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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.324 OF 2003

KEC International Limited
(As successor to M/s RPG Cables Ltd.)
RPG Center, 30 Forjett Street,
Near Bhatia Hospital, Tardeo,
Mumbai – 400 036 ...Appellant

Versus

Deputy Commissioner of Income-
Tax, Special Range 19, Room 603,
6th Floor, Aayakar Bhavan, Churchgate,
Mumbai – 20 ...Respondent

Mr. Madhur Agarwal a/w Mr. Punit Shah, Mr. Balasaheb Yewale and Ms. Rupali Vasaikar i/b. Rajesh Shah & Co. for Appellant.
Mr. Suresh Kumar for Respondent.

CORAM : M. S. Sonak &
Jitendra Jain, JJ.

RESERVED ON : 23 January 2025

PRONOUNCED ON : 30 January 2025

JUDGMENT (Per Jitendra Jain J):-

1. This Income Tax Appeal is filed, under Section 260A of the Income Tax Act, 1961, by the Appellant-Assessee for the assessment year 1988-1989 challenging an order of the Income Tax Appellate Tribunal (Tribunal) dated 8 October 2002, whereby the Appellant-Assessee's appeal challenging jurisdiction of the Commissioner of Income Tax to invoke revisional power under Section 263 of the Income Tax Act, 1961 ("the IT Act") was dismissed.

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2. This appeal was admitted on 25 October 2004 on the following substantial question of law. :-

> *"Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in holding that the deduction of the decapitalised interest of Rs.317.63 lacs (Rs.396.94 lacs minus Rs.79.21 lacs) pertaining to earlier years while computing book profits under Section 115J had not assumed finality. "*

3. By consent of both the parties, the substantial question of law is reframed to bring out the exact controversy :

> *"Whether the Tribunal was justified in upholding exercise of revisional power by the CIT u/s 263 of the Act and further was justified in holding that observations made by the CIT in his order u/s 263 on the issue of Section 115J is not definite finding on the merits of the issue?"*

FACTS :

4. The Appellant-Assessee are successor to the erstwhile Asian Cables Limited. On 1 January 1987, Asian Cable and Corporation Ltd. amalgamated with Wiltech India Ltd. w.e.f. 1 January 1987 and the name of the amalgamated company was changed to Asian Cables Ltd.

5. In the hands of Wiltech India Ltd., interest on term loan from financial institutions were capitalised, including interest for the period subsequent to the date of commencement of commercial production (i.e. 1 May 1982). Total interest aggregating to Rs.617,07,00,000/- was capitalised. Depreciation on such capitalised interest claimed by Wiltech India Ltd. in the accounts for 1982-1983, 1983-1984, 1984-1985 and 1985-1986 was Rs.79.21 lakhs. From the accounting year, ending 31 March 1988, i.e. the year of the amalgamation, the accounting policy of capitalising future interest was changed, whereby interest relating to period from the commencement of production upto 31 December 1986 was decapitalised and charged as an expenditure in the profit and loss

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account of the year 1987-1988, and the depreciation claim on the said capitalised interest in the earlier year was also written back to the profit and loss account in 1987-1988.

6. On 28 July 1988, the Appellant-Assessee filed its return of income declaring loss. The said return was revised on 7 July 1989 and income under Section 115J of the IT Act was declared at Rs.49,19,380/-. The said revised return was further revised on 23 April 1990 in which the deduction under Section 32AB of Rs.80,85,862/- was claimed, but the income under Section 115J remained the same i.e. Rs.49,19,380/-. The said return was selected for scrutiny assessment.

7. On 28 February 1991, an assessment order under Section 143(3) of the IT Act was passed by the assessing officer , assessing the income under normal provisions of the IT Act at rupees 'NIL' after making disallowance under Rules 6D, 37(2A), incentive payment, 40A(5), 43B, payment to club, addition on account of mortgage etc. and after setting off unabsorbed losses. The assessing officer after computing income under normal provisions of the IT Act, accepted computation of income made by the Appellant-Assessee under Section 115J at Rs.49,19,377/-.

8. On 25 February 1993, a notice under Section 263 of the IT Act was issued by the Commissioner of Income Tax (CIT) in which he stated that the assessment framed by the ITO is erroneous insofar as it is prejudicial to the interest of revenue on the ground that deduction allowable under Section 32AB of the IT Act has not been computed correctly, since interest on loans relating to prior period amounting to Rs.3,96,84,098/- has been added to the book profit and further book profit under Section 115J of the IT Act are not calculated correctly. The Appellant-Assessee was called upon to show cause why the assessment

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order under Section 143(3) should not be revised under Section 263 of the IT Act.

9. On 10 March 1993, the Appellant-Assessee filed its reply giving its submissions on why the computation under Section 32AB and 115J of the IT Act is correct. The Appellant-Assessee prayed for dropping the proceedings. In the said reply no grievance was raised on assumption of jurisdiction by the CIT.

