IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH KOLKATA

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.409/Kol/2023
Assessment Year: 2018-19

Bijni Dooars Tea Company Ltd. 4th Floor, Room No. 1, Shantiniketan, 8, Camac Street, Kolkata-700017. (PAN: AABCB1013E)	Vs.	Principal Commissioner of Income-tax, Kolkata-2, Kolkata.
(Appellant)		**(Respondent)**

Present for:

Appellant by : Shri S. K. Tulsiyan, Advocate & Ms. Mita Rizvi, CA
Respondent by : Shri S. Datta, CIT, DR

Date of Hearing : 25.07.2023
Date of Pronouncement : 20.10.2023

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the revisionary order passed u/s. 263 of the Income-tax Act, 1961 (hereinafter referred to as the "Act") by Ld. Pr. CIT, Kolkata-2 dated 30.03.2023 against assessment order by Income Tax Department, National e-Assessment Centre, Delhi u/s. 143(3) read with sections 143(3A) & 143(3B) of the Act dated 19.02.2021 for AY 2018-19.

2. Assessee has raised four grounds of appeal, all of which relate to assumption of jurisdiction by the Ld. Pr. CIT for invoking the revisionary proceeding u/s. 263 of the Act and

passing the impugned order thereon. Grounds are not reproduced for the sake of brevity.

3. Brief facts of the case are that assessee filed its return of income on 06.10.2018, reporting total income at Rs.2,76,33,600/-. Ld. AO having taken note of details submitted in the course of assessment proceeding, completed the assessment u/s. 143(3) of the Act on 19.02.2021 at an assessed total income of Rs.5,52,64,107/-. Subsequently, Ld. Pr. CIT called for and examined the case records and formed a prima facie view that impugned assessment order passed u/s. 143(3) of the Act dated 19.02.2021 is erroneous insofar as it is prejudicial to the interest of the revenue. Accordingly, a notice u/s. 263 of the Act, dated 08.02.2023 was issued on the following two reasons, which are reproduced as under:

> *"3.1. On examination of the assessment records and Books of accounts for the year ended 31.03.2018, it is observed that you M/s Bijni Dooars Tea Company Limited have proposed dividend of Rs.90,00,000/- along with DOT of Rs. 7,32,875/- for the financial year 2017-18. From the Statement of particulars (Form 3CD) to Audit Report u/s 44AB. DOT of Rs. 7,32,875 for the distributed profit of Rs.90,00,000/- has been paid on 28.09.2017. From the Annual Tax Statement in Form 26AS, it revealed that the Tax on distributed profit of domestic companies (Mirror Head 106) Rs 7,32,875/- was deposited by the company on 28.09.2017. Since the date of declaration/distribution payment of Dividend (28.09.2017) falls in the F.Y. 2017-18, any DOT thereon would qualify for the AY 2018-19. But neither in the return for the A.Y. 2018-19 nor in the scrutiny assessment order thereof had such DOT been qualified. Further examination revealed that the amount DOT paid was shorter than that of payable amount. As short payment of DOT might be failure to pay such tax, it would therefore, attract penal interest u/s 115P which was also required to be quantified. Omission to quantify the actual amount of DDT and interest thereof resulted in short levy of DOT and interest.*
>
> *3.2 It is further observed that loss, (after indexation) from sale of two investment viz. (i) 11.40% Lakshmi Bilas Bank 2018 for Rs.1,09,500/- and (ii) 10.75% IDBI Bank PERP 2024 Bonds for Rs 11,97,600/- had been taken in the calculation of LTCG and carried forward to the subsequent years. Again, the same losses for those investments, without Indexation, for Rs.1,09,500/- and Rs.11,97,600/- had also been taken into account in the calculation of STCG. Those losses accordingly decreased the quantum of STCG or an amount Rs.13,07,100/-. Since the loss had been taken in the calculation of LTCG, it would not be available m the calculation of STCG simultaneously. Such mistake led to understatement of STCG of Rs.13,07,100./- and which in turn led to short levy of revenue.*

3.3 It is observed that the A.O. failed to consider the issues as discussed in paragraph 3.1 and 3.2 above while framing the assessment order which, prima facie, has rendered the assessment order dated 19.02.2021 passed u/s. 143(3) of the Act to be erroneous in so far as it is prejudicial to the interest of revenue."

4. Assessee filed its written submission dated 01.03.2023, explaining in detail as to why the impugned assessment order is not erroneous and prejudicial to the interest of the revenue. However, Ld. Pr. CIT did not find favour with the same and set aside it directing the Ld. AO to consider the submissions of the assessee, verifying the same from its books of account and to reframe the assessment afresh after providing an opportunity of being heard to the assessee. He held the impugned assessment order as erroneous insofar as it is prejudicial to the interest of the revenue.

5. From the above extraction of the two issues raised by Ld. Pr. CIT for the revisionary proceeding u/s. 263, we note that first issue is in respect of Dividend Distribution Tax (DDT) on proposed dividend of Rs. 90,00,000/- which has not been quantified in the return filed by the assessee as well as in the assessment order passed by the Ld. AO. According to the Ld. Pr. CIT, there was a short payment of DDT which attracts penal interest u/s. 115P which also was not quantified. Omission to quantify the actual amount of DDT and interest thereon resulted in short levy of DDT and interest, according to Ld. Pr. CIT.

