

GAHC010202772016



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : ITA 7/2016

1:PRINCIPAL COMMISSIONER OF INCOME TAX and ANR,
GOVT. OF INDIA, MINISTRY OF FINANCE, DIBRUGARH C.R. BUILDING,
DIBRUGARH 786003, ASSAM

2: ADDITIONAL COMMISSIONER OF INCOME TAX

RANGE-2
DIBRUGARH
ASSAM

VERSUS

1:M/S OIL INDIA LTD.
P.O. DULIAJAN, DIST. DIBRUGARH, ASSAM.

Advocate for the Petitioner : MR.S SAIKIA

Advocate for the Respondent : SC, OIL

Linked Case : ITA 9/2016

1:PRINCIPAL COMMISSIONER OF INCOME TAX and ANR

GOVT.OF INDIA
MINISTRY OF FINANCE
DIBRUGARH
C.R. BUILDING
DIBRUGARH-786003
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2: ADDITIONAL COMMISSIONER OF INCOME TAX

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DIBRUGARH
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VERSUS

1:M/S OIL INDIA LTD.
P.O. DULIAJAN
DIST. DIBRUGARH
ASSAM.

Advocate for the Petitioner : MR.P SAIKIA
Advocate for the Respondent : MR.A SARMA

Linked Case : ITA 10/2016

1:PRINCIPAL COMMISSIONER OF INCOME TAX and ANR

GOVT. OF INDIA
MINISTRY OF FINANCE
DIBRUGARH
C.R. BUILDING
DIBRUGARH-786003
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2: ADDITIONAL COMMISSIONER OF INCOME TAX

RANGE-2
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VERSUS

1:M/S OIL INDIA LTD.
P.O. DULIAJAN
DIST. DIBRUGARH
ASSAM.

Advocate for the Petitioner : MR.P SAIKIA
Advocate for the Respondent : SC
OIL

Linked Case : CO 11/2017

1:PRINCIPAL COMMISSIONER OF INCOME TAX and ANR

GOVT. OF INDIA
MINISTRY OF FINANCE
DIBRUGARH
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VERSUS

1:M/S OIL INDIA LTD.
P.O. DULIAJAN
DIST. DIBRUGARH
ASSAM.

Advocate for the Petitioner : MR.A J MAHANTA
Advocate for the Respondent : MR.S SAIKIA

Linked Case : CO 9/2017

1:PRINCIPAL COMMISSIONER OF INCOME TAX and ANR

GOVT. OF INDIA
MINISTRY OF FINANCE
DIBRUGARH
C.R. BUILDING
DIBRUGARH 786003
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2: ADDITIONAL COMMISSIONER OF INCOME TAX

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VERSUS

1:M/S OIL INDIA LTD.
P.O. DULIAJAN
DIST. DIBRUGARH
ASSAM.

Advocate for the Petitioner : MR.S CHOUDHURY
Advocate for the Respondent :

Linked Case : CO 10/2017

1:PRINCIPAL COMMISSIONER OF INCOME TAX and ANR
GOVT. OF INDIA
MINISTRY OF FINANCE
DIBRUGARH
C.R. BUILDING
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VERSUS

1:M/S OIL INDIA LTD.
P.O. DULIAJAN
DIST. DIBRUGARH
ASSAM.

Advocate for the Petitioner : MR.S CHOUDHURY
Advocate for the Respondent :

Linked Case : CO 12/2017

1:PRINCIPAL COMMISSIONER OF INCOME TAX and ANR
GOVT. OF INDIA
MINISTRY OF FINANCE
DIBRUGARH
C.R. BUILDING
DIBRUGARH 786003
ASSAM.

2: ADDITIONAL COMMISSIONER OF INCOME TAX

RANGE-2
DIBRUGARH

ASSAM.
VERSUS

1:M/S OIL INDIA LTD.
P.O. DULIAJAN
DIST. DIBRUGARH
ASSAM.

Advocate for the Petitioner : MR.A J MAHANTA
Advocate for the Respondent :

Linked Case : ITA 8/2016

1:PRINCIPAL COMMISSIONER OF INCOME TAX and ANR

GOVT. OF INDIA
MINISTRY OF FINANCE
DIBRUGARH
C.R. BUILDING
DIBRUGARH 786003
ASSAM.