10. On 30 March 1993, the Commissioner of Income Tax passed an order under Section 263 of the IT Act after hearing the representative of the Appellant-Assessee. The operative portion of the Commissioner's order reads as under:-

> *"4. I have considered the facts of the case and also the arguments of the assessee's counsel. Taking the first point relating to deduction allowable u/s. 32AB it is seen that the same has to be allowed with reference to profits of the assessee for the assessment year under consideration. It is noted from the Profit & Loss account for the fifteen months ended 31.3.1988 that a net sum of Rs. 3,17,63,000/- has been debited by way of interest on Fixed Loans after adjusting an amount of Rs.79,21,000/- being write back of depreciation. This represents interest on term loans which were capitalised in the earlier years in respect of (Wiltech India Ltd.) Wiltech division subsequent to the date of commencement of commercial production. Since this item of expenditure being interest on loan has not been claimed as revenue expenditure being interest on loan has not been claimed as revenue expenditure in the books of Wiltech division in those years, the assessee is making this adjustment in this year of amalgamation.* ***The deletion of the prior period interest debited in the books of accounts is not one of the items referred to in the provisions of Section 32AB(3) which defines the profits on business for the purpose of this Section. Since the assessing officer has not taken this aspect into consideration, the assessment made by the assessing officer is erroneous and prejudicial to the interest of revenue on this account.***
>
> *5.* ***Taking the second point for the purpose of Section 115J the book profits have to be taken into consideration. However, it does not mean that the adjustments made by the assessee in respect of earlier years should be allowed to alter the figures of business profits of this year. If such adjustments has to be allowed for the purpose of Section 115J the assessee will be at liberty to alter the figures of the current year's books by making adjustment entries. It***

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will artificially have the effect of decreasing the book profits of this year with sole intention of avoiding applicability of Section 115J. Such attempt cannot be said to be within the scheme of the provisions of Section 115J. Accordingly the deduction of the book profits to the extent of Rs. 3,17,16,000/- by way of interest on fixed loans could not be said to be a correct allowance made while computing the profits u/s. 115J. Since the assessing officer has not considered this aspect, the same is erroneous and prejudicial to the interest of revenue.

6. In the light of the above discussions the assessment for the assessment year 1988-89 is set aside on both the points referred to above. The assessing officer will compute the relief u/s. 32AB and also the book profits u/s.115J afresh by applying the correct provisions of law and after providing an opportunity to the assessee."

[emphasis supplied]

11. The Appellant-Assessee being aggrieved by the revisional order passed under Section 263 filed an appeal to the Tribunal. The said appeal was disposed of by the Tribunal on 8 October 2002. The operative portion of the Tribunal order reads as under:-

"11. We have considered the rival submissions and have gone through the facts. Admittedly, the AO has not examined the important issues as mentioned above and his order is completely silent on these issues. Thus, he accepted the claim made by the assessee without proper enquiry and without application of mind. Therefore, the AO's order is erroneous and prejudicial to the interests of the revenue as held by the ITAT in the cases cited. In the case of Arbit Exports Ltd., the ITAT relied upon Hon'ble Supreme Court decision in the case of Malabar Industrial Co. Ltd. Vs. CIT 243 ITR 83. The arguments of the ld. Counsel that on merits the issues are now covered by the Hon'ble Supreme Court decision in the case of Appollo Tyres (supra) is not acceptable. Firstly, the decision was not available at the point of time when the CIT passed his order U/s. 263 of the IT Act. Secondly, whether the Supreme Court decision is applicable or not would depend upon the facts of particular case. The 1d. CIT in his order U/s. 263 has not decided the merits and he has merely directed the AO to decide the issues in accordance with the relevant provisions of law. Thus, on merits, the issue is still open. Having regard to the facts and circumstances mentioned above, we hold that the relevant assessment order was erroneous and prejudicial to the interests of the revenue and accordingly, the ld. CIT was justified in assuming jurisdiction U/s. 263 and setting aside the assessment. In the circumstances, we refrain from commenting on the merits of the isues."

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12. Meanwhile, the assessing officer on 31 January 1995 passed an order pursuant to Section 263 order. The said order under Section 143(3) read with Section 263 of the IT Act was passed after giving an opportunity to the Appellant-Assessee, who made various submissions vide various letters on the issue of computation of deduction allowable under Section 32AB and computation of book profit under Section 115J. After detailed analysis of the submissions made by the Appellant-Assessee and after hearing the Appellant-Assessee on the merits, the assessing officer passed an order under Section 143(3) read with Section 263, wherein book profit under Section 115J was computed at Rs.1,44,48,277/- and eligible income under Section 32AB was computed at Rs.1,14,49,120/- but deduction was restricted to the extent of amount utilised for acquiring the plant and machinery which was Rs.80,85,862/-. The assessing officer with respect to decapitalisation of interest gave the same treatment in computing deduction under Section 32AB as given in computing book profit under Section 115J and similarly with respect to write back of depreciation.