5.1. On this issue, assessee has taken additional grounds of appeal. On the question of law, the additional grounds raised on this issue are reproduced as under:

"1. That, on the facts and circumstances of the case, the Ld. CIT(A) erred in law in not considering that revision of an order u/s. 263 of the Act presupposes existence of an order and as such, there cannot be any revision of a non-existing order.

2. That the Ld. CIT(A) further erred in not appreciating that in the instant case the assessment order is passed u/s. 143(3) of the act, wherein the assessing officer is required to make assessment of the "total income or loss" of the

assessee and as such, in absence of an order u/s. 115P of the Act imposing interest for short payment of DDT, the Ld. PCIT has no power to revise the assessment order dated 19.02.2021 passed u/s. 143(3) of the Act of which sec. 115-O of the Act was never a part."

5.2. According to the Ld. Counsel, these additional grounds goes to the root of the matter and require no further investigation of fresh facts. He placed reliance on the judgment of Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. Vs. CIT (1998) 229 ITR 383 wherein it was held that question of law can be raised at any stage of proceedings. On confrontation of these grounds of appeal to the Ld. CIT, DR as to their admission, no objection was raised and hence, they are admitted for adjudication. We will deal with additional grounds on the first issue later.

6. We first refer to the second issue raised by the Ld. Pr. CIT in the revisionary proceedings which pertains to understatement of short term capital gain (STCG) amounting to Rs.13,07,100/-. In this respect, assessee had submitted before the Ld. Pr. CIT that it had wrongly adjusted the Long Term Capital Loss of Rs.13,07,100/- incurred during the year twice, once with Long Term Capital Gain and again with Short Term Capital Gain out of inadvertent mistake in its computation of income as per the normal provisions of the Act. However, the total amount of gain on sale of investments was correctly reflected in the audited balance sheet at Rs.78,48,519/-. There was no mala fide intention of the assessee and it is a case of inadvertent mistake.

6.1. It was further submitted that there will be no additional tax liability due to the said error as mentioned above since the assessee was liable to pay tax as per section 115JB of the Act and the assessee had surplus tax credit u/s.115JAA for tax paid in earlier years. Original as well as revised/correct computation of income and calculation of tax thereon were referred, placed on record from where

it was pointed that total tax payable of Rs.52,27,263/- for the AY 2018-19 remains the same.

6.2. Assessee, in the backdrop of the above facts asserted that since it had already paid the requisite tax on the Total Income and there arises no additional tax liability due to the said clerical mistake, the assessment order is not erroneous in so far as prejudicial to the interest of the revenue. According to the assessee, only the amount of carried forward credit u/s.115JAA of the Act needs to be reduced which will be done in its return of income for A Y 2023-24.

6.3. Ld. Counsel submitted that power of revision can be exercised by Ld. Pr. CIT only if he forms a consideration on examination of records of any proceedings as to order passed is erroneous insofar as it is prejudicial to the interest of the revenue. According to him, the twin conditions must be satisfied in order to exercise the powers of revision.

7. For this, let us take guidance from judicial precedence laid down by the Hon'ble Apex Court in the case of Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordships have held that *twin* conditions need to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer *must be erroneous and in so far as prejudicial to the interest of the Revenue*. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed *on incorrect assumption of fact*; or (ii) *incorrect application of law*; or (iii)Assessing Officer's order is in *violation of the principle of natural justice*; or (iv) if the order is passed by the Assessing Officer *without application of mind*; (v) if the AO *has not investigated the issue* before him; [*because AO has to discharge dual role of an investigator as well as that of an adjudicator*] then in

aforesaid any of the events, the order passed by the AO can be termed as erroneous order. Looking at the second limb as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue, one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (*supra*) held that this phrase i.e. "*prejudicial to the interest of the revenue*" has to be read in conjunction with an *erroneous order* passed by the AO. Their Lordships held that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue unless the view taken by the Assessing Officer is unsustainable in law.

7.1. On this issue, ld. Pr. CIT in his revisionary order in para 6 has noted that he has examined the revised computation of income furnished by the assessee. Upon his examination, he has noted that gross tax payable under normal provisions of the Act as per the original computation of income is Rs.76,13,748/- which now comes to Rs.79,73,887/-. The enhanced gross tax liability under the normal provisions of the Act is Rs.3,60,139/- which after rectification of the mistake will reduce the carry forward credit u/s. 115JAA of the Act. According to him, the mistake in computation of income has caused prejudice to the interest of revenue which has been overlooked by the Ld. AO. He thus, held that the impugned assessment order requires to be set aside for fresh adjudication by the Ld. AO.

