

*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “B” KOLKATA*

Before **Shri P.M.Jagtap, Vice-President** and
Shri S.S.Godara, Judicial Member

ITA No.793/Kol/2019 Assessment Year:2014-15

M/s Maithan Steel & Power Ltd., 6 th Floor, Ideal Centre, 9, A.J.C. Bose Road, Kolkata-17 [PAN No.AADCM 1188 M]	बनाम / V/s.	Principal Commissioner of Income Tax, Kolkata-1, 7 th Floor, Aayakar Bhavan, P-7, Chowringhee Square, Kolkata-69
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

अपीलार्थी की ओर से/By Appellant	Shri S.K. Tulsiyan, Advocate, & Mrs Puja Somai, ACA
प्रत्यर्थी की ओर से/By Respondent	Shri Radhey Shyam, CIT-DR
सुनवाई की तारीख/Date of Hearing	10-12-2019
घोषणा की तारीख/Date of Pronouncement	26-02-2020

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

This assessee's appeal for assessment year 2014-15 arises against the Principal Commissioner of Income Tax-1, Kolkata's order dated 20.03.2019, passed in case Memo. No.Pr. CIT-1/Kol/Revision u/s.263/2018-19/12933, involving proceedings u/s 263 of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file comprising of assessee's audit report, balance-sheet, statement of profit and loss account, cash flow statement, notes from financial statements of the relevant previous year, assessment / re-assessment

orders dated 02.11.2016 and 17.11.2015 for AY 2014-15 and 2010-11, computation of income for AYs 2011-12 to 2014-15, settlement commission orders dated 15.09.2015 u/s 245D(4) for AYs 2011-12 to 2013-14 and u/s 245D(6B) for the said former three AYs dated 25.03.2016, Central Excise Settlement Commission order u/s 32E of the Central Excise Act, 1944 for Units I & II alongwith copies of challans for payment of excise duty as well as compilation of various judicial precedents running into 125 and 84 page(s) coupled with taxpayer's additional paper book containing DCIT, Central Circle-3(1), order dated 27.11.2015 for AYs 2011-12 and 2012-13 followed by reconciliation of book profits stand perused.

2. We advert to the basic relevant facts. The assessee-company manufactures sponge iron and TMT bars / rods. It filed its return on 26.09.2014 stating loss of ₹3,89,72,058/-. The Assessing Officer completed his regular assessment on 02.11.2016. He discussed relevant issue of "exceptional items" involving a sum of ₹85,15,999/-. We notice from para-3(ii) page-2 of the assessment order dated 02.11.2016 that the assessee *inter alia* submitted break-up of said sum. It explained to have filed petition(s) before settlement commission disclosing the corresponding additional income(s) assessable in assessment years 2010-11 to 2013-14. The same stood disposed of on the one hand and the DCIT Circle-3(1) Kolkata framed re-assessment in its case for the said first assessment year 2010-11 on 17.11.2015 on the other. The assessee placed on record the corresponding order(s) to this effect as well. Its case before the Assessing Officer was that its additional income offered before the settlement commission had not been accounted earlier and therefore, it chose to include the same in its computation in the relevant financial year 2013-14 only. And that in view of the foregoing circumstances, the very income; accounted in the impugned assessment year, stood assessed in earlier assessment year(s) as per the settlement commission proceedings attaining finality *qua* the very figures included in the computation of income of the relevant current assessment year and therefore, the figure(s) in question deserved to be excluded so as to avoid double assessment. The assessee appears to have tendered a detailed break-up of the "**exceptional items**" of

₹85,15,111/- in which income offered for assessment in earlier assessment years to the tune of ₹12,56,69,703/- had been duly included. There is no dispute that the Assessing Officer's assessment forming subject-matter of the impugned revision proceedings examined the assessee's forgoing submission as well its sec. 43B excise duty claim of ₹321,64,869/- in view of the corresponding documents produced during the course of scrutiny. There is further no issue that he accepted assessee's returned loss of ₹389,72,062/- and proceeded to compute its sec. 115JB book profits coming to final figure of ₹103,77,217/-.

3. Case file suggests that the PCIT thereafter sought to assume sec. 263 revision jurisdiction by terming it as an erroneous one causing prejudice to interest of the Revenue on the following twin issues:-

"i) The assessee company has deducted prior period income of Rs.11,04,19,703/- (as income already offered before Settlement Commission) to arrive at the book profit which is not admissible as per provisions of section 115JB. Therefore, the above mentioned irregularity has resulted in underassessment of income of Rs.11,04,19,703/- having potential tax effect of Rs.2,78,89,308/-

ii) It is observed that the assessee deducted an amount of Rs.6,28,68,798/- from income as "Payment of excise Duty in respect of earlier years now allowable" as per details given below:

Total excise duty paid in respect of settlement period	Rs.10,52,58,034/-
Interest paid on excised duty	<u>Rs. 46,10,764/-</u>
	Rs.10,98,68,798/-