13. The said order of the assessing officer dated 31 January 1995 under Section 143(3) read with Section 263, where on merits the contention raised by the Appellant-Assessee came to be rejected, has not been challenged by the Appellant-Assessee and has become final.

14. It is in the above backdrop and being aggrieved by the Tribunal's order dated 8 October 2002 upholding the jurisdiction under Section 263, the Appellant-Assessee has filed the present appeal which was admitted by this Court vide order dated 25 October 2004 on substantial question of law reproduced above which we have now reframed.

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Submissions of the Appellant-Assessee :

15. Mr. Agarwal, learned counsel for the Appellant-Assessee submits that the order under Section 263 of the IT Act records a definite finding on merits and, therefore, the Appellant-Assessee are justified in contesting the same on merits before the Tribunal and this Court. He relies upon the decision of this Court in the case of ***Herdillia Chemicals Ltd. Vs. Commissioner of Income Tax***[1] in support of this submission. Secondly, he submits that the view taken by the assessing officer was in consonance with the decision of the Cochin Bench in the case of ***Apollo Tyres Ltd. Vs. Deputy Commissioner of Income Tax***[2] and, therefore, he contends that if two views are possible and one of the view is taken by the assessing officer, then the CIT cannot exercise jurisdiction under Section 263 of the Act. He relies upon the decision of the Supreme Court in the case of ***Commissioner of Income Tax (Central), Ludhiana Vs. Max India Ltd.***[3] for this proposition. He further submits that the issue is now covered on merits by the decision of the Supreme Court in the case of ***Apollo Tyres Ltd. Vs. Commissioner of Income Tax***[4]. He further submits that since in the original assessment order, the assessing officer has computed book profit under Section 115J of the Act, it should be deemed that he had examined the computation of book profit under Section 115J and, therefore, the jurisdiction exercised by the CIT is not warranted. He further submits that the assessee has not challenged the order giving effect to the order passed under Section 263 and, therefore, for all the above reasons this Court should answer the question in favour of the Appellant-Assessee and against the revenue.

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1 (1997) 90 Taxman 314
2 (1992) 43 ITD (Cochin)
3 (2008) 166 Taxman 188 (SC)
4 (2002) 255 ITR 273 (SC)

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Submissions of the Respondent :-

16. Per contra, Mr. Suresh Kumar, learned counsel for the Respondent submits that the issue raised in the order under Section 263 was never examined by the assessing officer in the course of the original assessment proceedings. He further submitted that the CIT can exercise jurisdiction under Section 263 of the IT Act only if the order is erroneous and prejudicial to the interest of the revenue. He submits that to satisfy these twin jurisdictional conditions, the CIT after giving an opportunity of hearing to the Appellant, has to form some opinion on merits for coming to a conclusion that the order passed under Section 263 of the IT Act is erroneous and prejudicial to the interest of the revenue. After having observed the same, he has remanded the matter to the assessing officer to consider the same afresh by applying correct provision of law and after providing an opportunity to the assessee. He submits that on a holistic reading of paragraphs 4 to 6 of the order under Section 263, it cannot be said that the CIT has given a definite finding on merits. He further submits that in the order giving effect to the Section 263 order, detailed submissions were made on merits by the assessee and after adequate opportunity of hearing, the assessing officer computed income under Section 115J and also computed eligible profit under Section 32AB at a figure higher than the original assessment order, but restricted the deduction to the extent of amount utilised for plant and machinery. He submits that an attempt is made today to attack the impugned order because the Appellant-Assessee has not challenged the order giving effect to the Section 263 order and having missed the bus, they cannot indirectly challenge the merits in the present proceedings. He, therefore, prayed for dismissal of the appeal.

17. Learned counsel for the Respondent further distinguished the decision in the case of ***Herdillia Chemicals Ltd. (supra)*** and stated that

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in that case, the CIT has himself withdrawn the deduction under Section 80J and, therefore, this Court held that the assessee in that case ought to have challenged the order under Section 263 of the IT Act and having not challenged the same, cannot pursue remedies by filing appeal against the order giving effect to the Section 263 order.

18. We have heard learned counsel for the Appellant-Assessee and the Respondent and with their assistance have perused the documents shown to us. We note that other than what is recorded above, no other submissions have been made by both the parties.

Analysis and Conclusion:

19. The issue which requires consideration is whether the order passed under Section 143(3) dated 28 February 1991 is erroneous and prejudicial to the interest of revenue and further whether the order under Section 263 gives a conclusive finding on issue relating to Section 115J of the IT Act so as to permit the Appellant-Assessee to agitate the issue on merits.

20. Section 263(1) of the IT Act, as it stood at the relevant time, reads as under :

> **Revision of orders prejudicial to revenue-**
>
> *263. (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 insofar 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, or cancelling the assessment and directing a fresh assessment.*
>
> *[Emphasis supplied]*

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21. The object of conferring revisional power on CIT under Section 263 of the IT Act is that the revenue has no right of appeal to CIT(A) against any order passed by the assessing officer. Therefore, this section is enacted conferring supervisory power on the CIT to be exercised when an order passed by the officer is found to be erroneous and prejudicial to the interest of the revenue.

