagbhai Patel one of the partners explained that the said page is related to on money received by our firm and agreed to pay tax thereon. The above said business incomers shown; as construction business receipt even in service tax return filed by the assessee-firm. Thus, once it is proved that the unaccounted income declared as income and during survey is to be assessed under the head Business, then the assessee's firm is entitled to claim higher amount of remuneration to partners as per limit prescribed u/s 40(b). It was also submitted that the income disclosed during the survey proceedings was business income of the assessee firm and not an income from other sources, therefore, provision of sec. 115BBE of the Act are not applicable for the said income. The assessee further submitted that it has paid service tax of Rs.39,33,270/- towards the income disclosed in survey proceedings and further has claimed remuneration paid to the tune of Rs.24,00,000/-. It was accordingly submitted that the net income after such claim of expenses at Rs.10,36,75,230/- was determined and disclosed in the return as 'Business Income' and not income from other sources and, therefore, the provisions of sec. 115BBE are not applicable in their case. Furthermore, it was submitted that the assessee has not

claimed any business or construction expenses from the income declared in survey proceedings. The assessee also submitted as under:

> *"(a) The Service Tax is* a *tax paid on the income declared in survey. There is no denial that the said tax is payable and paid by the assessee. Further, it is payable and paid by the assessee.*
>
> *Further, it is rightly allowable as expense u/s 37(1) and 43B. Hence, the assessee firm has not claimed anything not genuine. Payment of service tax on the declared income is implied and mandatory and deduction of the same cannot be denied because the same is a legal expenses paid to the government and there is nothing like a false claim or afterthought of claim*
>
> *(b) Regarding the remuneration to partners, the same is also rightly allowable as expenses u/s 40(b)(iv) In fact the remuneration allowable would be much more that what is claimed, but the assessee firm has not claimed all the allowable remuneration.*
>
> *(c) Further, the amount claimed as deduction for remuneration to partners is taxable in the hands of the partners. Hence, the partner has already paid tax on the said remuneration. Therefore, it is indirectly not a deduction claimed but taxed in the hands of the partner.*

The assessee has also placed reliance on the following decisions of Hon'ble ITAT Ahmedabad:

1. DCIT v/s Navsari Circle v/s M/s Dayaram Brijbhukhandas Choksi in ITA No. 1379/ Ahd/ 2010 dated 30.11.2010 for Assessment Year 2006-07.

2. DCIT Navsari Circle v/s Amthabhai B Parekh in ITA No 3135/Ahd/2008 for Assessment Year 2005-06.

In view of the above submission the assessee contended that the view taken by the ld AO is correct and very well sustainable in law. Hence, there is no requirement to exercise the powers u/s 263. Service tax and remuneration to partners both are allowable expenses from the declared income in survey. Accordingly, the assessee requested to drop the revision of the order passed by the AO.

8. However, Ld. PCIT rejected the contention of the assessee and held that it is undisputed fact in this case that a survey u/s 133A of the Act was carried out at the business premises of the assessee on 25.09.2014. During the survey, certain facts were discovered and statement on oath u/s 131 of the Act was recorded of

Shri Parvatbhai Muljibhai Kakadia, one the partners of the firm. In the statement so recorded, an amount of Rs.11,00,08,500/- was disclosed as "income over and above regular income of the assessee-firm" (for F Y 2014-15 relevant to AY 2015-16). It is also undisputed in this case that the said amount of Rs.11,00,08,500/- has been disclosed in the P & L A/c under the head "income declared during the survey". However, after claiming deduction u/s 37 towards service tax paid of Rs.39,33,270/- and deduction claimed u/s 40(b) of the Act towards remuneration paid to partners at Rs.24,00,000/-, net income in the return was declared at Rs.10,36,75,230/- by the assessee, which was accepted by the AO in the impugned assessment order passed u/s 143(3) of the Act on 29.09.2017. In view of the provisions of sec. 115BBE(2) of the Act and in the facts and circumstances of the case, the Assessing Officer allowed such erroneous claim of total deduction made by the assessee of Rs.63,32,270/-.