7.2. From the above noted observation of Ld. Pr. CIT, it is evident that he has recognised that there is a mistake which has occurred in filing the return by the assessee. Even assessee has admitted that it has wrongly adjusted the long term capital loss of Rs.13,07,100/- twice, once with LTCG and again with STCG in its computation of total income as per the normal provisions of the Act. Assessee had also explained the reason of such a mistake that it occurred due to typographical error with regard to the date of sale of the relevant investments, hence, adjusted twice. For such a bonafide mistake, assessee has evidently demonstrated in the revisionary proceedings before the Ld. Pr. CIT that no additional tax liability arises for the year under consideration because of the said mistake in computation of total income.

7.3. Ld. Counsel of the assessee has made a detailed written submission on the facts of this issue which is reproduced for ease of reference:-

> *"As per the original computation of total income as reflected in the ROI, after the wrong adjustment of LTCL of Rs.13,07,100/- against STCG resulting in understatement of STCG to the tune of Rs.13,07,100/-, Gross tax payable under normal provisions of Income Tax Act was arrived at Rs.76,13,748/- and the tax payable u/s. 115JB of the Act was Rs.52,27,263/-. Since, the assessee was entitled to claim MAT credit u/s. 115JAA of the Act, the same was calculated at Rs.23,86,485/- in the original computation as per ROI, being the difference between tax computed under normal provisions and tax payable u/s. 115JB of the Act for the AY 2018-19.*
>
> *Accordingly, the total tax payable for the A Y 2018-19 as per ROI was arrived at Rs.52,27,263/- after availing the MAT credit of Rs.23,86,485/- u/s.115JAA of the Act and the net figure of tax payable after adjustment of taxes paid was arrived at a refundable figure of Rs.2,07,332/-.*
>
> *On the other hand, perusing the revised computation of total income reveals that even after correcting the said mistake in the original computation of total income i.e. increasing the STCG by Rs.13,07,100/-, the tax payable u/s. 115JB of the Act remains the same at Rs. 52,27,263/-, while the Gross tax payable comes to Rs.79,73,887/- under normal provisions of the Income Tax Act. In this case, the MAT credit available u/s. 115JAA of the Act comes to Rs.27,46,624/- and the total tax payable per the revised computation is arrived at Rs.52,27,263/- [which is same as in the original computation of total income as per ROI] after availing the MAT credit of Rs.27,46,624/- u/s.*

115JAA of the Act. Finally, the resultant net figure of tax payable after adjustment of taxes paid remains the same as in the original computation of total income i.e. refund of Rs.2,07,332/-.

Hence, clearly, no additional tax liability arises even after correcting the mistake of wrongly adjusting the LTCL of Rs.13,07,100/- against STCG.

Thus, under no circumstances, the order passed by the Ld. AO can be alleged to be prejudicial to the interest of the revenue is concerned."

7.4. We note that on the issue of adjustment of LTCG twice, admittedly, it is a fact on record that it occurred due to an inadvertent mistake on the part of the assessee. Further, it is evidently demonstrated that this does not have a bearing on the income-tax liability for the year under consideration. The effect is on the availability of MAT credit in subsequent year for which assessee submitted to make the course correction. Thus, in this context, it is a settled law that scope of section 263 to revise an assessment is different from scope of section 154 to rectify any mistake apparent from record.

7.4.1. Provisions of section 263 give jurisdictional power whereas provisions of section 154 gives power of rectification. It will not be correct to say that "rectification" is equal to "revision" under the Act.

7.4.2. Term "erroneous" used in the section 263 is to be read relating to jurisdictional error on the part of the Assessing Officer in exercise of his powers vested under the law. It cannot be read as to a "mistake" which is rectifiable under the provisions of section 154 either suo moto or on the application of the assessee.

7.4.3. Error committed by the Assessing Officer must be an error of jurisdiction, for if the order is not kept confined to jurisdictional error, no distinction would be left between the corrective powers conferred under section 154 and the revisionary powers exercisable under section 263.

If such a distinction between the corrective powers and revisionary powers is not recognized, every incorrect order would become amenable to revisionary jurisdiction and the fall out would be that revisionary jurisdiction would then become exercisable even in case where the provisions for rectification are attracted. Such an exercise of provisions of section 263 will lead to making the provisions of section 154 redundant.

7.4.4. Rectification u/s 154 can be done suo motto either by Assessing Officer himself or by the assessee on application. In the instant case, all the documents and details related to the impugned transaction were on record. We need to understand if such a mistake can lead to holding the order erroneous for the purpose of assuming jurisdiction u/s. 263 to invoke revisionary proceedings. The matter was open before Ld. AO to take appropriate measures for rectification of mistake apparent from records.

7.5. Considering the submissions made by the Ld. Counsel, we find that on this issue, present case is purely on facts which are verifiable from the records of the assessee, examination and verification of the original computation of income and tax vis-à-vis the revised computation of income and tax placed on record. Further, considering the judicial precedent in the case of Malabar Industries Ltd. (supra), we find that it is case of bonafide mistake committed by the assessee, which effectively does not result into prejudice caused to the revenue in the year under consideration. Liability of tax for the year under consideration is duly discharged by the assessee which has been evidently demonstrated from the two computations placed on record. Accordingly, on this issue raised by the Ld. Pr. CIT in the revisionary proceeding, no action u/s. 263 of the Act is justifiable.