22. At the outset a query was raised by the Court as to whether there is any material on record to show that the assessing officer in the course of the original assessment proceedings had raised a query on the issues which were the subject matter of proceedings under Section 263, and whether the Appellant-Assessee had filed any response/reply to such query on these issues having been raised by the assessing officer during the course of the original assessment proceedings. We were not shown any such material. Therefore, admittedly the assessing officer had not examined the issue during the course of the original assessment proceedings on the subject matter of Section 263 proceedings. Even in reply to the show cause notice under Section 263, the Appellant-Assessee has not stated that this issue was examined during the course of the original assessment proceedings nor was it the case of the Appellant-Assessee before the Tribunal. Therefore, there can be no dispute that the issues raised in revisional proceedings were never examined during the course of original assessment proceedings. The finding of the Tribunal on this issue has also not been challenged in this appeal.

23. The only contention raised by the Appellant-Assessee is that in the original assessment order under Section 143(3), at the end of the order, the assessing officer has computed income u/s 115J at Rs.49,19,377/- and therefore it should be presumed that the officer has

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examined the issue of computation of book profit under Section 115J. We are afraid to accept this submission. In the assessment order, disallowance under regular provisions of the Act, namely disallowance under Rule 6-B, travelling expenses, Rule 6-D, etc. were made which led to the assessing officer computing assessed income at Rs.5,83,29,868/- and after setting off unabsorbed losses arrived at 'NIL' income under the normal provisions of the Act. Thus, the assessing officer had to compare normal income with the book profit under Section 115J which the Appellant-Assessee has declared at Rs.49,19,377/-. The additions made in the assessment order were not related to the computation of book profit under Section 115J of the IT Act. The assessing officer therefore accepted the Appellant-Assessee's computation made under Section 115J at Rs.49,19,377/- since same was more than the income under normal provisions of the Act.

24. In our view, the assessing officer at the end of the assessment is always required to compute the assessed income under the normal provisions of the Act and compare it with the book profit under Section 115J. Merely because the assessing officer for this comparison at the end of the assessment order reproduces the computation of income under Section 115J made by the assessee, it cannot be said that the assessing officer has examined the issue of computation of book profit under Section 115J moreso as observed by us above when admittedly there was no query raised by the assessing officer during the course of the original assessment proceedings on the issues raised in Section 263 proceedings, nor was it at any point of time argued before any of the authorities that these issues were examined in the course of the original proceedings. Therefore, in our view, merely because an assessing officer reproduces the computation of book profit made by the assessee at the end of the assessment order, it cannot be said that the assessing officer

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has examined the issue of computation of book profit under Section 115J of the IT Act. Therefore, the contention raised by the Appellant-Assessee on this issue is rejected.

25. It is important to note that in the reply to show cause notice to notice under Section 263, the Appellant-Assessee had not challenged the jurisdiction of the CIT but made submissions on merits. However in grounds of appeal to the Tribunal, assumption of jurisdiction was challenged. However, on a perusal of the Tribunal's order, submission on jurisdiction appears to be that since on merits issue is covered by the subsequent decision of the Supreme Court in the case of ***Apollo Tyres (supra)*** the jurisdiction assumed is bad in law. Although initially Mr. Agarwal sought to contend that due to subsequent decision of the Supreme Court in the case of ***Apollo Tyres Limited (supra)*** revisional proceedings are bad in law but on being confronted on this issue, he fairly pointed out that the decision of the Supreme court in ***Max India (supra)*** holds that the jurisdiction under Section 263 of the Act has to be tested on the basis of law prevailing on the date when the CIT exercised the jurisdiction. Therefore, the subsequent decision of the Supreme Court in the case of ***Apollo Tyres Limited (supra)*** on Section 115J cannot be considered for testing the validity of exercise of jurisdiction under Section 263 since on the day when the CIT exercised his jurisdiction, the Supreme Court had not decided the issue. We make it clear that we have not examined whether the decision of the Supreme Court is at all applicable since we are not adjudicating upon the merits of the case.

26. Section 263 confers powers on the Commissioner which are in the nature of supervisory jurisdiction and same can be exercised only on satisfaction of twin conditions that the order sought to be revised is not

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only erroneous, but also prejudicial to the interest of the revenue. The Commissioner, therefore, has to give his reasons on satisfaction of these two conditions in his order exercising jurisdiction under Section 263 of the Act since such an order is amenable to appeal before the Tribunal. In the instant case, admittedly the issues for which revisional proceedings were initiated were not examined by the assessing officer . Therefore, merely because the assessing officer has not examined this issue and therefore order is erroneous, could not have been the only ground for exercising the jurisdiction but in addition to the same the Commissioner would have to form some opinion for coming to the conclusion that the order sought to be revised is not only erroneous, but also prejudicial to the interest of revenue. For satisfaction of the condition of *'prejudicial to the interest of revenue',* the Commissioner is required to say something on merits moreso when same was not examined during original assessment proceedings. It is in these contexts that the Commissioner has observed that computation of book profit to the extent of Rs.3,17,16,000/- by way of interest on fixed loans could not be said to be a correct allowance made while computing the profits under Section 115J. The CIT after observing so has stated that this issue was not considered by the assessing officer and, therefore, same is set aside for computation of book profit under Section 115J afresh by applying the correct provisions of law, and after providing an opportunity of hearing to the assessee.