Therefore, Ld. PCIT held that the assessment order u/s 143(3) passed on 29.09.2017 (for Asstt Year 2015-16) is found to be **erroneous in so far as it is prejudicial** to the interest of Revenue and Ld. PCIT directed the Assessing Officer to frame the assessment ***de novo.***

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

10. Learned Counsel for the assessee submitted that in the survey proceedings itself, the assessee has explained the nature of 'on money', as money relating to his business. To substantiate this, the Ld. Counsel for the assessee submitted the English translation of relevant statement of Piyuskumar C. Patel, partner of M/s. Shivam Developers recorded under section 133A of the Act, which is reproduced below:

> *"Que. 20 Today in the course of survey proceedings, some papers/ books were found which were inventorised as per Annexure BF-1. Kindly provide us the explanation of the above papers/books after inspecting the same.*
> *Ans. 20 ……..*
>
> *PAGE NO. 75 - This page was found during the course of survey proceedings from my wallet. This paper relates to our MIDAS SQUARE PROJECT. The name*

of partners of our partnership firm is mentioned in this page. This is the account of entire cash receipts (On Money) relating to the sale of all shops of our firm. First column of this page describes various dates of cash receipts and partners have withdrawn the same as per their requirements. Cash withdrawn is mentioned besides the date and name. On money received in cash from sale of all the shops of our project was received completely by 28.08.2014. On the very same day, we distributed the amount amongst the partners as per their respective ratio. After deducting expenses from this unaccounted income, net profit was Rs.11,00,08,500/-.

Que.22 In the answer to the previous question, you have mentioned that unaccounted net profit of your MIDAS SQUARE come to Rs.11,00,08,500/-. Tax on the same would approximately come to Rs.3,63,02,805/-. Do you know that this tax is additional tax over and above the regular income of your firm?

Ans. 22 Yes, I am well aware of the fact that amount of Rs.11,00,08,500/- is unaccounted net profit of our firm and it is my responsibility along with other partners to pay the tax of Rs.3,63,02,805/- . Apart from this, it is my responsibility as well as other partners to pay tax on regular income of our firm. So I along with my partners declare Rs.11,00,08,500/- as our firm's unaccounted net profit. Therefore, we take the responsibility to pay tax of Rs.3,63,02,805/- on the same. This unaccounted amount belongs to financial year 2014-15."

11. The Ld. Counsel also submitted that the assessee has claimed the deduction under section 37 towards service tax paid Rs.39,33,270/- and also claimed the deduction under section 40(b) of the Act towards remuneration of Rs.28,00,000/- and thereafter the assessee has declared the net income of Rs.10,36,75,230/-. The Ld. Counsel submitted that assessee is entitled to claim the remuneration since it belongs to the assessee's business and it was the on-money relating to assessee's business and therefore assessee is entitled to claim the deduction on account of service tax which is related to on money and remuneration paid to partners.

12. On the other hand, Learned Departmental Representative (Ld. DR) for the Revenue relied on the para no.6.2, 6.3 and 6.4 of the order of the ld. PCIT and contended that the ld. PCIT has passed an elaborate order and therefore his finding may be confirmed.

13. We have heard both the parties and noted that the issue under consideration is no longer *res integra.* The service tax which is related to "on money" and remuneration paid to partners are allowable expenses out of on

money declared by assessee as the on money so declared by assessee was business income. For that, on identical facts, the reliance can be placed on the judgment of Hon'ble Gujarat High Court in the case of Suman Papers & Boards Ltd. , 314 ITR 119 (Guj.) wherein it was held as follows:

> ***"2.*** *The controversy relates to block period commencing from asst. yr. 1986-87 and ending on 6th Jan., 1996. The respondent assessee, a limited company, claimed deduction under ss. 80-I or 80-IA of the Act in relation to the total undisclosed income of the block period. The said claim was rejected by the AO and the matter carried before Tribunal. The Tribunal vide its impugned order dt. 18th May, 1988 [sic-1998] allowed the relief for the reasons recorded in paragraph No. 21 of the impugned order, material portion whereof reads as under:*
>
> > *"From the above, it is clear that as per the provisions of s. 158BB(1), the undisclosed income of the block period shall be the aggregate of the total income computed in accordance with the provisions of Chapter IV without giving effect to set off of brought forward losses under Chapter VI or unabsorbed depreciation under s. 32(2), as per the restrictions provided in s. 158BB(4) referred above and it has to be inferred that the income under each of the head of income is to be computed upto the stage of gross total income and no set off of brought forward losses and unabsorbed depreciation are to be given. However, the Act nowhere lays down any restriction for allowance of deduction under Chapter VI-A of the Act. The above legislative intention is further supported from the specific column in Part-Ill on p. 3 in Form No. 2B, which is the prescribed form for filing the return of undisclosed income. It contains the headwise income upto gross total income and thereafter, there is a column for deduction under Chapter VI. The distinction in Form No. 2 and Form No. 2B is only with regard to column for set off of brought forward losses and unabsorbed depreciation. Sec. 158BH clearly provides that all other provisions of the Act would be applicable to block assessment. Thus, there is specific exclusion of no set off of brought forward losses and depreciation under s. 32(2) but no specific exclusion of eligible deduction under Chapter VI-A. According to Rules of the interpretation relating to exclusion and inclusion, whatever is not specifically excluded shall be deemed to have been included in taxing statutes. Thus, as far as the deductions under Chapter VI-A are concerned, the legal provisions are very clear that the assessee cannot be denied the deduction under s. 80-IA. The view of the AO as well as the CIT that deduction under s. 80-IA is admissible to the assessee on disallowances and additions made on the ground that these are out of the expenses recorded in the books of account, but the same is not admissible in relation to the undisclosed income declared in Form No. 2B as the same is not a part of the report of the chartered accountant and quantitative information in relation to that income is not annexed to the audit report, is not tenable, because by its very nature, the undisclosed income could not be certified by the auditor in the audit report; because if the undisclosed income is certified in the audit report, then it will cease*

> *to be undisclosed and will become disclosed income, and then there would be no question of any undisclosed income. It is also pertinent to note that the undisclosed income declared in Form No. 2B is under the head business income from industrial undertaking as the only activity of the assessee companies is the manufacture and sale of board paper and craft paper, which has been all along assessed as business income and in all the assessment years falling within the block periods, there has been no other head of income except 'Business income', (ii) During the course of search from the records seized, there is no evidence that the assessee companies were having income assessable under any other head namely, house property, capital gains or income from other source except business income, (iii). The chairman of the companies Shri N.R. Agrawal in the various statements recorded under s. 132(4) has specified the manner of earning undisclosed income out of the trading activities of the assessee companies relating to the manufactured goods namely, board paper and craft paper by under-invoicing of sales and over-invoicing of purchases and inflation of expenses etc. Thus, on a correct interpretation of the provisions of ss. 158BB(1), 158BB(4) and 158BH as applicable to the facts and circumstances of the cases before us, we are of the opinion that the assessee will be eligible for deduction under s. 80-I/80-IA in respect of the undisclosed income assessed by the AO under the block period. This issue is, accordingly, adjudicated in favour of the assessee."*

14. After going through the judgement of Hon'ble jurisdictional High Court in the case of Sumarn Papers & Boards Ltd. (supra); wherein it was held that manner of earning undisclosed income was out of trading activities of the assessee company related to manufactured goods, therefore assessee was eligible for deduction under section 80-I/80-IA of the Act. Likewise the service tax which is related to on money, is the expenses of business. The partners' remuneration is also expenses allowable under the Act. From the above facts, it is abundantly clear that Assessing Officer has taken one of the possible views. The Assessing Officer, while framing the assessment order, has allowed expenses which are related to the business. Therefore, we note that order passed by the Assessing Officer is neither erroneous nor prejudicial to the interest of Revenue. Hence, jurisdiction exercised by Ld. PCIT under Section 263 of the Act is not sustainable in the eye of law.