8. Now, we take up the issue relating to DDT on the proposed dividend in which assessee has raised additional grounds of appeal. Facts relating to this are oozing from the issue recorded by the Ld. Pr. CIT in show cause notice itself, which is already extracted above. Important facts to be noted from the same are that assessee had proposed dividend of Rs. 90 lakh along with DDT of Rs.7,32,875/- for the FY 2017-18. This fact was reported in Form 3CD in Tax Audit Report u/s. 44AB. Ld. Pr. CIT has also noted the fact of payment of DDT of Rs.7,32,875/- on 28.09.2017 which is reflected in the Annual Tax Statement in Form No. 26AS. However, the details of DDT were not quantified in the return furnished by the assessee.

8.1. Before adverting on the additional grounds, we would first lay our hands on the factual disclosures made by the assessee in respect of proposed dividend and DDT thereon in its various records forming part of the paper book. First and foremost is a disclosure made by the assessee in the directors' report placed at page 23 of the paper book wherein while reporting operating results, assessee has made a disclosure of dividend paid for Rs. 90 lakh and dividend distribution tax on the same at Rs.7,32,873/-. Similar disclosure is made in the statement of changes in equity, forming part of the audited financial statement in the year under consideration, placed at page 51 of the paper book. We also take note of financial statement at note no. 46 wherein, at point no. 3, disclosure has been made towards proposed dividend and tax thereon. However, on perusal of income-tax return form filed in ITR-6, we note that in the 'schedule DDT' which relates to 'details of tax on distributed profit of domestic companies and its payment' is left blank, which is placed at page 144 of the paper book. Thus, from the above observations and noting there are disclosures of proposed dividend and DDT thereon done by the assessee in its audited financial statement and audit report. However, the same

remained to be included in the income tax return form which according to assessee, is an inadvertent mistake on its part.

9. Now, we delve on the question of law raised by the assessee by taking additional grounds on this issue for which we first appraise ourselves with the relevant provisions contained in the Act. The moot point raised by the assessee in the additional ground is that section 263 of the Act presupposes existence of an order in absence of which revisionary proceedings cannot take place. First, according to the assessee, an order passed u/s. 143(3) is not an order pursuant to imposition of liability u/s. 115-O read with section 115P. Since there is no order on the issue raised by the Ld. Pr CIT, there cannot be any exercise of revision which can be undertaken by him.

10. To express our views on the above contention, we first look at the provisions of sec. 263 of the Act, which is as under:

> *"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 Income-tax 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 afresh assessment."*

10.1. In view of the foregoing provision, it is seen that any order passed by the AO which is erroneous as well as which is prejudicial to the interests of the Revenue may be revised by the relevant competent authority provided an opportunity of being heard is given to the assessee and after making (or causing to be made) such inquiry as he deems necessary. Thus, for the application of sec.263(1) of the Act, four conditions are to be satisfied simultaneously: -

(i) There should be a proceeding.

(ii) There should be an order passed by the AO in such proceeding.

(iii) Such order should be erroneous and

(iv) Such order should be prejudicial to the interests of the Revenue.

10.2. As stated supra, power to invoke revisionary proceeding is not an arbitrary or unchartered power. It can be exercised only on fulfilment of the requirements laid down in sec. 263(1) of the Act. Again, it clearly follows from the above that section 263 of the Act can only apply to a case where an order has been passed by the ITO. That is to say, if the ITO fails to pass any order, the Commissioner is not empowered by the provisions of section 263 of the Act to compel the ITO to pass an appropriate order.

11. In the instant case, assessment was completed u/s.143(3) of the Act. In this context, it would be of relevance to reproduce sec.143(3) of the Act:

Sec.143(3) of the Income Tax Act, 1961, reads as under:

"143(3) On the day specified in the notice, issued under sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Assessing Officer may require on specified points, and after taking into account all relevant material which he has gathered, the Assessing Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him or refund of any amount due to him on the basis of such assessment:

……"

11.1. What emerges from the above is that in the assessment order passed U/S 143(3) of the Act, assessing officer is required to make assessment of the "total income or loss" of the assessee. That is to say the jurisdiction of Ld. AO u/s.143(3) of the Act is only to assess the total income or loss of the assessee and determine the sum payable by him or refundable to him on the basis of such assessment.

11.2.. It may be noted here that the expression "total income" is defined in sec.2(45) of the Income tax Act to mean the "total amount of income referred to in section 5, computed in the manner laid down in this Act. Scc.2(45) of the Act reads as under:

> *"sec.2(45) "total income" means the total amount of income referred to in section 5, computed in the manner laid down in this Act,· "*

11.3. In this regard, perusal of provisions of sec. 5 of the Act (relevant extract reproduced as under) shows that it talks about the income received or deemed to be received or accrued or deemed to accrue or arise. Thus when the assessing officer is determining "total income" of the assessee, he is required to look into the income received or deemed to be received or accrued or deemed to accrue or arise. Section 5 of the Act, reads as under:

> *"5. SCOPE OF TOTAL INCOME*
>
> *(1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which-*
>
> > *(a) is received or is deemed to be received in India in such year by or on behalf of such person; or*
> >
> > *(b) accrues or arises or is deemed to accrue or arise to him in India during such year; or*
> >
> > *(c) accrues or arises to him outside India during such yer:*
> >
> > *Provided that in the case of a person not ordinarily resident in India 'within the meaning of sub-section (6) of section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India.*
> >
> > *....”*

12. Coming to the facts of the assessee's case, it is seen that the question which arises for consideration is whether Ld. PCIT can revise the assessment order of the AO passed u/s.143(3) of the Act on the issue of short payment of DDT, which comes under separate Chapter XII-D.