27. The very fact that the Commissioner is required to make an order after affording an opportunity of hearing to the assessee ingrains in the process the requirement of recording reasons for its conclusion, as is necessary for any quasi-judicial order required to be made by a quasi-judicial authority. It cannot be doubted nor has it been questioned that orders under Section 263 bear stamps of quasi-judicial nature and

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require to be supported by reasons for its conclusion. Necessary consequence is that while passing the order revising an order passed by subordinate officer, the Commissioner must record reasons in support of his conclusion that the order is revised being erroneous and that it would be prejudicial to interests of revenue due to such erroneousness.

28. In our view, the Appellant-Assessee cannot pick up one sentence of the operative order and contend that the Commissioner has given a definite finding on the merits of the case. There has to be a holistic reading of whole of the operative parts of the order and if one reads holistically the whole of the operative parts, it can be safely concluded that for coming to the satisfaction of twin conditions mandated by Section 263 of the Act, the CIT had to make some observations on the merits of the case moreso because the issue was not examined during the course of the assessment proceedings. The CIT having said so has directed the assessing officer to recompute the book profit afresh by applying the correct provision of law, and after providing an opportunity to the assessee. In our view on a complete reading of the operative paragraphs of order under Section 263, it cannot be said that the observations made by the Commissioner on computation of book profit was definite and conclusive, but he had to make these observations for satisfaction of the twin conditions mentioned in Section 263 for assumption of jurisdiction. If he had not made such observation, then the order under Section 263 would have fallen foul of the mandatory conditions required for exercising jurisdiction under Section 263. Therefore, on a holistic and complete reading of the operative paragraphs, we cannot accept the submission made by the Appellant-Assessee that the observation made by the CIT on computation of book profit is definite and therefore he is entitled to challenge the same on merits before the Tribunal and before this Court.

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In our view, the observation made by CIT cannot be to read *dehors* the other directions of the operative portion of paragraph 5 and 6 of the revisional order and therefore this contention of the Appellant-Assessee is rejected.

29. We also do not accept the submission made by the Appellant-Assessee that merely because they have not challenged the order giving effect to Section 263 order, this Court should permit the Appellant-Assessee to agitate the issue on merits. In our view, this would amount to achieving indirectly what could not be achieved directly. Admittedly, the order giving effect to Section 263 order has become final since same has not been challenged till today. Having not challenged the said order, we cannot permit the Appellant-Assessee to agitate the issue on merits before us since that would amount to adjudicating upon the assessment order giving effect to Section 263 order which has become final and same is not before us and certainly under the scope of Section 260A of the Act, we cannot permit such course of action since we are in appellate jurisdiction and not in equity jurisdiction.

30. Learned counsel for the Appellant relied upon the decision of this Court in the case of ***Herdillia Chemicals Ltd. (supra)*** in support of his submission that there is a definite finding of the CIT in his order on the merits of the case and, therefore, the Appellant should be permitted to agitate the issue on merits. In our view, in the case of ***Herdillia Chemicals Ltd. (supra)***, the CIT expressly stated that he is **withdrawing** the reliefs under Section 80J of the Act **granted** by the ITO and after withdrawing the reliefs, the ITO was directed to determine the reliefs afresh in accordance with law after giving opportunity to the assessee of being heard only for ministerial purpose. In the present case before us, admittedly the issues raised in the revisional proceedings were not examined by the assessing officer during the course of the original

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assessment proceedings. The Commissioner, therefore, had to make observations on the merits for satisfying the twin conditions of assuming jurisdiction under Section 263 of the Act. Having made so, the CIT noted that since this issue was not examined during the course of the assessment proceedings, he directed the officer to decide the issue afresh in accordance with law and after giving opportunity of hearing. In the case before us, there is no express/definite direction by the CIT to the Officer that the Officer has to compute book profit under Section 115J in accordance with the observations made by the CIT. On the contrary, the assessing officer was directed to recompute the book profit under Section 115J in accordance with law afresh and after giving opportunity of hearing. Pursuant to the said direction of the CIT, the assessee filed detailed submissions on merits in the course of the proceedings giving effect to the revisional proceedings. Therefore, in our view, on a holistic reading of the operative part of Section 263 order, the decision of ***Herdillia Chemicals Ltd. (supra)*** is not applicable to the facts of the present case.