15. We note that on identical facts, the Hon'ble High Court of Gujarat in the case of Mhaskar General Hospital, in Tax Appeal No. 1474 of 2009 (Guj. HC), held as follows:

"Having thus heard the learned counsel for the parties, in so far as the first question on which the Commissioner sought to reopen the assessment by exercising powers under section 263 of the Act is concerned, same permits no debate. It is by now well settled that interest on borrowed funds would be allowable deduction irrespective of whether such funds are utilized for incurring revenue or capital expenditure. Reference in this regard can be made right from the the decision of this Court in the case of CIT v. Khedut Sahakari Khand Udyog Mandli, 104 ITR 206. This view was reiterated by this Court in the case of Gujarat State Fertilizer & Chemicals Ltd v. Asst. CIT, (2009) 313 ITR 244 (Guj) as also by the Apex Court in the case of Deputy CIT v. Core Health Care Ltd., (2008) 298 ITR 194(SC). Therefore, the said ground does not hold valid.

With respect to second question, we may notice that the assessee's stand is that its sole business was that of running a hospital. It had no other source of income and that therefore, treating such undisclosed income from other source was not justified.

In the case of Deputy CIT v. Radhe Developers India Ltd., (2010) 329 ITR 1(Guj.), this Court while distinguishing the decision in the case of Fakir Mohmed Haji Hasan (supra), observed as under:

> *"The decisions of this Court in the case of Fakir Mohmed Haji Hasan (supra) and Krishna Textiles (supra) are neither relevant nor germane to the issue considering the fact that in none of the decisions the Legislative Scheme emanating from conjoint reading of provisions of sections 14 & 56 of the Act have been considered. The Apex Court in the case of D.P.Sandu Bros.Chembur P. Ltd.,(supra) has dealt with this very issue while deciding the treatment to be given to a transaction of surrender of tenancy right. The earlier decisions of the Apex Court commencing from case of United Commercial Bank Ltd.Vs. CIT (1957) 32 ITR 688 (SC) have been considered by the Apex Court and, hence, it is not necessary to repeat the same. Suffice it to state that the Act does not envisage taxing any income under any head not specified in section 14 of the Act. In the circumstances, there is no question of trying to read any conflict in the two judgments of this Court as submitted by the learned Counsel for the Revenue."*

In any case, we are convinced that the Tribunal was correct in holding that even if two views are possible, powers under section 263 of the Act could not and ought not to have been exercised. The Apex Court in the case of Malabar Industrial Co. Ltd. observed as under:

> *"The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view*

> *taken by the Income-tax Officer is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue. Rampyari Devi Saraogi v. Commissioner of Income-tax, (1968) 67 ITR 84 (SC) and in Smt. Tara Devi Aggarwal v. Commissioner of Income-tax, West Bengal, 88 ITR 323."*

In the case of S.K.Srigiri and Bros. (supra), the Karnataka High Court held as under:

> *"We have perused the orders of the Tribunal. The Tribunal has carefully considered the questions put by the authority and the answer of the partners of the assessee's firm and based on the same, the Tribunal has come to the conclusion that the additional income received by the assessee in the instant case is from business and not from other sources. If the Tribunal has come to the conclusion that the additional income is from business, the remuneration paid to the partners has to be deducted while considering the profit and loss. In the circumstances, we are of the opinion that on facts the Revenue has no case on the merits. So far as the question of law is concerned, we have to answer the same in favour of the Revenue."*

In view of the above discussion, we do not find any question of law arises. Tax Appeal is therefore, dismissed."

16. Thus, it is abundantly clear from the above judgment that additional income, i.e. on money received by assessee is from business, therefore the service tax which relates to "on-money" should be allowed as deduction and partners' remuneration should also be allowed as deduction. We note that during the assessment proceedings, the Assessing Officer issued notice to the assessee asking the assessee to justify service tax and partners' remuneration. The said notice of Assessing Officer is placed at paper book page no.16. In response to the show-cause notice of the Assessing Officer, the assessee submitted its reply to the Assessing Officer which is placed at paper book page no.14. Thus, we note that Assessing Officer has conducted inquiry on the issues raised by Ld. PCIT in his order under section 263 of the Act. The Assessing Officer also applied his mind and took possible view, thus order passed by the Assessing Officer is neither erroneous nor prejudicial to the interest of revenue.

17. We note that judicial precedents 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".** 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 ld Principal CIT, being *ab initio void*.

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

Order is pronounced on 11/11/2022 by placing record on notice board.

Sd/-	**Sd/-**
(PAWAN SINGH)	**(Dr. A.L. SAINI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Surat
दिनांक/ Date: 11/11/2022
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