12.1. In this regard, it may be noted that DDT is paid as per the provisions of sec.115-O (reproduced as below) which is titled as "Tax on Distributed Profits of Domestic Companies", and is a special provision under a separate Chapter XII-D. Sec.115-O. (1) reads as under:

> *"115-0. (1) Notwithstanding anything contained in any other provision of this Act and subject to the provisions of this section, in addition to the income-tax chargeable in respect of the total income of a domestic company for any assessment year, any amount declared, distributed or paid by such company by way of dividends (whether interim or otherwise) on or after the 1st day of June, 1997, whether but of current or accumulated profits shall be charged to additional income-tax (hereafter referred to as tax on distributed profits) at the rate of fifteen per cent. "*

12.2. As seen from the above, section Il5-O comes under a separate Chapter XII-D and enacts provision of overriding nature which shall prevail over any other provision contained in the Act.

12.3. It may be noted here that interest payable for non-payment of DDT by domestic company and when it is deemed to be in default are defined under sections 115P of the Act, reproduced as under:

> *"115P. Where the principal officer of a domestic company and the company fails to pay the whole or any part of the tax on distributed profits referred to in sub-section (1) of section 115-0, within the time allowed under sub-section (3) of that section, he or it shall be liable to pay simple interest at the rate of one per cent for every month or part thereof on the amount of such tax for the period beginning on the date immediately after the last date on tax was payable and ending with the date on which the tax is actually paid."*

12.4. Chapter XIID also has section 115Q with the heading 'when company is deemed to be in default'. The said section is reproduced as under:

> *"115Q. In any principal officer of a domestic company does not pay tax on distributed profits in accordance with the provisions of section 115-O, then he or it shall be deemed to be an assessee in default in respect of the amount of tax payable by him or it and all the provisions of this Act for the collection nd recovery of income-tax shall apply."*

12.5 It is pertinent to note from the above section that assessee has to be held as 'assessee in default' in respect of the amount of tax payable by it towards distributed profits. Further, it is only after holding the assessee as 'assessee in default' that the collection and recovery of tax payable under this Chapter can be made from the assessee. Provisions relating to collection and recovery of tax are common to both DDT and income-tax.

13. With the back ground of above provisions, Ld. Counsel for the assessee submitted that in case of failure of interest payable u/s.115P of the Act for short payment of DDT, as alleged by the Ld. PCIT in its order dated 30/03/2023 passed u/s.263 of the Act, a separate order will have to be passed for charging interest u/s.115P of the Act. Above view has been taken up by the Hon'ble Supreme Court in the case of Central Provinces Manganese Ore Co. Ltd. reported in [1986] 160 ITR 961 (SC), in respect of levy of interest u/s.215 of the Act.

13.1. Applying the same ratio to the facts of the present case, he submitted that an order levying interest u/s.115P of the Act is a separate and distinct order from the assessment order passed u/s.143(3) of the Act. This is because the assessment order culminates in raising a demand of tax which is created by charging section 4 of the Act, whereas, section 115P of the Act, which comes under a separate Chapter altogether, makes an assessee liable to pay interest when there is a shortfall in payment of DDT.

13.2. According to him, revision of an order u/s.263 of the Act presupposes existence of an order. Undoubtedly, there cannot be any revision of a non-existing order. In the instant case assessment order was passed u/s.143(3) of the Act where jurisdiction of Ld. AO is only to compute total income or loss of the assessee and determine the sum payable by him or refundable to him on the basis of such

assessment. Levy of interest u/s.115P of the Act for short payment of DDT u/s.115-0, which comes under a separate Chapter, was not a part of the assessment order passed u/s.143(3) of the Act. Facts of the assessee's case reveal that no order u/s.115P was passed charging interest for short payment of DDT. He thus contended that under such circumstances, the impugned assessment order dated 19/02/2021 passed u/s.143(3) of the Act cannot be termed as erroneous in so far as is prejudicial to the interests of the revenue as section 115-0 was not a part of the said assessment order. Hence, in absence of order u/s.115P of the Act imposing interest for short payment of DDT, Ld. PCIT has no power to revise the assessment order passed u/s.143(3).

13.3. In support of his argument, he placed reliance on the decision of Hon'ble Jurisdictional High Court in the case of P.P. Dinwala v. Commissioner of Income-tax reported in 78 TAXMAN 421 (CAL.).