31. Learned counsel for the Appellant, thereafter, relied upon the decision of ***Max India Ltd. (supra)*** in support of his submission that where the Officer has **adopted** one of the courses permissible in law and has **taken** a view which was in accordance with the Cochin Tribunal's view in the case of ***Apollo Tyres (supra)***, the order passed under Section 263 cannot be said to be erroneous and prejudicial to the interest of the revenue. In our view, the said decision of ***Max India Ltd. (supra)*** is not applicable to the facts of the Appellant before us. In the instant case before us, the assessing officer had not raised any query on any of the issues of computation under Section 115J of the Act. Therefore, the question of the Officer applying his mind to the computation of book profit under Section 115J does not arise. If the assessing officer had

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raised the query on the computation of book profit under Section 115J and after seeking response from the assessee had accepted the submissions by not making any adjustment, then in that scenario, it could have been contended that the assessing officer has adopted one of the views which was in consonance with the Tribunal's decision. If the assessing officer has not examined computation of book profit under Section 115J at all in the course of the original assessment proceedings, then in that scenario, it cannot be presumed and said that he has applied his mind and therefore, the question of forming any opinion does not arise which could be said to have been adopted or taken. The decision in the case of ***Max India Ltd. (supra)*** itself states that when the ITO **adopted** one of the courses permissible in law or where two views are possible and **ITO has taken** one view and the **CIT disagrees** with it then, in that scenario, the order cannot be treated as erroneous or prejudicial to the interest of the revenue. In the instant case before us, since the issue of computation of book profit was never examined by the assessing officer on any count, the issue of taking a view by the assessing officer or adopting anything and consequently the CIT disagreeing also does not arise and, therefore, the observations made in the case of ***Max India Ltd. (supra)*** would not apply to the facts of the present case.

32. The decision of ***Max India Ltd. (supra)*** follows decision of the Supreme Court in the case of ***Malabar Industrial Co. Ltd. vs. CIT***[5] wherein exercise of jurisdiction under Section 263 of the IT Act was upheld since the ITO failed to apply his mind to the case and it is in that context the Supreme Court further observed, by way of example, that when an ITO adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the ITO

5 (2000) 243 ITR 83

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has **taken** one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue. These observations read in the context of the facts before the Supreme Court in the case of ***Malabar Industrial Co. Ltd. (supra)*** clearly show that application of mind by the ITO in the course of original assessment proceedings is a must and if the CIT does not agree to such a view, order cannot be treated as erroneous order prejudicial to the interest of the revenue. In the instant case, admittedly and undisputedly there is no examination of computation of book profit by the assessing officer at the time of assessment and therefore, the case of the Appellant-Assessee is covered by this decision of the Supreme Court in the case of ***Malabar Industrial Co. Ltd. (supra)***.

33. The next submission of Mr. Agarwal that on account of Cochin Tribunal's decision in the case of ***Apollo Tyres Limited (supra)***, the assessment order cannot be said to be erroneous and prejudicial is also to be rejected. In this case the original assessment order is dated 28 February 1991 whereas Cochin Tribunal's decision is of 29 July 1992 i.e. much after assessment order was passed and moreso when the assessing officer has not examined. Also ***Apollo Tyres Limited (supra)*** was a case where assessee had filed an appeal, which indicates that at the time of passing the assessment order in the present case, the view on merits (if at all applicable) was against the assessee and in favour of the revenue. Therefore, even on these facts, decision in the case of ***Max India Ltd. (supra)*** on this proposition does not come to the rescue of the Appellant-Assessee.

34. After the hearing was concluded, this Court came across a decision of the Co-ordinate Bench, (which was not cited by any of the parties). The Court brought to the notice of the learned counsel for the

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Appellant-Assessee and the respondent the said decision. This Court in the case of ***CIT, Nagpur Vs. Ballarpur Industries Ltd.***[6] was faced with a very similar and identical situation with which we are faced today. The issue before the High Court was validity of jurisdiction under Section 263 of the Act with respect to deduction under Section 80HHC, where the AO had not examined the issue in the course of the assessment proceedings. The argument of the assessee was that in view of conflicting decision with respect to deduction under Section 80HHC and by placing reliance on the decision of the Supreme Court in the case of ***Max India Ltd. (supra)*** was that the jurisdiction was wrongly assumed. The Coordinate Bench reconciled and explained the decision in the case ***Malabar Industries Co. Ltd. (supra)*** and ***Max India Ltd. (supra)*** and has observed as under :

> *10. The law on exercise of jurisdiction under Section 263 of the Act is settled by the decision of the Apex Court in the case of Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83/109 Taxman 66 wherein it has recorded that power of revision under Section 263 of the Act can be exercised only on satisfaction of twin conditions namely the order of the Assessing Officer must be erroneous, and also prejudicial to the interest of the revenue. The Court further observed that where a claim made by the assessee is allowed by the Assessing Officer without having made any enquiry, then the order of the Assessing Officer to the extent it allowed such a claim is erroneous in law. The Apex Court also recorded the fact that where two views are possible, and the Assessing Officer has taken one possible view, then even if the CIT does not agree with the view, it would not give him the jurisdiction to exercise jurisdiction under Section 263 of the Act.*
>
> *11. In the above view, Mr. Bhattad, learned counsel for the applicant-Revenue submits that it is very clear that the claim of the respondent - assessee for deduction under Section 80 HHC of the Act was allowed without any discussion and/or consideration of the eligibility and/or extent of eligibility of claim under Section 80 HHC of the Act. Therefore, the substantial question of law be answered in favour of Revenue.*