Less: already claimed u/s. 43B in earlier years	<u>Rs.4,70,00,000/-</u>
	Rs.6,28,68,798/-

However, from the order of the Settlement Commission dated 15.09.2015, it was seen that total non-remittance of Excise duty for the settlement period (AY 2011-12 to 2013-14) was Rs.7,70,50,738/- out of which Rs.4,70,00,000/- had already been claimed. Thus, only Rs.3,00,50,738/- was available for deduction in AY 2014-15 on actual payment basis. Deduction of Excise duty of Rs.6,28,68,798/- on payment basis instead of available unpaid excise duty of Rs.3,00,50,738/- has resulted in underassessment of income of Rs.3,28,18,060/- having potential undercharge of tax of Rs.1,0647,819/- (under normal provision)."

4. The PCIT therefore issued his sec. 263 notice dated 04.10.2018. The assessee filed its detailed reply dated 20.11.18 contesting the PCIT's foregoing twin reasoning. Its explanation *qua* the former issue of prior period income of ₹11,04,19,703/- on facts read as under:-

“2. The assessee had made an application before the Hon'ble Settlement Commission, Kolkata on 18-03-2014 for the assessment years 2010-11 to 2013-14. However, application for assessment year 2010-11 was not allowed to be proceeded with as no proceedings were pending on the date of the application and therefore, (lie same was not allowed to be proceeded with u/s 245D(1) of the Act. Accordingly, the case was reopened u/s. 148 of the Act.

3. In the settlement application, the assessee offered an income of Rs.12,56,69,703/- (Rs.10,51,59,874 + Rs.2,05,89,830) which were not so included in the Income Tax Returns filed for the respective years. The income offered by the assessee was as follows:

A.Y	Income disclosed being gross profit from undisclosed sales	Income disclosed being peak negative capital	Excise duty collected but not deposited to the credit of the Central Government
2010-11	31,01,988	1,80,76,698	47,26,402
2011-12	6,21,37,228	24,33,132	4,33,32,789
2012-13	3,99,20,658	- -	3,11,05,678
2013-14	- -	- -	- -
Total	10,51,59,874/-	2,05,89,830/-	7,91,64,869

Now the grounds for reopening the case are discussed herein below:

Ground 1- Prior period income of Rs.11,04,19,703/- which is inadmissible u/s. 115JB of the Act.

In this regard, it is submitted that the assessee offered an additional income of Rs.12,56,69,703/- in the settlement application filed before the Hon'ble Settlement Commission, Kolkata on 18-03-2014 for the assessment years 2010-11 to 2013-14 which were not so included in the original Income Tax Returns filed for the respective years. The assessee duly paid the taxes on the said income offered before the Hon'ble Settlement Commission and also on the additions made by the Hon'ble Settlement Commission in the order passed u/s.245D(4) of the Act dated 21-09-2015. The same is evident from the copy of the settlement order passed u/s.245D(4) of the Act enclosed at page 49-70.

Further note that this additional income of Rs.12,56,69,703/- offered in the settlement application filed before the Hon'ble Settlement Commission, Kolkata was incorporated in the regular books of account of the current year and was credited to the statement of the profit and loss a/c under the head “**Exceptional Income**”. Further, an amount of Rs.1,52,50,000/- was debited to Profit and Loss A/c, being expenses incurred in AY 2010-11 to AY 2013-14 but not claimed in the Settlement Application.

In this regard, further note that the said income of Rs.12,56,69,703/- and expense Rs.1,52,50,000/- were not incorporated in the accounts of the respective years since the assessee had filed the settlement application offering its undisclosed income on 21-03-2014 i.e. after the close of those financial years. In other words, the accounts for the period AY 2010-11 to AY 2013-14 were audited and these audited accounts were already submitted before the Registrar of Companies and therefore no amendments to the said accounts were possible. Accordingly, the income of

Rs.12,56,69,703/- and expenses of Rs.1,52,50,000/- was incorporated in the audited books of the current year.

Here, please refer to the Statement of the Profit and Los A/c enclosed at page 7 and Note 29 of the audited accounts, refer page 19. Copy of the accounts is enclosed at page 1-22. On perusal of Note 29, it can be seen that an amount of Rs.(85,15,11/-) was shown as net expenses (Expenses / Losses Rs.13,41,84,814/- less Income Rs.112,56,69,703/-) under the head “**Exceptional Income**” as per item-wise details here under:-

Particulars	Income	Expenses /losses
i) Interest subsidy for earlier years short sanctioned by		1,59,64,517/-
ii) Additional income offered before Hon'ble Hon'ble Supreme Court for AY 2010-1 to AY 2013-14	12,56,69,703 /-	
iii) Expenses incurred but not claimed as deduction offered before Settlement Commissions		1,52,50,000/-
iv) Provision for income tax & interest etc. in respect of additional income.		6,92,66,368/-
v) VAT paid in part in respect of Additional sales resulting in additional income		30,00,000/-
vi) Total excise duty including interest thereon as per order of Hon'ble SC of Excise (net of excise duty collected Rs.7,91,64,869/- as stated hereinabove)		3,07,03,929/-
	12,56,69,703 /-	13,41,84,814/-

As such, the sum of Rs.12,56,69,703/- and Rs.1,52,50,000/- were routed through the profit and loss a/c under the head “**Exceptional Income**”. However, in the computation of income for the subject assessment year, the net amount of Rs.11,04,19,703/- was reduced from the net profits and also from the book profits as the same had already been included in the computation of total income under both normal and MAT provisions of the respective years, being AY 2010-11 to AY 2013-14 and accordingly the same has already been duly assessed to tax in those years.

To substantiate that tax was paid on such income of Rs.12,56,69,703/- in the respective years, please find enclosed the computation of income forming part of the assessment order for AY 2010-11, refer page 38, wherein the sum of rs.31,01,988/-, being gross profit on undisclosed sales and Rs.1,80,76,698/-, being peak negative capital was added to the enc under both normal provisions and MAT provisions. Further, please note that in this year, AY 2010-11, tax was paid under MAT provisions since the tax liability was more under MAT provisions than normal provisions. As such, there is no iota of doubt that the sum of Rs.31,01,988/- and Rs.1,80,76,698/- is tax paid income under MAT provisions.

For AY 2011-12, 2012-13 and 2013-14 please find enclosed at page 44, 45 and 46 respectively the computation of income for these years wherein the additional income

disclosed by the assessee in the settlement application filed u/s.245D(1) of the Act and the additions made by the Hon'ble Settlement Commission in the order passed u/s. 245D(4) of the Act is added to the net profits in computation of taxable income under both normal provisions and MAT provisions under section 115JB of the Act. The said computations prepared by the assessee are in line with the computation of taxable income determined in the settlement order passed u/s 245(6B) of the Act. The said order is enclose at **page 71-86**. Here, please note that since tax liability was more under normal provisions than MAT provisions, the assessee paid tax on such additional income under normal provisions as per the requirement of law. Entire tax computed by the Hon'ble Settlement Commission was duly paid and the same is evident from the settlement order passed u/s 246D(6B) of the Act and the computation of income prepared by the assessee.

The assessee has duly substantiated with the help of glaring evidences that the net income of Rs.11,04,19,703/- is a tax paid income.

In continuation to the above, the assessee further submits that since the net income of Rs.11,04,19,703/- is a tax paid income relating to earlier years and was incorporated in the books in the current year, the same forms part of the capital in this year and therefore the sum of Rs.11,04,19,703/- becomes a capital receipt. The said capital receipt was routed through the Profit and Loss Account in accordance with Part 1 and Part II of Schedule VI to the Companies Act, 2013. However, in the present case, the said receipt is not in the nature of income at all. The sum of Rs.11,04,19,703/- was incorporated in the books for the current year only to regularize the income of earlier years on which tax has already been paid. If the same is not allowed to be reduced from the “**Book Profits**” then the real working results of the current year would be distorted. In this regard, your kind attention is now invited to the show cause notice issued u/s.263 of the Act wherein your goodself has questioned the computation of income under MAT provisions and opined that deduction of prior period income is not admissible by virtue of the Explanation enshrined in section 115JB of the Act. However, the notice is silent on the computation of income under normal provisions. As per the computation of income prepared by the assessee for the subject assessment year under both normal provisions and MAT provisions, the impugned sum of Rs.11,04,19,703/- was reduced from the net profits. But the computation of income under normal provisions is not questioned and as such is not a ground for invoking the provisions u/s. 263 of the Act. This alternately implies that your goodslef is satisfied that the assessee has rightly reduced the sum of Rs.11,04,19,703/- form net profits under normal provisions since the same is not in the nature of income and is in the nature of capital receipt not liable to tax. As such, this is a contradictory stand taken by your goodself.”

4. The assessee next highlighted the Assessing Officer's observation in assessment order that he had duly taken up exceptional item of ₹85,15,111/- (supra) inclusive of its income offered for taxation in earlier assessment year to the tune of ₹12,56,69,703/-. It also placed on record the Settlement Commission order(s) alongwith earlier assessment year's final computation of income to this effect.

5. Coming to the latter issue of excise duty of ₹628,68,798/- on payment basis instead of the alleged eligible sum of ₹300,50,738/- the assessee's detailed reply read as follows:-

“Ground 2 – Deduction of Excise Duty of Rs.6,28,68,798/- on payment basis instead of available excise duty of Rs.3,00,50,738/-.