14. Per contra, Ld. CIT, DR vehemently supported the order of revision passed by Ld. Pr. CIT. For the arguments made by him, he has placed on record, a written submission on the two issues raised by the Ld. Pr. CIT, the same are reproduced hereunder for ease of reference:

> *"The primary issue in the case was whether DDT should be levied on the 40% portion of dividend distributed by tea company as per Rule 8 of the IT Rules. The assessee filed a copy of Supreme Court order in the issue in the case of Jayshree Tea & Industries Ltd where SLP filed by the department was dismissed on the ground of delay. However, it is seen that the Supreme Court, in this very issue has pronounced an order dated 20/09/2017 where CA No. 9178 pertaining to Tata Tea Co Ltd, CA No. 9179 pertaining to George Williamson (Assam) Ltd and CA No. 9180 pertaining to Apeejay Surendra Corporate Service Ltd was decided, reversing the decision of Calcutta High Court in the matter of Jayshree Tea & Industries Ltd and holding that additional Tax can be levied only on the 40% of the dividend income shall be altering the provision of section 1150 for which there is no warrant. Therefore, as per this decision of the Supreme Court, full amount of dividend by tea company is taxable u/s 1150.*

The AR of the assessee filed additional grounds of appeal holding that an order of revision u/s 263 presupposes existence of an order and, as such, there cannot be any revision of a non existing order u/s 115P. According to him, in absence of an order u/s 115P of the Act imposing interest for short payment of DDT, the PCIT has no power to revise the impugned assessment order dated 19/02/2021 passed u/s 143(3) because section 1150 of the Act was never a part of the said order.

It is the argument of the assessee that section 1150 starts with a non obstante clause and, therefore, is an independent provision requiring passing of separate order u/s 1150 to determine tax on distributed profits of domestic companies. Similarly, as per the Ld AR of the assessee, for imposition of consequential interest upon shortfall of deduction of DDT, a separate order is needed u/s 115P also. In both the cases, the PCIT can only interfere U/S 263 where separate orders U/S 1150 and 115P exist. There is no scope to consider the issues of 1150 and 115P in an order of assessment of total income or loss.

The submission of the AR of the assessee is devoid of merit. There is no mention in the IT Act anywhere that to invoke provisions of 1150 and 115P, separate mechanism is required and that the issues cannot be dealt with while passing an order of assessment. Imposition of penalty u/s 115P forms part of the assessment order like imposition of interest u/s 234A/B/C. The assessee is required to file particulars of dividend declared in the return of income itself. In fact, in response to the show cause notice of the PCIT u/s 263, it was submitted, " ... The details of the same payment of DOT were duly disclosed in the Form No. 3CD filed by the assessee company, however, the same was omitted to be disclosed in the Return of Income filed for the relevant year due to a clerical mistake." (page 21 of the Paper book)

Further, the assessee submitted, "the assessee company had wrongly adjusted the Long Term Capital Loss of Rs. 13,07,100/- incurred during the year twice, once with Long term Capital Gain and again with Short Term Capital Gains as per the normal provisions of the Act.. .. there was no malafide intention of the assessee company to make such a mistake." (page 22 of the Paper Book)

First of all, the AR of the assessee admits that mistakes have been made. Secondly, he also admits that particulars of DOT are part and parcel of both the Tax Audit Report in Form 3CD as also the Return of Income. If proceedings u/s 1150 and 115P are delinked with the determination of income and loss, such requirements of filing details of DOT would not have been formulated in the return forms and there would have been separate mechanisms prescribed in the IT Act for invoking provision of 1150 and '115P, which is not the case. There is no such practice prevailing in the department to consider 1150 and 115P as separate and distinct proceedings.

Section 1150 starts with a non obstante clause as follows:

"Notwithstanding anything contained in an other provision of this Act and subject to the provisions of this section, in addition to the income-tax chargeable in respect of the total income of a domestic company for any assessment year, any amount declared, distributed or paid by such company

by way of dividends (whether interim or otherwise) on or after the 1st day of April, 2003 (but on or before the 31st day of March, 2020), whether out of current or accumulated profits shall be charged to additional income-tax (hereafter referred to as tax on distributed profits) at the rate of fifteen percent.."

It, therefore, appears that the non obstante clause has been used since tax u/s 1150 is an additional imposition apart from tax on income of the company as because dividend declared, distributed or paid by a company is not its income. This is a requirement to tax something which is not the income or deemed income of the assessee company. The dividend is taxed in the hands of the company, and it has to be considered as exempt income in the hands of the shareholder. The use of the non obstante clause cannot be stretched to mean that section 1150 or 115P acts independently and cannot form part of an order of determination of income or loss. If such an interpretation is to be accepted then all sections starting with the word

"notwithstanding" would require independent mechanisms. In such a scenario, section 115JB, 43B, 115QA for example, would all require separate orders to be invoked. In such a scenario, even for making an addition u/s 2(22)(e), there would be issues because for deemed dividend, section 1150 again requires deduction of tax @ 30%.