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12. However, Mr. Dewani, learned counsel for the respondent-assessee while not disputing the above position in law with the requirement of satisfaction of twin requirements, submits that in this case the issue was debatable and two views were inherently possible in view of the complexity of Section 80 HHC of the Act. In support he placed reliance upon the decision of the Apex Court in Max India Ltd. (supra) which also reiterates that where two views are possible, the exercise of the revisional power under Section 263 of the Act is not called for. The two views he submits by inviting our attention to the fact that statement of case refers to the decision of the Tribunal placing reliance upon its decision in Mysore Exports Ltd. (supra) taking the same view. Further in support that there were two views possible at the time when the Assessing Officer passed the order, reliance was placed upon the decision of the Andhra Pradesh High Court in CIT v. Gogineni Tobacco Ltd. [1999] 238 ITR 970 which relies upon the orders passed under the Act indicating the issue is debatable. Without prejudice to the above, it is also submitted that from a bare reading of the statement of case it is clear that the Assessing Officer had allowed deduction under Section 80 HHC of the Act only after due application of mind. In support of the aforesaid, he relied upon the fact of the statement of case refers to the words "allowed deduction under Section 80 HHC of the Act". Further observation in the statement of case " Assessing Officer is thus seemed to have allowed deduction under Section 80 HHC without subjecting the claim to due verification and/ subsequent quantification and allowability".

13. The above issue which comes for our consideration is, did the Assessing Officer consider and examine the claim of the respondent before allowing a claim for deduction under Section 80 HHC of the Act. The respondent- assessee seeks to draw inference from the statement of case that there was an inquiry made before allowing the claim of deduction under Section 80 HHC of the Act at Rs.92.81 lakhs. This inference is not justified. Mere using the word "allowed" does not mean examination and enquiry before allowing deduction under Section 90 HHC of the Act. The words "due verification" would include within its ambit not only inadequate inquiry/verification but also no enquiry/verification. However, in case the respondent-assessee was of the view that the claim has been examined by the Assessing Officer before allowing it, then respondent-assessee ought to have the statement of case modified/amended so as to bring the aforesaid facts on record, as held by the Apex Court in the case of Calcutta Agency Ltd. (supra). This not being done and now to draw far fetched inference cannot be

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accepted. It is now settled in view of Malabar Industries (supra) that non-enquiry before allowing the claim would make the order of the Assessing Officer amenable to jurisdiction under Section 263 of the Act. The non-enquiry by the Assessing Officer gives jurisdiction under Section 263 of the Act. Merely because the issue is debatable, it does not absolve the Assessing Officer from examining the issue and taking a view on the claim after examination. Similarly because the two views are possible and or that there are contrary view of higher forums, does not permit non-examination of the claim and taking one of the possible view by giving reasons. In this case no examination of the claim under Section 80 HHC of the Act has been done by the Assessing Officer. Therefore, the exercise of jurisdiction by the Commissioner of Income Tax under Section 263 of the Act was valid.

14. The decision of the Apex Court in Max India Ltd. (supra) relied upon by the respondent-assessee to our mind would not come to its rescue for the reason that in the present facts the statement of the case does not indicate that the view taken to allow the claim under Section 80 HHC of the Act was after examination/inquiry. Mere taking of a view by the Assessing Officer without having subjected the claim to examination would not make it a view of the Assessing Officer. A view has necessarily to be preceded by examination of the claim and opting to choose one of the possible results. In the absence of view being taken, merely because the issue itself is debatable, would not absolve the Assessing Officer of applying his mind to the claim made by the assessee and allowing the claim only on satisfaction after verification/enquiry on his part. A view in the absence of examination is no view but only a chance result. Therefore, even the decision of the Andhra Pradesh High Court in Gogineni Tobacco Ltd. (supra) will also have no application.

15. It appears from the decision of the Apex Court in Max India Ltd. (supra) that the Assessing Officer had taken one of the two views of the word "profit" as occurring in Section 80 HHC of the Act. Therefore, it was in that context that the Apex Court held that Section 263 of the Act would not be attracted particularly when the view of the Assessing Officer was found to be a view taken by various authorities under the Act. In passing we may point out that as recorded in the statement of case, the Tribunal held the exercise of powers under Section 263 of the Act by the Commissioner of Income Tax to be bad in law as the view of the Assessing Officer was in line with the decision of the Tribunal in Mysore Exports Ltd. (supra). It is relevant to note that on the date when the Commissioner of Income Tax exercised his powers under Section 263

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of the Act on 31.03.1995, the decision of the Tribunal in Mysore Exports Ltd. (supra) was not available before him as it was rendered on 19.05.1995.

16. Therefore, we are of the view that the Assessing Officer cannot abdicate his responsibility of examining the claim for deduction before allowing it. Absence of examination of the claim made by the assessee while passing an assessment order and allowing the claim made, would render the order of the Assessing Officer erroneous and coupled with the fact that in this case it is admitting prejudicial to the interest of the revenue, exercise of the revisional jurisdiction under Section 263 of the Act by the Commissioner of Income Tax proper and valid.

35. In our view, this decision of the Coordinate bench supports the reasoning given by us in rejecting the submissions of the Appellant-Assessee.

36. We may also point out that in the written submissions, the Appellant-Assessee has referred to various decisions but at the time of hearing, some of them were not relied upon and, therefore, we are not considering the same. The decisions which were relied upon have been discussed above.

37. It is also important to note that during the course of the original assessment proceedings, deduction under Section 32AB was also not examined. In the show cause notice under Section 263 of the Act, the CIT proposed to initiate the revision proceedings on calculation of deduction allowable under Section 32AB with regard to interest on loan amounting to Rs. 3,96,86,398/- relating to prior period, in addition to computation of book profit under Section 115J on this very item. The proposal of computation of book profit was also not examined in the original assessment proceedings. In response to the show cause notice, the Appellant made submissions with respect to the interest written off and depreciation written back in computation of deduction

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under Section 32AB as well as book profit under Section 115J of the Act on merits. The order under Section 263 of the Act records in paragraph 4 that deletion of prior period interest debited in the books of account is not in accordance with the provisions of Section 32AB and, therefore, since the Officer has not taken this aspect into consideration, the assessment order is erroneous and prejudicial to the interest of the revenue. Similar observation was made in paragraph 5 with respect to computation of book profit under Section 115J of the Act.

38. In the grounds of appeal before the Tribunal, the Appellant did not raise any ground with respect to calculation of deduction under Section 32AB but only raised the ground with respect to computation of book profit under Section 115J. Therefore, it is an admitted position that the assessee accepted the revisional proceedings being within jurisdiction so far as Section 32AB is concerned. If that be so, then, we fail to understand that on the same grounds, how can the Appellant-Assessee challenge the assumption of jurisdiction of computation of book profit. Placing reliance on the order giving effect to the Section 263 order to justify the acceptance on the issue of Section 32AB would not be correct since the order giving effect to the Section 263 proceedings is dated 31 January 1995, whereas the grounds of appeal filed before the Tribunal are dated 2 May 1994. Secondly, in the order giving effect to the Section 263 proceedings, eligible profit computed under Section 32AB has been revised but since the said profit was more than the amount utilised in the plant and machinery, the deduction was restricted to the amount utilised for acquiring the plant and machinery. The calculation of eligible profit differed in the original assessment order and order giving effect to the Section 263 order. Therefore, to justify acceptance of revisional jurisdiction when it comes to Section 32AB deduction, but at the same time on similar grounds to challenge

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the jurisdiction when it comes to computation of book profit under Section 115J, in our view, would be self-contradictory insofar as assumption of jurisdiction is concerned. Even before us, the Appellant has not raised any grievance on assumption of jurisdiction under Section 32AB by the CIT. If that be so, then, on very same ground the Appellant-Assessee cannot raise any grievance with respect to assumption of jurisdiction *qua* computation of book profit is concerned.

39. The learned counsel for the Appellant-Assessee further submitted that in the revisional order, CIT has not stated as to under which clause of Explanation to Section 115J, the addition could have been made and therefore, the revisional order is bad in law. This submission of the Appellant supports the case of the revenue's contention that CIT has directed the assessing officer to decide afresh in accordance with law. As to under which clause of the Explanation the adjustment could be made, if at all, was left to the assessing officer since CIT had directed the officer to examine the issue afresh in accordance with law. This submission also mitigates against the Appellant-Assessee's argument on CIT having given definite finding which submission as observed by us above is incorrect.

40. In our view, for the reasons stated above, there is no infirmity in the exercise of revisional jurisdiction by the CIT and upheld by the Tribunal. We make it clear that we have not expressed any opinion on merits of the claim since same has been accepted by the Appellant-Assessee by not challenging the order giving effect to revisional order (atleast which assessee ought to have challenged after Tribunal's order) and same for reasons stated above could not have been agitated before us. We have only approved the Tribunal's order upholding the exercise

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of revisional jurisdiction by the CIT and not adverted to the merits of the claim in this appeal.

41. In view of above and for the reasons stated above, the appeal filed by the Appellant-Assessee is dismissed and the question of law is answered against the Appellant-Assessee and in favour of the Respondent-revenue.

42. Appeal is dismissed.

(Jitendra S. Jain, J.) **(M. S. Sonak, J.)**

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