Your goodself has observed that the assessee has deducted an amount of Rs.6,28,68,798/- from income as payment of excise duty in respect of earlier years now allowable. However, from the order of the Settlement Commission dated 15-09-2015 it was seen that total remittance of excise duty for the settlement period (AY 2011-12 to 2013-14) was Rs.7,70,50,738/- out of which the sum of Rs.4,70,00,000/- had already been paid. Thus only Rs.3,00,50,738/- was available for deduction in the current year. Deduction of excise duty of Rs.6,28,68,789/- on payment basis instead of available unpaid excise duty of Rs.3,28,18,060/- has resulted in underassessment of income having potential undercharge of interest.

In this regard, please note that the assessee had made an application before the Hon'ble Customs and Central Excise Settlement Commission, Kolkata on 19-11-2013 for the period December 2009 to July 2011 for Unit-2 admitting liability on account of non-payment of Central Excise duties of Rs.8,18,22,881/- and interest liability of Rs.71,64,290/-, refer **page 104**. For Unit 1 the application was filed on 02-07-2014 for the period April 2010 to July 2011 admitting the liability on account of non-payment of Central Excise duties of Rs.1,62,70,862/- and interest of Rs.46,10,764/-, refer **page 90**. As such, the company paid an amount of Rs.10,98,68,798/- towards settlement applications filed before Hon'ble Customs and Central Excise Settlement Commission in respect of two units. The same is evident from the copy of the orders passed by the Hon'ble Customs and Central Excise Settlement Commissions u/s.32E of the Central Excise Act, 1944 for **Unit I** and **Unit II** enclosed at page 87-99 and 100-108 respectively. Out of Rs.10,98,68,798/-, the sum of Rs.4,70,00,000/- had already been claimed by the company in earlier years and therefore the balance amount of Rs.6,28,68,798/- has been claimed in the current year. The date-wise payment of Rs.6,28,68,798/- is tabulated below:-

Copies of the challans is enclose at page 109-125.

Out of the Rs.10,98,68,798/-, the claim of Rs.7,91,64,869/- was already included in the settlement application filed before Hon'ble Income Tax Settlement Commission. The assessee had already claimed a sum of Rs.4,70,00,000/- paid in earlier years covered in the settlement period and the balance sum of Rs.6,28,68,798/- was claimed in the current year, being payments made in the relevant assessment year. Out of Rs.6,28,68,798/-, the sum of Rs.3,21,64,869/- was claimed u/s. 43B, being payment of excise duty of earlier years covered in the settlement period but paid in the current year. The said payment was not claimed in the earlier years for reasons already discussed in Ground 1. This issue was duly considered and examined by the learned AO and on being satisfied, the same was allowed as deduction u/s 43B. To support this claim of the assessee, the relevant extract of the assessment order for the current year is produced below:

“The details of claim of deduction u/s.43B in respect of excise duty amounting to Rs.3,21,64,849/- was also examined with documents produced in the course of hearing.”

Further with regard to the balance amount of Rs.3,07,03,929/- (**Rs.6,28,68,798 minus 3,21,64,869**), it is submitted that the same was determined as short payment of excise duty in the current year and therefore the company filed two settlement applications for its two Units

separately before Hon'ble Customs and Central Excise Settlement Commissions admitting liability on account of non-payment of excise duty and interest thereon. However, out of Rs.6,28,68,792/-, the sum of Rs.5,82,58,034/- was paid in the current year and only the sum of Rs.46,10,764/- was paid against interest liability on 01-07-2014 i.e. before the date of filing the return and thus was claimed u/s. 43B of the Act. As such, since the entire liability of Rs.6,28,68,792/- was crystallized during the current year, therefore the assessee has rightly claimed the deduction of excise duty inclusive of interest paid during the year.

Here, please note that the assessee has duly submitted before the learned AO the deduction claimed Rs.3,07,03,929/-, being excise duty payment made during the year and no discrepancy was found in this regard. The same is evident from the copy of the submissions filed before the learned AO. Hence, this case is clearly not a case of lack of enquiry on the part of the AO and as already discussed in the preceding paras, **“it is only in cases of lack of inquiry that proceedings u/s 263 of the Act would be open.”** Here reliance is placed on the judgment of the Delhi High Court in the case of Commissioner of Income tax vs. Ashish Rajpal (2010) 320 ITR 0674 (Del) wherein it was held that,

“The fact that a query was raised during the course of scrutiny which was satisfactorily answered by the assessee but did not get reflected in the assessment order, would not by itself lead to a conclusion that there was no enquiry with respect to transactions carried out by the assessee giving the CIT jurisdiction to invoke s. 263, more so when the Tribunal had found that there had been an enquiry which had not been conducted with ‘**undue haste**’.”

Further, please note that that your goodsself has mentioned in the notice that total non-remittance of excise duty for the settlement period was Rs.7,70,50,738/-. In this regard, please note that excise duty collected but not paid was Rs.7,91,64,869/- as per the settlement application filed by the assessee.

However, application for assessment year 2010-11 was not allowed to be proceeded with u/s. 245D(1) of the Act as non proceedings were pending on the date of the application and therefore Rs.47,26,402/- was not included in the settlement order. Further, please note that the sum of Rs.7,70,50,738/- was the enhanced figure commuted by the Settlement Commission exclusive of AY 2010-11.

The break up of Rs.7,91,64,869/- and Rs.7,70,50,738/- is as under:-

A.Y	Excise duty collected but not deposit to the credit of the Central Government as per the original SOF	Enhanced excise duty determination by the hon'ble settlement commission
2010-11	47,26,402	Not admitted, assessed u/s. sec. 148 of the Act.
2011-12	4,33,32,789	4,53,20,664
2012-13	3,11,05,678	3,17,30,074
2013-14	--	
Total	7,91,64,869/-	7,70,50,738/-

As such, in view of the above facts, it cannot be said that the assessment order passed u/s. 143(3) of the Act is erroneous. As such, since one of the basic conditions mentioned in section 263 of the Act is not met, initiation of revision proceedings u/s 263 is not as per law. In Commissioner of Income-tax vs. Gabriel India Ltd (1993) 208 ITR 0108 (Bom) it was held that:

‘The power of suo motu revision under sub-[section and can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise the power of revision under this sub-section, viz., (i) the order should be erroneous; and (ii) by virtue of the order being erroneous prejudice must have been caused to the interests of the Revenue.’

6. The PCIT's revision directions under challenge decline the assessee's foregoing detailed averments as follows:-

5. I have considered the facts of the case and submission of the assessee. Two issues were raised in the show-cause notice, which are considered as under:

(i) Prior period income of Rs.11,04,19,703/- which is not admissible u/s. 115JB of the Income Tax Act, 1961. It is seen that the assessee had deducted net credit amount of Rs.4,11,53,335/- i.e. Rs.11,04,19,703/-less Rs.6,92,66,368/- to arrive at book profit. The figure of Rs.11,04,19,703/- has been arrived at by the assessee by deducting an expenditure of Rs.1,52,50,000/- from the total additional income of Rs.12,56,69,703/- offered by the assessee for AY 2010-11, AY 2011-12 & AY 2012-13 before the Hon'ble Settlement Commission. Hence, at the first instant, the prior period income should be taken as per declared Rs.12,56,69,703/-. So, there is no reason to give the benefit of the "**expenditure incurred but was not claimed as deduction offered before the Settlement Commission**" of Rs.1,52,50,000/- at this late juncture. Secondly the sum of Rs.85,15,111/- is shown by assessee as a debited exceptional item in the P&L A/c. which represented net of debit item of short item sanctioned interest subsidy of Rs.159.65 lakhs written off and credit item of Rs.75.50 lakhs additional income which is again net of expenses, taxes and duties and interest thereon as evident from the applications before the Hon'ble Settlement Commission. Furthermore, the assessee had also declared Rs.7,91,64,869/- on account of Excise duty collected but not deposited. The determination on account of excise duty default by the Hon'ble Settlement Commission of excise has to be also seen as same not provided by assessee. Hence the claim of '**exceptional item**' by the assessee therefore requires to be examined. It is also to be kept in mind that the Hon'ble Settlement Commission (ITSC) had settled assessee's case for AY 2010-11 to AY 2012-13 only so the records and assessment framed u/s.148 for AY 2013-14 will have to be looked into also. In other words, the AO is directed to recompute the book profit after ascertaining as per the aforesaid observations.

(ii) Deduction of excise duty of Rs. 6,28,68,798/- on payment basis instead of available excise duty of Rs. 3,00,50,738/-.

As per assessee, the excise duty availability for the Settlement period is Rs.10,98,68,798/- out of which Rs.4,70,00,000/- stood claimed u/s. 43B in earlier years. Of the remaining Rs.6,28,68,798/-, it is assessee's case that an amount of Rs.3,21,64,869/- pertaining to earlier years covered in the settlement period was claimed and paid during the current year. The balance was stated to short payment of excise duty in the current year. Assessee goes on to say that out of Rs.6,28,68,798/-, a sum of Rs.5,82,58,034/- was paid in the current year and Rs.46,10,764/- was paid before filing its income tax return. In other words, assessee contends that it has rightly claimed the deduction of excise duty during the year. It was also contended that the AO had examined the claim of deduction of Rs.3,07,03,929/- paid during the year.

However, the fact of the matter is that the Hon'ble Settlement Commission (custom and excise) had determined unpaid excise duty of Rs.7,91,64,869/- for A.Ys. 2010-11,2011-12 and 2012-13. So after allowing Rs.4,70,00,000/- already claimed, the

balance works out to Rs.3,00,50,738/-, which becomes allowable only on actual payment basis. Thus there is a glaring need to reconcile the excise duty liabilities as offered by assessee before the Settlement Commission (C&E) and what was the enhancement if any. Furthermore assessee states that the application for AY 2010-11 relating to the unpaid duty of Rs.47,26,402/- was not considered by the Settlement Commission (C&E) as no proceeding was pending on that date. Copy of the order of Settlement Commission (C&E). was not provided by assessee as already stated. In fact both issues raised in this show cause notice will have a bearing on each other.

The assessee has questioned the present proceedings. It need not be emphasised that the assessing officer should have ascertained the facts before mechanically accepting the contentions of the assessee for the role of AO is not only as an adjudicator but also an investigator. Last but not the least, the function of a tax authority is to levy and collect tax in accordance with law on facts of each case. Hence an order which causes lawful loss of tax revenue is not only erroneous but also prejudicial to the interest of revenue, as would be evident from the discussions on pre- pages.

6. Hon'ble Delhi High Court in the case of **GEE VEE Enterprise vs. Addl.CIT reported ITR 99 ITR 375. 386 (Del)** has held that the CIT may consider the order of the Assessing Officer to be erroneous not only if it contain some apparent error of reasoning or of law or of fact on the face of it but also because the Assessing Officer has failed to make enquiries which are called for in the circumstances of the case and it is an order which simply accepted what the assessee has stated in his return of income on the said issue. It is not necessary for the CIT to make further enquiries before cancelling the assessment order. The Commissioner can regard the order erroneous on the ground that the Assessing Officer should have made further enquiries.

7. Hon'ble Karnataka High Court in the case of **Thalibai F. Jain vs. ITO 101 ITR 1, 6 (Karn)** has held that where no enquiries made by the Assessing Officer on the relevant issue, assessment must be held to be prejudicial to the interests of the revenue and what is prejudicial to the interest of the revenue must be held to be erroneous the converse may not always be true.

8. Hon 'ble Supreme Court in the case of **Malabar Industrial Co. Pvt. Ltd vs. CIT reported in (2000) 243 ITR 83, 87 -88 (SC)** affirming the Hon'ble Kerala High Court decision (198 ITR 611) has held that the phrase "**Prejudicial to the Interests of the Revenue**" is of wide import and is not confined to only loss of taxes. If the A.O. has accepted the claim of the assessee without any enquiries then such assessment order passed by the A.O. was held to be erroneous.

9. In this regard it is mentioned that mere non enquiry would also render a particular order passed by lower authority as erroneous and prejudicial to the interests of Revenue. This position has been clearly confirmed by Hon'ble Supreme Court in the case of **Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84 & Smt. Tara Devi Aggarwal v. CIT [1973] 88 JTR 323 (SC)**. The reasoning for this proposition has been explained by Hon'ble Delhi High Court in the case of **Gee Vee Enterprise v. Addl. CIT [1975] 99 ITR 375** in the following para:-

"It is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income-tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return. The reason is obvious. The position and function of the Income-tax Officer is very different from that of civil court. The statements made in the pleading proved by the minimum amount of evidence may be adopted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which come before it. The Income-tax

Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "**erroneous**" in section 263 includes the failure to make such an enquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct."

10. Further to this it is noticed that there is no appeal right available to the Revenue from the order of assessment passed by Assessing Officer and i.e. why revisionary powers have been given to the Commissioner and such power were held to be of wide amplitude by the Hon'ble Supreme Court in the case of **CIT v. Shree MaDjunathesware Packing Products 85 Camphor Works [1998] 231 ITR 53/96 Taxman 1**. Therefore, normally when Assessing Officer has not made any enquiry on a particular issue, then such order in view of the above detailed discussion has to be construed as erroneous and prejudicial to the interest of Revenue and therefore, the impugned assessment order is erroneous and prejudicial to the interest of Revenue as Assessing Officer has failed to make any enquiry.

11. Having regard to the facts and circumstances of the case and in the light of the aforesaid decisions of Hon'ble Supreme Court and Hon'ble High Court, and in accordance with the amendment made in Section-263 of the Act with effect from 01.06.2015, I hold that the impugned assessment order dated 23.12.2016 passed by the A.O. is erroneous in so far as it is prejudicial to the interests of the revenue. I further hold, after giving the assessee an opportunity of being heard, that the impugned assessment order dated 23.12.2016 is liable to set-aside. Therefore, I set aside the said assessment order directing the A.O. to frame the assessment afresh after considering the aforesaid observations, Hon'ble Supreme Court and Hon'ble High Court decisions and as per law.

12. In the result, the assessment order u/s 143(3) dated 23.12.2016 for A.Y. 2014-15 is set-aside to the file of the Assessing Officer with a direction to pass a fresh assessment order after considering the aforesaid observations, as per law and after giving an opportunity of being heard to the assessee."

It is in this backdrop of fact that the assessee's instant appeal seeks to reverse the PCIT's assumption of revision jurisdiction vested u/s 263 of the Act.

7. We have given our thoughtful consideration to rival contentions against and in support of the PCIT's impugned revision action direction. The PCIT admittedly quotes a catena of case law including their lordships' landmark decision in *Malabar Industrial Co. Pvt. Ltd.* (supra) as well as sec. 263 Explanation-2 inserted vide Finance Act, 2015 w.e.f. 01.06.2015 to involve his statutory revision jurisdictions. There is no dispute between the parties that about the settled legal proposition that before the learned CIT or the PCIT seeks to exercise his revision jurisdiction vested u/s. 263 of the Act, the assessment concerned ought to be both erroneous as well as

prejudicial to the interest of the Revenue. ; simultaneously. And that each and every case causing loss to the Revenue need not come under the purview of revision jurisdiction in case the assessing authority concerned adopts one of the two possible views. Both the learned representatives are *ad idem* during the course of hearing that whether or not the various judicial precedents quoted in the PCIT's revision direction apply in each and every case, has to be examined as per the relevant factual backdrop involved in a *lis*. We therefore deem it appropriate to revert back to the detailed facts involved herein once again.

8. Coming to the former issue of the alleged under assessment of the prior period income's assessment of ₹11,04,19,703/- for the purpose of sec.115JB computation as per the PCIT's above extracted directions, case file suggests that the clinching factual position herein is that the assessee had declared additional income of ₹12,56,69,73/- in its disclosure petition(s) before the Settlement Commission on 18.03.2014 for assessment year(s) 2010-11 to 2013-14. It is an admitted fact that the said additional income had not been included in the corresponding computation(s) finalized earlier. The said declaration of additional income followed payment of tax as per sec. 245D(4) and 245D(6B) order(s) in pages 49 to 70 and 71 to 86; respectively. There is further no dispute that the corresponding additional income of ₹12,56,69,703/- had also been incorporated in the books of account of the relevant previous year 2013-14 as well as in the profit and loss account as an **"exceptional income"** alongwith the corresponding expenditure of ₹153,50,000/- which had not been claimed in the settlement petition.

9. Learned counsel at this stage submitted that since the assessee's accounts for the said earlier assessment year(s) stood submitted before the Registrar of Company's, "ROC" no rectification was permissible therein and therefore, it included both the above stated additional income as well as expenditure in the relevant previous year's books only. Our attention is invited to note-29 in assessee's audit report explaining all the foregoing facts of settlement petition followed by declaration of the relevant asset therein stated to have been accounted for in the impugned assessment year only.

10. Mr. Tulsian's next plea is that the assessee's additional income stood duly assessed in assessment year(s) 2011-11 to 2013-14 as per the corresponding computation at page-38 revealing profits on undisclosed sales with peak negative capital of ₹180,76,698/- (***included in normal as well as MAT computation***) respectively. It is further highlighted that the assessee's normal computation exceeded the latter MAT computation, both the former sums stood assessed. The factual position is stated to be no different for the remaining three assessment year's 2011-12 to 2013-14 as well as per the assessee's computation(s) in pages 44 to 46 sufficiently indicating that its income in normal computation included MAT as per the Settlement Commission order(s). We are of the opinion in these facts and circumstances that once the assessee had declared additional income of ₹12.56 crores in earlier assessment year(s) 2010-11 to 2013-14 in due compliance of the Settlement Commission and got the same assessed under normal scheme than MAT assessment, there is hardly any scope left of under-assessment on impugned prior period income going by the PCIT's observations. We wish to re-emphasise here that PCIT has raised the issue of prior period income of ₹11,04,19,703/- for sec. 115JB computation only relating to the relevant previous year. We thus are of the opinion that once the said prior period income stood assessed under normal provisions in the corresponding earlier assessment year(s) 2010-11 to 2013-14, The Assessing Officer's alleged inaction in not disallowing the very sum(s) as prior period income for the purposes of MAT computation could neither be termed as erroneous nor causing prejudiced to interest of the Revenue going by the foregoing settled legal proposition (*supra*).

11. Next comes yet another significant aspect for this former issue. The assessee had admittedly incorporated its additional income of ₹12,56,69,703/- in its books of account of the relevant previous year in the nature of its capital. The same therefore acquired the character of a capital receipt routed in profit and loss account as per part-I and part-II of the schedule-VI of the Company's Act. That being the case, we hold that there was no loss or prejudice caused to the Revenue even otherwise also since a capital receipt not taxable under the normal provision could also not be added u/s 115JB MAT computation as per this tribunal's co-ordinate Bench's decision *Tata*

Metaliks Ltd. vs. Income Tax Officer, Ward-3(2), Kolkata ITA No.439 & 478/Kol/2016 decided on 27.04.2018, *Dy. CIT Vs. Binami Industries Ltd.* (2016) 178 TTJ 658 (Kol.trib), *Indo Rama Synthetics (I) Ltd. vs. Commissioner of Income Tax* (2011) 330 ITR 336/9 taxmann.com 25, *Apollo Tyres Ltd. vs. Commissioner of Income Tax* (2002) 255 ITR 273/122 Taxmann 562 (SC) and *Rain Commodities Ltd. vs. Dy. Commissioner of Income Tax* (2010) 40 SOT 265 (Hyd.) (SB) and *PCIT vs. Ankit Metal & Power Ltd.* ITA No. 155 of 2018 dated 09.07.2019 (Kol) etc.,

12. Learned CIT-DR submitted that the assessee ought not to have any grievance at this premature stage since the PCIT has merely directed the Assessing Officer to re-compute its book profits as per the foregoing detailed observations. This technical plea carries no substance. We make it clear that the assessee had very well placed all of its additional income declaration details before the Settlement Commission followed by the corresponding order(s) finality culminating assessment thereof in assessment years) 2010-11 to 2013-14 in normal scheme. We thus conclude that even if the PCIT's directions are taken as for the purpose of mere re-computation, the same go against the settled legal proposition that the sec. 263 revision jurisdiction is not attracted in absence of the corresponding assessment being both erroneous as well as causing prejudice to interest of the Revenue. This tribunal's yet another co-ordinate bench's decision in *Narayan Tatu Rane vs. Income Tax Officer* (2016) 70 Taxmann 227 (Mumbai) also holds that insertion of Explanation-2 in sec. 263 vide the Finance Act, 2015 w.e.f 01.06.2015 does not *ifso facto* mean that every regular assessment could be revised even in those cases wherein the action of the Assessing Officer satisfies normal "**prudence**" test in scrutiny. We accordingly hold that the PCIT's revision directions *qua* this former issue of prior period income's sec. 115JB MAT computation is not substantive. The same is accordingly reversed.

13. We proceed further a notice that the factual position is no different qua the latter issue of deduction of excise duty amounting to ₹628,68,798/- on payment basis instead of the available excise duty of ₹30,05,078/- as well. It is not in dispute that the assessee had actually paid the impugned excise duty of ₹628,68,798/- as per the

corresponding challens (pages 109 to 125 of the paper book). We find that apart from all other technical aspects, sec. 43B makes it clear such a deduction of excise duty under sub-sec.1 thereof is allowable only on actual payment irrespective of previous year in which the liability to pay the same as arose to the assessee as per the method of accounting regularly employed. The Revenue's stand questioning liability of assessee's excise duty; whether for factual re-verification or on legality, deserves to be rejected on this sole ground.

14. Learned counsel drew our attention to assessee's settlement application dated 19.11.2013 for its unit-II admitting unpaid central excise liability of ₹818,22,881/- with interest of ₹71,64,290 (page 104 in paper book) for the period from December, 2009 to July 2011. It had also admitted a similar liability of ₹162,70,862/- with interest of ₹46,10,764/- for unit-I for the period from April, 2010 to July, 2011 (page **90 in paper book**). All these four figures' aggregate to ₹109,868,798/-. The same stood duly accepted by the Custom and Central Excise Settlement Commission u/s 32E of the Central Excise Act, 1944 (pages 87 to 108 in the paper book). The assessee had admittedly paid the sum of ₹47,00,000/- in the corresponding assessment year(s) leaving behind the remaining unpaid figure(s) of ₹628,68,798/- paid in the relevant previous years only. Learned CIT-DR at this stage submitted that the amount in question as per the PCIT's revision direction is of ₹770,50,738/-. He therefore contests assessee's preceding figure(s). Mr. Tulsiyan clarified that assessee's excise duty collected but not deposited to the government account and enhanced excise duty determined by settlement commission for assessment year(s) 2010-11 to 2012-13 read figure(s) of ₹ 47,26,402/-, ₹433,32,789/- & ₹311,05,678/- with corresponding figure of ₹453,20,664/- and ₹317,30,074/-; aggregating to head-wise figure ₹791,64,869/- and ₹770,50,738/-; respectively. He also took us to Assessing Officer's order in page-2 para-3(ii) (supra) making it clear to have examined the impugned excise duty claim u/s 43B amounting to ₹321,64,869/-. We therefore conclude in these clinching factual aspects as well that the Assessing Officer's action in not disallowing / adding the impugned excise duty claim could neither be termed as erroneous nor prejudicial to the interest of the Revenue so as to set sec. 263 revision mechanism in motion as per

PCIT's directions. We accordingly accept the assessee's foregoing arguments challenging correctness of the impugned revision action. The same stands reversed. The assessee's regular assessment framed in the instant case dated 02.11.2016 is restored as a necessary corollary.

15. This assessee's appeal is allowed.

Order pronounced in open court on 26/02/2020

Sd/-
(उपाध्यक्ष)
(P.M.Jagtap)
Vice President

Sd/-
(न्यायिक सदस्य)
(S.S.Godara)
Judicial Member

*Dkp-Sr.PS

दिनांक:- 26/02/2020 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-M/s Maithan Steel & Power Ltd. 6th Floor Ideal Centre, 9, A.J.C. Bose Road, Kolkata-17
2. प्रत्यर्थी/Respondent-PCIT, Kolkata-1, 7th Floor, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।