2: ADDITIONAL COMMISSIONER OF INCOME TAX

RANGE-2
DIBRUGARH
ASSAM.
VERSUS

1:M/S OIL INDIA LTD.
P.O. DULIAJAN
DIST. DIBRUGARH
ASSAM.

Advocate for the Petitioner : MR.P SAIKIA
Advocate for the Respondent : MR.K KALITA

P R E S E N T

HON'BLE THE CHIEF JUSTICE MR. A.S. BOPANNA

HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI

For the Appellants : Mr. S. Saikia, and
Ms. P. Tamuli, Advocates

For the Respondent : Mr. Ajay Vohra, Senior Advocate
Mr. Gaurav Jain, and
Mr. Anshuman Sarma, Advocates

Date of Hearing : 24.01.2019

Date of Judgment & Order : 20.02.2019

JUDGMENT AND ORDER

(CAV)

(A.S. BOPANNA, C.J.)

The issue in all these appeals and the cross-objections relates to the returns filed by the respondent assessee for the Assessment Years 2005-06 and 2006-07. The assessee having filed its return of income had claimed deduction under Section 80 IC(2)(b)(iii) of Income Tax Act (Act for short) by describing itself as a mineral based industry as contained in Part-A of 14th Schedule, Item 16, being an industry situated in the North Eastern Region. The claim to that effect was made in respect of 59 oil wells. The Assessing Officer through his assessment order dated 29.11.2007 rejected the claim seeking for such deduction. The rejection, however, was on the ground that though each oil well is claimed to be an undertaking, a combined Form in 10CCB is filed instead of separate Form in respect of each oil well. Though the issue as to whether the assessee is a mineral based industry, was not specifically analyzed, the Assessment Officer had

assumed it to be correct and proceeded further, but rejected the claim on the technical non-compliance of filing separate Forms.

2. The assessee being aggrieved by the said assessment order dated 29.11.2007 filed appeals to the Commissioner of Income Tax (Appeals), for short "CIT (A)", in Appeal Nos.23-24-Dib/2005-2006 and 28-29-Dib/2007-2008. The appeals related to the returns for the year 2005-2006 and 2006-2007 also. The CIT (A) by the order dated 29.2.2008, on consideration of the appeals, allowed the same and the benefit of deduction under Section 80IC was allowed. When this was the position, the Commissioner of Income Tax (for short "CIT") assumed jurisdiction under Section 263 of the Act and a revision proceedings was initiated suo-moto. In the notice issued to the assessee, the CIT had indicated that the Assessing Officer had not examined or applied his mind on the basic issue as to whether the assessee is actually a mineral based industry or not. It is in that view, the revision of the assessment was proposed. The assessee had, in their reply, indicated reasons to claim benefit under Section 80 IC(2)(b)(iii) by contending that they are a mineral based industry. The threshold contention raised by the assessee, however, was to question the authority of CIT to initiate a revision under Section 263 of the Act when the said issue had already been concluded on the consideration made by the CIT(A) through its order dated 29.2.2008. It was further contended that the revision under Section 263 is permissible only in respect of an issue which was not considered earlier before the CIT(A) and wherein the order passed by the Assessing Officer is erroneous and it is also prejudicial to the interest of the revenue. It was contended that in the present circumstance when the issue was considered and one of the plausible views is already taken and also when the order of the Assessing Officer has merged in the order passed by the CIT (A), there was no scope for re-examination of the same in a revision under Section 263 of the Act, where the scope is limited.

3. In that background, the CIT on adverting to the issue, through the order dated 22.3.2010 has held that the assessee is not a mineral based industry. Accordingly, the Assessing Officer was directed to modify the assessment in terms of the order passed in the said proceeding under Section 263 of the Act. Pursuant thereto, the Assessing Officer by the order dated 7.4.2010 modified the assessment order and rejected the claim of the assessee under Section 80 IC. The assessee, in that circumstance, preferred another appeal before the CIT (A) against such modified assessment order dated 7.4.2010. The CIT (A), by the order dated 22.7.2013, rejected the appeal filed by the assessee. It is in that light, the assessee filed the appeal before the Income Tax Appellate Tribunal, Kolkata (for short "ITAT"), both against the order dated 22.3.2010 passed in proceedings under Section 263 of the Act as also the consequential assessment orders which had been upheld by the CIT(A) through the order dated 22.7.2013. Since the issue was common and the consequence of the consideration of the order dated 22.3.2010 under Section 263 of the Act would befall on the subsequent orders passed by CIT(A) dated 22.7.2013, the ITAT clubbed all the appeals and made a common consideration of the same. Though an independent consideration as to whether the assessee is a mineral based industry was not made by the ITAT, the consideration was to the effect as to whether the proceedings under Section 263 of the Act was sustainable. The ITAT has, accordingly, through its order dated 7.5.2015 allowed the appeals filed by the assessee and the order passed under Section 263 of the Act was set aside. The Revenue, therefore, claiming to be aggrieved by the order dated 7.5.2015 has filed these appeals, while the assessee has filed the cross-objections/cross appeals raising the grounds insofar as the aspects that were not adverted to by the ITAT, more particularly with regard to the deductions as claimed under Section 80 IC which would become necessary for consideration if the revision proceedings under Section 263 of the Act is held to be sustainable.

4. In that light, this Court while admitting the appeals, had framed the following substantial questions of law :-

- i) Whether the Tribunal is correct in law in cancelling the order passed by the Commissioner by holding that the learned Commissioner had illegally invoked jurisdiction under Section 263 of the Act, 1961 ?
- ii) Whether the Tribunal has correctly held that allowance of relief under Section 80 IC of the Act to the assessee on the ground that it is a mineral based industry even though it is engaged in the business of refining mineral oil ?
- iii) Whether the view taken by the Tribunal is not sustainable in law keeping in view the scheme of the Act read with the Union, Concurrent and State Lists of the Constitution of India ?

5. From a perusal of the contentions urged, the sequence of events that have followed and the first substantial question of law raised for consideration being, as to whether the jurisdiction invoked by the CIT under Section 263 of the Act is justified, the said aspect is to be taken note at the outset and the other questions would arise only as a consequence thereto. In that light, since the consideration is common to all these appeals and cross-objections, they are taken up together and considered through this common order.

6. Heard Mr. S.Saikia, learned counsel for the Revenue and Mr. Ajay Vohra, learned

senior counsel for the assessee and perused the appeal papers.

7. In the present facts, the issue also is when the order of the Assessing Officer dated 29.11.2007 was subjected to appeal and had concluded with the order dated 29.2.2008 passed by the CIT (A), whether in that circumstance the order of the Assessing Officer had merged in the order passed by the CIT (A) and, in that light, was the order of the Assessing Officer dated 29.11.2007 still open and available to be revised by the CIT under Section 263 of the Act ?

8. A perusal of the provisions as contained under Section 263 of the Act would indicate that it provides for the Commissioner to call for and examine the records of any proceeding under the Act and, if he considers that any order passed therein by the Assessing Officer is erroneous and it is prejudicial to the interest of the Revenue, the Commissioner may after giving the assessee an opportunity of being heard, and after making such inquiry, pass order thereon including to enhance or modify or cancel an assessment and direct fresh assessment. Clause (c) to Explanation-1 to sub-section (1) of Section 263 further reads as hereunder :-

“(c) Where any order referred to in this sub-section and passed by the Assessing Officer had been subject matter of any appeal filed on or before or after the first day of June, 1988, the powers of the Principal Commissioner or Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeals.”

9. In the present facts, the provision as contained in Clause (c) would also become relevant since apart from the Commissioner having the power to invoke the jurisdiction under Section 263 of the Act, it is clarified that he can invoke such powers only in respect of erroneous portion of the order of the Assessing Officer causing prejudicial interest to the Revenue and such portion of the order not being a part of the consideration in any appeal, having been filed in respect of such assessment order to the CIT (A) and the matter not being concluded therein. Therefore, in the instant facts, what is also required to be taken note of is whether in the Assessment Order dated 29.11.2007 and the order dated 29.2.2008 passed by the CIT (A) in respect of the said assessment, the issue as to assessee claiming to be a mineral based industry was also an issue which was raised and taken note of in the proceedings whereunder the deduction was sought. In order to take note of the same, a close scrutiny of the assessment order dated 29.11.2007 would disclose that deduction under Section 80 IC was an issue which had arisen for consideration since the deduction was sought on that basis. The relevant portion of the contention and the reply of the assessee as taken note in the assessment order, is as hereunder :-

“ ***It is seen that in the return of the income filed on 31.10.2005 deduction u/s 80-IC has been claimed by way of a note in respect of fifty one new wells successfully drilled for production of crude oil (including sixty-eight wells completed in earlier last seven years). The amount of the claim was not quantified and no deduction has been made from the gross total income in the computation of income. Audit report in Form No.10CCB was also not submitted along with the return of income. The amount of deduction claimed u/s 80-IC was subsequently quantified as Rs.369,60,15,777/- and communicated vide the company's letter dated 30.03.2006. Form No.10CCB was also submitted later on in the course of assessment proceedings. In the Annexure attached to the form it is seen***

that deduction has been claimed for 59 wells. The assessee was asked to justify its claim of deduction u/s 80-IC vis-à-vis the provisions of the Act. The assessee stated that the detailed reply given for A.Y. 2006-07 vide letter dated 15.10.2007 may be treated as the reply given for A.Y. 2005-06 also as the facts and circumstances of the case are the same. The assessee's reply vide letter dated 15.10.2007 is reproduced as verbatim below :

(a) Evidence of fulfilling the conditions laid down U/S 80IC(2)(a) of 80IC(b) as the case may be :

M/s Oil India Ltd. (Assessee), is engaged in business of Exploration, Production & sale of crude Oil & natural gas. In the course of such a business activities assessee running/increasing its business strength by way of existing/new eligible Production Centres (Oil/Gas Wells) producing articles as specified in part A of the Schedules XIV of the Income Tax Act 1961 i.e. Gas Based Intermediate Products under Items No.13 and Mineral Based Industry under Item of 16, are mostly spread over the North East Region as well as some part of the India with its Regional Office Situated at Duliajan in the district of Dibrugarh."

10. The Assessing Officer after taking note of the reply and the contention has concluded as hereunder :

“ It may be true that the assessee's wells are spread over the North Eastern States and that these wells are producing articles of things specified in the Fourteenth Schedule of the I T Act. The issue is whether these wells would qualify as 'undertakings' or 'enterprises' as envisaged in section 80-IC. The assessee has claimed deduction u/s 80-IC in respect of 59 wells by treating each well as a new independent production centre. A single Form 10CCB has been submitted wherein all the profits of these so called independent production centres have been clubbed together. The profits of

these wells have been computed by taking the sales value of the output from these wells and reducing therefrom the drilling costs and proportionate production costs. These wells started production on various different dates starting from the year 1997-98 till upto 2004-05. Just because the profits of a plant can be proportionately worked out does not necessarily mean that it became an 'undertaking' or 'enterprise'."

..... They are not undertakings or enterprises. The assessee's claim for deduction u/s 80-IC by treating these oil/gas wells as undertakings or enterprises is, therefore, not allowable.

..... The requirement of accounts of the undertaking to be audited by an accountant in order to be admissible for deduction u/s 80-IC is also not satisfied.

...."

For all these reasons discussed above the assessee's claim for deduction u/s 80-IC is disallowed."

11. It is against such conclusion of the Assessing Officer in not allowing the deduction which was claimed under Section 80 IC, the assessee was before the CIT (A). The CIT (A) took note of the claim for deduction as provided in Section 80 IC and, in that light, having considered each oil well as an enterprise, has given the benefit of the deduction as claimed under Section 80 IC, by concluding as hereunder :

" Applying the above tests, each oil well appears to satisfy the test of 'undertaking' for the purpose of Section 80IB/80IC of the Act. Each oil well is a distinct, separate and integrate unit for which capital is separately employed and the expenses incurred are separately accounted for. Each oil

well produces crude oil and natural gas and therefore it satisfies also one of the tests for the purpose of claiming the benefit of Section 80IB & 80IC.

....."

For the reasons aforesaid it was submitted by the AR that the benefit under Section 80IB for the assessment years 2003-04 and 2004-05 and benefit u/s 80IC for the assessment years 2005-06 and 2006-07 are to be allowed.

.....

I have considered both the assessment order of the A.O. as well as the written submissions and arguments of the Ld. A/R. The written submissions of the appellant are specific and deal with each issue as raised by the A.O. The two(2) grounds of appeal, pressed by the appellant regarding disallowance of the claim of the Appellant u/s 80IB and 80IC of the Act for the A.Y. 2003-04, 2004-05, 2005-06, 2006-07 and also disallowance of discount allowed by the Appellant on account of under-recovery of the oil marketing company for A.Y. 2005-06 and 2006-07 have been factually explained by the appellant and buttressed by relevant case law on the issues raised. I have gone through the assessment order of the A.O. and put across the revenues point of view as well as the issues involved to the A/R's of the appellant company. They were asked to submit a para-wise rebuttal of the A.O's observations etc. Their written submissions dated 27.2.06 explains the appellant's the appellant's position and clarifies the issues involved. This have been summarized by me above. The arguments of the appellant as well as the case law cited by the A/R's are persuasive and factual and after careful consideration of the merits of both sides I am of the considered opinion that the grounds relating to disallowance of the claim of the Appellant u/s 80IB and 80IC of the Act for the A.Y. 2003-04, 2004-05, 2005-06, 2006-07 and disallowance of discount allowed by the Appellant on

account of under-recovery of the oil marketing company for A.Y. 2005-06 and 2006-07 have been adequately explained by the appellant company and are deserving of relief. In the circumstances, the appellant succeeds on both the above mentioned grounds. The other grounds being withdrawn the appeal is treated as allowed."

12. The learned senior counsel for the assessee in order to substantiate the contention that the power under Section 263 of the Act cannot be invoked when the order of the Assessing Officer has merged in the order in appeal, has relied on the decision in the cases of :-

(1) Oil India Limited Vs. Commissioner of Income-tax, 138 ITR 836 (Calcutta),

wherein while considering the claim of the assessee regarding depreciation on bungalows, which was disallowed by the Assessing Officer, and on appeal, the appellate authority allowed the appeal, but had not given any direction as to the quantum of depreciation and when the Commissioner subsequently issued a show cause notice under Section 263 inviting the assessee's objection to his proposal to set aside the assessment order insofar as it was prejudicial to the interest of the Revenue, an issue arose as to whether the order passed by the Commissioner under Section 263 of the Act was sustainable. In that context, it was held that in an appeal preferred before the appellate authority, the whole assessment is open for review and when the matter raised in the appeal is the subject matter before the Commissioner in the revision, the Commissioner has no jurisdiction to issue the notice under Section 263 of the Act and to pass any order. As such, it was held that where an appeal is preferred and the subject matter of appeal, particularly raised, is the subject matter before the AAC, that order cannot be the subject of an order of revision by the Commissioner. Such conclusion was reached as what was

urged was the quantum of the depreciation which was the subject matter of appeal and, in that circumstance, the Commissioner had no jurisdiction in the facts and circumstance of the case.

(2) ***Commissioner of Income-tax –Vs.- Shashi Theatre (P) Ltd., 248 ITR 126 (Gujarat)***, wherein the assessee had claimed investment allowance and the Assessing Officer had allowed the claim on the plant and machineries, but had not granted investment allowance for the remaining items. The assessee had preferred an appeal and the same was decided in his favour and the investment allowance was granted on all items. Subsequently, another Commissioner took up the matter in revision under Section 263 of the Act and ordered that the grant of investment allowance by the Assessing Officer was erroneous. On appeal, it was held that the revision under Section 263 of the Act was not justified as the order of the Assessing Officer had merged in the appellate order. The Gujarat High Court in addition to the question of merger had also kept in view Clause (c) of Explanation to Section 263(1) and has held that Section 263 could not have been invoked.

(3) ***Commissioner of Income-tax Vs.- Mehsana District Co-op. Milk Producers Union Ltd., 263 ITR 645 (Gujarat)***, wherein the similar issue as to whether powers under Section 263 can be invoked when order sought to be revised was already subjected to appeal was considered and it was held that the power under Section 263 cannot be exercised.

13. The learned senior counsel for the Revenue, on the other hand, has relied on the

decision of the Hon'ble Supreme Court in the case of ***Commissioner of Income Tax, Gujarat-I, Ahmedabad –Vs.- Shri Arbuda Mills Ltd., Ahmedabad, (1998) 9 SCC 702,*** wherein on the issue of merger, it has been held that the powers of the Commissioner under Section 263 of the Act shall extend to such matters as has not been considered and decided in the appeal. In the facts therein, the ITO while making certain additions and disallowances, also accepted the claim of the assessee in respect of three items. In the appeal filed by the assessee, the three items were not the subject matters of the appeal. In respect of those three items, the CIT exercised his powers under Section 263. It is in that context, it was held that in respect of the said three items, there was no merger.

14. From the decisions cited on either side, the law as enunciated would be clear that in order to consider the position as to whether the order of the Assessing Officer had merged in the order of CIT (A) and, in that context, whether the subject matter which was the issue in the assessment proceedings as also in the appellate proceedings before the CIT (A), and that in the revision proceedings before the CIT is the same, the facts involved in each case will have to be taken note so as to arrive at a conclusion whether the invocation of the power under Section 263 of the Act to revise such assessment order is in respect of the same subject matter and the issue which had concluded in the assessment as also the appellate proceedings. In that background, the present facts will have to be noticed.

15. The extracted portion supra relating to the contention and consideration of the assessment proceedings leading to the Assessment Order dated 29.11.2007 will disclose that the claim for deduction as contemplated under Section 80 IC of Act was predicated on the claim that

the assessee is a mineral based industry located in North Eastern State and reference was also made to Item 16 in Part-A of Schedule XIV of the Act. The Assessing Officer during the course of the consideration has stated that it may be true that it is producing articles specified in Schedule XIV of the Act. However, the claim was disallowed since the Assessing Officer was of the view that the wells regarding which claim for deduction was made cannot be considered as 'undertaking' or 'enterprise' and despite claiming that wells to be independent production centre, single Form 10 CCB was submitted. Hence, the claim for deduction under Section 80 IC as made by the assessee was disallowed. When the appeal was filed to the CIT(A) against such disallowance, the CIT(A) has reversed the conclusion of the Assessing Officer and allowed the claim by accepting that each oil well appear to satisfy the test and it is further held that each oil well produces crude oil and natural gas and, therefore, it satisfies also one of the tests for the purpose of claiming benefit of Section 80 IB and 80 IC. Accordingly, the claim was allowed.

16. In that backdrop, a perusal of the revision proceedings under Section 263 of the Act will disclose that the very issue which was considered by the CIT(A) and concluded was re-opened, which is indicative by the observation of CIT, wherein he has stated that the perusal of the record shows that the Assessing Officer had not examined or applied his mind on the basic issue as to whether the assessee is actually a mineral based industry or not. As noticed, the question of considering the wells of the assessee as an undertaking was not accepted by the Assessing Officer though the claim of mineral based industry was not rejected. Whether such acceptance was erroneous and whether the CIT(A) has committed an error in allowing the claim will lose its relevance when it is to be noticed only to the extent of finding out whether the same issue could have been examined in a subsequent revision proceeding under Section 263 of the Act. When in the revision proceedings the CIT accepts during the course of the order that the

assessee had claimed deduction under Section 80 IC claiming to be a mineral based industry and in that background when the claim was disallowed by the Assessing Officer but allowed by the CIT(A), the issue would stand concluded and there would be no scope for re-examination in the jurisdiction under Section 263 of the Act as the assessment order has merged in the appellate order. The matter not having been examined in the same manner or to the same extent and depth is immaterial. When the claim for deduction was on that basis, the exception as contained in Clause-(c) to Explanation-1 to sub-section (1) of Section 263 of the Act would not apply nor will the circumstance stated by the Hon'ble Supreme Court in the case of ***Shri Arbuda Mills Ltd., Ahmedabad (supra)*** be relevant to the present fact situation. In that view, the revision proceedings under Section 263 of the Act in the present context was not sustainable.

17. The contention urged on behalf of the assessee is also that the ITAT has appropriately decided the issue of proceeding under Section 263 of the Act not being maintainable and it is contended that it does not satisfy the twin test of the Assessment order being erroneous and also being prejudicial to the interest of revenue. The learned Senior Advocate for the assessee has relied on the decision of the Hon'ble Supreme Court in the case of ***Malabar Industrial Co. Ltd. Vs. Commissioner of Income Tax (243 ITR 83-SC) = (2000) 2 SCC 718***, which was also relied upon by the learned Advocate for revenue. In the said decision, it is held as hereunder :

5. To consider the first contention, it will be apt to quote Section 263(1) which is relevant for our purpose :

“263. Revision of orders prejudicial to Revenue. – (1) The Commissioner may call for and examine the record of any proceeding under this Act,

and if he considers that any order passed therein by the Assessing Officer is erroneous 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.

Explanation.- * * *

6. A bare reading of the provision makes it clear that the prerequisite to exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income Tax Officer is erroneous insofar as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent – if the order of the Income Tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue – recourse cannot be had to Section 263(1) of the Act.

7. There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.

8. The phrase "prejudicial to the interest of the Revenue" is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The High Court of Calcutta in Dawjee Dadabhoy & Co. V. S.P. Jain, the High Court of

Karnataka in CIT v. T. Narayana Pai, the High Court of Bombay in CIT v. Gabriel India Ltd. and the High Court of Gujarat in CIT v. Minalben S. Parikh treated loss of tax as prejudicial to the interests of the Revenue.

9. Mr. Abraham relied on the judgment of the Division Bench of the High Court of Madras in Venkatakrishna Rice Co. v. CIT interpreting "prejudicial to the interests of the Revenue". The High Court held :

"in this context, (it must) be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the order passed by the Income Tax Officer, which might set a bad trend or pattern for similar assessments, which on a broad reckoning, the Commissioner might think to be prejudicial to the interests of the Revenue Administration."

In our view this interpretation is too narrow to merit acceptance. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the Income Tax Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue."

18. The learned Advocate for the Revenue has relied on the decision of the Hon'ble Supreme Court in the case of ***Commissioner of Income Tax, Mumbai Vs. Amitabh Bachchan, (2016) 11 SCC 748***, wherein the revision proceeding under Section 263 of the Act was upheld. It is noticed that the decision in the case of ***Malabar Industrial Co. Ltd. (supra)*** was referred therein. The issue considered therein was whether the revision of assessment was in violation of natural justice and was it beyond the scope of show cause notice. In the instant case, it is noticed that the Assessment Officer had in fact disallowed the claim. Even if the order was

erroneous in so far as considering or not considering the aspect of mineral based industry, the same did not suffer from the second vice of causing financial prejudice to the revenue, which was in fact disallowed by the Assessing Officer but ultimately allowed by the CIT(A) which in any event cannot be corrected in a revision proceeding under Section 263 of the Act.

19. Though elaborate contentions have been addressed by the learned senior counsel on either side with regard to the other aspects including to contend with regard to the postulates of mineral based industry, in view of the above conclusion, the other aspects need not to be adverted to in detail by us.

20. In view of the above discussion, the order passed by the ITAT does not call for any interference. Accordingly, the substantial questions of law raised herein are answered against the Revenue.

21. In the result, the appeals bearing Income Tax Appeal Nos.7/2016, 8/2016, 9/2016 and 10/2016 are dismissed. Consequently, the C.O. Nos. 9/2017, 10/2017, 11/2017 and 12/2017 are disposed of without specific order. There shall be no order as to costs.

JUDGE

CHIEF JUSTICE

Comparing Assistant