To sum up, the PCIT has rightly detected that there was error in the order passed u/s 143(3) dated 19/02/2021. He has rightly observed that the decision of the Supreme Court in the case of Malabar Industrial Co Pvt Ltd vs CIT and other decisions on similar issues as referred to in the 263 order apply. It seems that the AR of the assessee tried to misdirect the Court by first citing the instance of Jayshree Tea where Calcutta High Court had pronounced an order holding that additional tax can be levied only on the 40% of the dividend income and the SLP of the department was dismissed on the ground of delay on 28/07/2006. The Supreme Court decided identical issue vide order dated 20/09/2017 where CA No. 9178 pertaining to Tata Tea Co Ltd, CA No. 9179 pertaining to George Williamson (Assam) Ltd and CA No. 9180 pertaining to Apeejay Surendra Corporate Service Ltd was considered and the decision of the Calcutta High Court in Jayshree Tea case was reversed. It is in this backdrop that the AR came up with his absurd idea of requirement of separate 1150 and 115P orders by filing additional grounds since there is hardly any scope to disagree that the order of the AO was erroneous and prejudicial to the interest of revenue, requiring intervention of the PCIT u/s 263."

14.1. Ld. CIT, DR also pointed to the computation sheet annexed to the assessment order. In this computation sheet, at Row No. 60 titled as "Dividend Distribution Tax (DDT) Computation", details pertaining to DDT are taken note of. He also referred to Row No. 62 titled as "Aggregation of refund and demand arising out of assessment order (after rounding of and gross adjustments)" wherein DDT is also

included for gross adjustment. Above stated relevant Rows from the computation are extracted below:

60. DIVIDEND DISTRIBUTION TAX (DDT) COMPUTATION		
Sl. No.	Reporting Heads	As per Current Order
	DDT	
1.	DDT PAYABLE U/S 115O	0
2.	SURCHARGE ON DDT	0
3.	EDUCATION + SECONDARY & HIGHER EDUCATION CESS	0
4.	TOTAL DDT PAYABLE	0
5.	INTEREST U/S 115P	0
6.	TOTAL DDT LIABILITY	0
7.	TAX AND INTEREST PAID	0
8.	DDT AMOUNT PAYABLE/REFUNDABLE (6-7)	0
9.	INTEREST U/S 244A (till order date or accounting closure date)	0
10.	TOTAL DDT AMOUNT PAYABLE/REFUNDABLE (8+9)	0
11.	DDT REFUND ALREADY ISSUED	0
12.	BALANCE DDT AMOUNT PAYABLE/REFUNDABLE(10-11)	0

62. AGGREGATION OF REFUND & DEMAND ARISING OUT OF ASSESSMENT ORDER (AFTER ROUNDING OFF AND CROSS ADJUSTMENTS)		
HEADS	REFUND AMOUNT	DEMAND PAYABLE
INCOME TAX	0	1,17,58,042
DDT	0	0
BBS	0	0
BALANCE REFUND/DEMAND AFTER CROSS ADJUSTMENTS	0	1,17,58,040

14.2. According to Ld. CIT, DR, there is no separate requirement of passing of order for DDT liability which forms part of the assessment order itself. Since Ld. AO failed to take cognizance of DDT liability on the assessee, Ld. PCIT has rightly invoked revisionary proceedings u/s. 263.

15. We have heard the rival contentions and perused the material available on record. We deal with the additional ground taken by the

assessee on this issue raised by Ld. Pr. CIT for invoking the revisionary proceedings u/s. 263 in the instant case. The moot point before us, raised by the Ld. Counsel is that invoking revisionary proceedings u/s. 263 requires existence of an order under the Act, in absence of which jurisdiction u/s. 263 cannot be assumed. In the present case, the issue relates to DDT liability on the proposed dividend declared by the assessee. According to the Ld. Counsel, there is no order which raises a demand on the assessee by holding it as an assessee in default as required u/s. 115Q and, therefore, no revision can be done.

15.1. With the gainful understanding of the relevant provisions which we have already dealt in the above paragraphs, it is noted that an assessment order passed u/s. 143(3) requires the AO to make an assessment of 'total income or loss' of the assessee which has to be assessed in reference to section 5. Ld. AO is required to look into the income received or deemed to be received or accrued or deemed to be accrued or arisen while determining total income of the assessee for making an assessment u/s 143(3). We also refer to section 156 which deals with notice of demand wherein any tax, interest, penalty, fine or any other sum, is payable in consequence of any order passed under the Act, ld. AO shall serve on the assessee, a notice of demand in the prescribed form, specifying the sum so payable. Thus, there has to be an order passed under this Act for any sum which is payable by the assessee under the Act.

15.2. Contrary to the provision of section 143(3) read with section 156, we notice that DDT is a tax payable on distribution of profits and it is in no way connected to the determination of total income. Though, ld. CIT, DR has pointed out that the computation sheet annexed to the assessment order passed u/s. 143(3) contains details pertaining to

DDT as stated above, yet we note that thrusting the assessee with DDT liability along with interest thereon cannot be said to be arising out of regular assessment proceedings u/s. 143(3) of the Act. Liability towards DDT and interest thereon gets fastened on the assessee by provisions contained under Chapter XIID by way of sections 115-O, 115P and 115Q.

15.3. To deal with the above stated contentions on the issue, we refer to the provisions of appeal available to the assessee in this respect as well as we draw analogy from the provisions relating to failure/shortfall to deduct tax at source.

15.3.1. When we refer to the provisions as contained in section 246A dealing with filing of appeal by the assessee. In section 246A(1)(a), there are various types of orders passed by the tax authorities which can be appealed by the assessee and which, inter alia, includes –

(a) an order against assessee where assessee denies his liability to be assessed under the Act and

(b) any order of assessment u/s. 143(3).

15.3.2. From this understanding, in our view, DDT liability does not form part of undertaking regular assessment and passing an assessment order u/s 143(3) for assessing total income of the assessee. It can be challenged in appeal by the assessee only under the class “an order against the assessee where the assessee denies his liability to be assessed under this Act” and not under the class “any order of assessment in sub-section (3) of section 143”, mentioned in section 246A(1)(a).

15.3.3. Thus, appeal remedy available to the assessee in respect of DDT liability would fall under a different class of liabilities as mentioned in section 246A which can be challenged by the assessee by denying the liability under the Act. However, for demand raised on the assessee by undertaking regular assessment u/s 143(3) for assessing the total income, appeal would lie under the different clause as stated above. Therefore, there will be two different appeals for the demands raised under different sections of the Act.

15.4 On the second aspect for drawing analogy from the provisions relating to tax deduction at source, the said liability is fastened on the assessee separately, by the provisions contained in section 201(1)/(1A) after holding the assessee as 'assessee in default'. A separate proceeding is undertaken on the assessee as a deductor for default in compliance with the TDS provisions and order is passed by holding the assessee as 'assessee in default' to fasten him with TDS liability. However, while making regular assessment for assessing total income of an assessee, failure/shortfall to deduct tax at source leads to a disallowance in the hands of the assessee while computing income under the head 'profits and gains of business or profession', forming part of the assessment order u/s. 143(3).

15.5. In the present case before us, it is pertinent to note that Chapter XIID contains a specific section 115Q which requires the assessee to be held as 'assessee in default' towards the DDT liability for the default committed by it u/s 115O and 115P. Further, provisions of section 115Q when kept in juxtaposition with sub-section (2) of section 115O, makes it clear that even if there is no income-tax payable by the domestic company on its total income then also tax on distributed profits shall be payable by it. This leads us to a gainful understanding that even in a situation where case of assessee is not

selected for regular assessment u/s. 143(3) and where no income-tax is payable by the assessee on its total income, then also, assessee has to discharge its liability of tax on distributed profits, if it distributes profits. Thus, this clearly lays down that provisions relating to DDT liability contained under Chapter XIID are independent of the section relating to assessment of total income contained in section 143(3).

15.5.1. In absence of any regular assessment undertaken of a domestic company u/s. 143(3), if no income-tax is payable on its total income but if domestic company has distributed profits and there is a demand on its distributed profits u/s 115O and 115P, then, for recovery of the same, the assessee is to be held as 'assessee in default' which can happen only by passing an order to that effect is required by invoking the provisions of section 115Q.

15.5.2. For this DDT liability, after holding the assessee as an 'assessee in default', a notice of demand u/s. 156 pursuant to this order would make the assessee liable for the same and the provisions of collection and recovery of tax will follow, accordingly. If we go by the contentions made by the Ld. CIT, DR to accept that provisions relating to DDT liability forms part of the assessment of total income made u/s. 143(3), then, in our considered view, section 115Q is rendered otiose and would not have any occasion for its application.

15.6. Thus, in conclusion, it clearly appears from the scheme of the Act that an order of assessment passed u/s 143(3) is an assessment of total income of the assessee which is separate and distinct from any other order. DDT liability is distinct and separate from the liability to pay income-tax on the total income of an assessee which is created by charging section 4. Revision of an order u/s. 263 pre-supposes existence of an order. In view of the above discussion, levy of interest

u/s. 115P and any liability of DDT u/s. 115O does not arise out of conduct of assessment proceedings and making an assessment of total income u/s. 143(3), therefore, Ld. Pr. CIT could not have invoked revisionary proceedings to direct the ld. AO for imposing DDT liability on the assessee in reference to assessment order passed u/s. 143(3). There is no separate order in existence, fastening the assessee with DDT liability by holding it as an 'assessee in default', contemplated u/s. 115Q. Thus, in absence of the same, in our view, Ld. Pr. CIT is not justified in invoking the revisionary proceeding u/s. 263 and passing an order thereon. Thus, even on this issue, we hold that passing of revisionary order u/s. 263 is not justifiable.

15.7. Accordingly, impugned order passed by Ld. Pr. CIT on both the issues is quashed. Grounds taken by the assessee on both the issues are allowed.

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

Order is pronounced in the open court on 20th October, 2023.

Sd/-	Sd/-
(Rajpal Yadav)	(Girish Agrawal)
Vice President	Accountant Member

Date:20th October, 2023

JD, Sr. P.S.
Copy to:

1. The Appellant:
2. The Respondent:
3. ACIT,
4. DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata