IN THE INCOME TAX APPELLATE TRIBUNAL
"I" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No.827/Mum/2021 (Assessment Year 2013-14)

Barclays Bank PLC 9th Floor, Building No.6 Nirlon Knowledge Park Off. Western Express Highway Goregaon (E) Mumbai-400 63 PAN : AAACB4876G	Vs.	CIT(IT), Range-1 17th Floor Room No.1704, Air India Building Nariman Point Mumbai-400 021
(Appellant)		(Respondent)

Assessee by	Shri P.J.Pardiwala & Madhur Agarwal
Department by	Shri Sanjay Singh
Date of Hearing	04.10.2021
Date of Pronouncement	03.01.2022

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the assessee is directed against the order under section 263 of the Income Tax Act by Learned Commissioner of Income tax, dated 30.3.2021 pertains to assessment year 2013-14.

2. Grounds of appeal read as under:-

> Ground no 1: On the facts and in circumstances of the case in law, the learned CIT has erred in initiating proceedings under section 263 of the Act.
> 1.1 The CIT has erred in holding that order passed by the Assessing Officer (hereinafter referred to as the 'learned AO') under section 143(3) read with section 144C(13) of the Act dated 27 September 2017 (hereinafter referred to as the Assessment Order) is erroneous and prejudicial to the interest of the Revenue;

1.2 The CIT has erred in not appreciating that where a legally permissible view is adopted while passing the Assessment order, the same cannot be considered as erroneous for the purpose of section 263 of the Act;
1.3 The CIT has erred in setting aside the Assessment Order with directions to the learned AO to make a fresh assessment and examine the taxability of the following issues:

- Loss on transfer of retail loan portfolio amounting to INR 65,51,06,135;
- Loss on sale of loan portfolios to asset reconstruction company amounting to INR 5,62,20,992;
- Service tax credit written off amounting to INR 13,88,97,251; and
- Disallowance related to Derivative Sales Credit (DSC) amounting to INR 3,68,30,713

Ground no 2
On the facts and in circumstances of the case in law, the learned CIT has erred in initiating proceedings under section 263 of the Act when the original assessment order has been passed under section 143(3) r.w.s. 144C(13) of the Act on the basis of the direction of the DRP.
Ground No. 3
Without prejudice to Ground nos 1 & 2, the learned CIT has erred in fact and in circumstances of the case and in law in holding that the learned AO has not verified the details pertaining to the loss on sale of retail loan portfolio amounting to INR 65,51,06,135 and, hence, the assessment order is erroneous and prejudicial to the interest of the Revenue.
3.1 The CIT erred in holding that the Appellant has not explained the reasons for the sale of the retail loan portfolios at a loss, when the same were recoverable loans and thereby challenging the business decision of the Appellant;
3.2 The CIT erred in holding that the learned AO has not verified the valuation of the loans on the date of sale;
3.3 The CIT erred in holding that the learned AO has not examined whether the sale of retail loan portfolio under consideration could be regarded as a 'slump sale[1] under the provisions of section SOB of the Act.
Ground no 4
Without prejudice to Ground nos 1 & 2 above, the learned CIT has erred in fact and in circumstances of the case and in law in holding that the learned AO has not verified the details pertaining to loss on sale of loan portfolio to Asset Reconstruction companies amounting to INR 5,62,20,992 and, hence, the assessment order is erroneous and prejudicial to the interest of the Revenue .
4.1 The CIT erred in holding that the learned AO has not verified the treatment of the loss incurred on account of loan portfolio amounting to INR 5,62,20,992 and whether the treatment is in accordance with the methodology prescribed in the 'RBI master circular - Prudential norms on Income Recognition, Asset Classification' thereby mandating compliance with RBI norms while determining taxable income;

4.2 The CIT erred in not appreciating the fact that the treatment given by the Appellant on sale of loan portfolio is as per RBI Guidelines, which provides that the gains arising on sale of loans are obligated to be transferred to provision account and any future loss is required to be adjusted against such provision;

Ground no 5
Without prejudice to Ground nos 1 & 2 above, the learned CIT has erred in fact and in circumstances of the case and in law in holding that the learned AO has not examined the allowability of deduction pertaining to service tax written off amounting to INR 13,88,97,251 and, hence, the same is erroneous and prejudicial to the interest of the Revenue
5.1 The CIT erred in holding that the learned AO has not verified whether the deduction in respect of the service tax written off amounting to INR 13,88,97,251 is allowable under section 37 of the Act; and
5.2 The CIT erred in holding that the learned AO has not verified whether only unavailed credits of the year under consideration have been allowed or cumulative credits of various years has also been allowed.
Ground no 6
Without prejudice to Ground nos 1 & 2 above, the learned CIT has erred in fact and in circumstances of the case and in law in holding that the learned AO has not examined the disallowance relating to DSC and, hence, the same is erroneous and prejudicial to the interest of the Revenue
6.1 The CIT erred in holding that the learned AO has not complied with the directions of the Joint Commissioner of Income-tax for verification of DSC claim of the Appellant; and
6.2 The CIT erred in holding that the learned AO has not verified the facts and the claim of the Appellant regarding the appropriate recovery of the excess DSC paid amounting to GBP 425,123 (INR 3,68,30,713) by Barclays UK
Each of the grounds of appeal referred above is separate and may kindly be considered as independent of each other.
The Appellant craves leave to add, alter, vary, omit, amend or withdraw the ground of appeal and to submit such statements, documents and papers as may be considered necessary either at or before the hearing of this appeal so as to enable the Hon'ble Income-tax Appellate Tribunal to decide this appeal according to, law.

3. Before proceeding further, it will be gainful to refer to the assessment order passed in this case, which is subject matter of the section 263 of the revision:

"1. The return of income for Assessment Year 2013-14 was electronically filed by the assessee on 29 November 2013 declaring total income of Rs. 539,949,260/ . The return of income for Assessment Year 2013-14 was revised by assesses on 26 March 2015 declaring a total income of Rs. 630,837,420/-.

2. The case was selected (or scrutiny. Notices u/s 142(1) of the? I.T. Act dated 4[11]' October 201 b and 3"' November 2.016 along with detailed questionnaire wore issued and duly served upon the assessee.

3. In response to above notices, Authorised Representative of the assesses Shn Azecm Bundeally from M/s. S. R. B C & Associates UP, Chartered Accountants, attended and submitted the details called for, which are placed on record, (he case was heard and discussed with him

4. Barclays Bank PLC is a financial services group, based in the United Kingdom, engaged primarily in banking, investment banking and investment management, It is a leading provider of coordinated global services to multi-national corporations and financial institutions. Barclays Bank PLC has been involved In banking for over 300 years and operates in over 60 countries. Barclays Bank PLC commenced banking operations in India by obtaining commercial banking license in 1990. H offers its clients investment banking and corporate finance? services including international capital market products, foreign exchange and money market instruments, During the financial yeas relevant to assessment year 2013-14, Barclays was operating out of its Indian branches.

5. After due consideration of the evidences produced, including order passed by the Transfer Pricing Officer, draft order as provided under section 144C(1) of the Income Tax Act 1961 was prepared and sent to the eligible Assesses on 31[M] December 2016. The Assessee filed objection against the said draft order before the DRP-1, Mumbai.

6. On 6th September 2017, the DRP 1, Mumbai passed order under section 144C (5) of the Income? Tax Act 1961. The DRP-1, Mumbai, vide said order, directed the assessing officer to give effect to the directions contained in the said order. Effect to the directions of the DRP is given as under:

7. Adjustments made by the transfer pricing officer;-

7.1 Barclays Bank PLC had a number of international transactions with its associated enterprises. With respect to these transactions, the bank had submitted an audit report in Form No. 3CEB along with the return of income, which was forwarded to the Transfer Pricing Officer for computation of arm's length price vide letter dated 10.03.2016. The Transfer Pricing Officer has passed order under section 92 CA(3) of the Income-tax Act, 1961 dated 31[sl] October 2016 and made an adjustment of Rs, 83,04,bl,395. The details of adjustments are as under:-

Sr.No.	International Transaction	T.P.Adjustment(Rs.)
1	Adjustment on account of compensation receivable for marketing of derivative products	79,73,03,514
2	Adjustment on account of compensation receivable for counter	1,85,22,328

	guarantees issued	
3	Adjustment on account of interest on SWEEP deposits	6,83,969
4	Interest on money market loans and deposits	99,15,611
5	Coordination in respect of ECBs	40,25,973
	Total	83,04,51,395

7.2 Based on the order passed by the Transfer Pricing Officer, an adjustment of Rs 83,04,51,395/- was made to the total income of the Assessee. For that purpose, reliance was placed on the IPOs order, wherein issues of adjustments have been discussed in detail. TPO's order under section 92CA(3) is enclosed and shall forms part of the assessment order

7.3 Assessee filed objections before the DRP 1, Mumbai, disputing adjustments proposed by the TPO and as adopted and applied by the AO. The DRP-1, Mumbai, vide order dated 6^{m} September 2017, passed under section 144C(5) of the Income Tax Act 1961, has dismissed and rejected all objections raised on the issue of TP adjustments. In view of the statutory directions issued under section 144C(5) of the l.T. Act 1961, addition of Rs. 83,04,51,395/-, is made to the total income of the Assessee. It is clarified that for making addition, a reliance is placed on the order of the TPO and subsequent directions issued under section 144C(5) of the l.T. Act.

8. Derivative Sales Credit (DSC)

8.1 The assessee, in the year under consideration, has remitted GBP 5,11,510 (INR 4,43,14,888) to Barclays UK as DSC. Of the total remittance of GBP 5,11,510, remittance amounting to GBP 1,511 i.e. Rs 130,906 (calculated on average basis) were actual payments while GBP 425,123 i.e. Rs 36,830,713 (calculated on average basis) pertains to excess paid and thus, reversed/recovered later. Further, remittances amounting to GBP 84,876 i.e. 7,353,269 (calculated on average basis) are in the nature of reversals of earlier receipts. Further, the assesse contended that the said payments are not subject to tax and accordingly no TDS is required to be withheld on the same.

8.2 In the written submission dated 16 December 2016, it is contended as under:

"Barclays Capital. ;i division of Barclays Bank Ple. UK (Barclays UK) manages the global derivatives operations of the Barclays group. The derivative products offered to clients typically include foreign exchange, interest rate and equity. The remittance made to Barclays UK is in relation to the origination, coordination and client relationship management activities undertaken with clients/prospective clients outside India, in respect of derivative products of the assessee. This payment for the said activities within the Barclays group is termed as Derivative Sales Credit(DSC). Barclays UK is remunerated for these activities as per the global transfer pricing policy followed by Barclays Group. Barclays UK performs the DSC activities in the ordinary course of its business.

Further, we wish to submit that Barclays India also receives from Barclays UK the DSC in relation to the origination. Coordination/liaisoning and client relationship management activities undertaken by Barclays India with client/s prospective clients in India requiring exposure in UK or other overseas markets in respect of derivative products of Barclays UK. Accordingly, Barclays India would receive as well as pay DSC to Barclays UK.

The revenue in the books of Barclays UK/India is booked on the basis of Estimated Day-I P&L ie difference between the value of prospective net cash flows based on the transaction price(i.e the price at which the transaction has been entered with the clients) and value of the prospective net cash flows based on market price/price at which the transaction could be hedged in the market (i.e the price based on the market parameters). Hence, there could be reversal of earlier receipt/payments identified at the time of revaluation of derivative contract (i.e marked to market valuation) undertaken by Barclays India on monthly basis or actual realization of profits/losses at the time of settlement of the derivative contract.

8.3 The above issue was examined in detail by the Joint Commissioner of Income-tax Range-l(2), who after due consideration, issued directions under section H4A of the Act, dated 13. 12. 2016, which is enclosed as Annexure B. and shall form the part of the order.

8.4 In view of the said directions u/s. 144A, the assessee was again asked to substantiate the claim of payment to Barclays UK and supporting documents evidencing the services rendered by Barclays UK to Barclays India. Vide submission dated 28'" December 2016, the Assessee only provided certain deal tickets (sample basis) as documentary evidences. However, the same was not found sufficient to establish the involvement of Barclays UK rendering services to the Barclays India in the derivative sales transactions. Accordingly the DSC expenses amounting to GBP 1,511 (Rs 130,906) was not considered as expenses incurred for the purpose of the India business of the assessee and is disallowed under section 37(1) of the Act and added back to the total income of the assessee.

8.5 Further, in respect of GBP 84,8/6 paid during the FY 7012-13, the assesse submitted that the same were recovered in excess earlier and hence paid back during the FY 2012-] 3. the assesse was asked to submit documentary evidences supporting the excess recovery of said payments. However, the assesse vide its submission dated 28 December 2016 only submitted the product level details and failed to submit party-wise details to evidence the derivative transactions. Accordingly, given the lack of sufficient documents, the said DSC expenses amounting to GBP 84,876 (Rs 7,353,269) is disallowed under section 37(1) of the Act and added back to the total income of the assessee. Penalty proceedings u/s. 271(1)(C) are initiated on this issue.

8.6 Assessee filed objections before the DRP-1, Mumbai, disputing additions on the above issues. The DRP 1, Mumbai, vide order dated 6'" September 2017, passed under section 144C(5) of the Income Tax Act 1961, has dismissed and rejected all objections raised on the issue. In view of the statutory directions issued under section 144C{5) of the I.I. Act 1961, re computation of DCS expenses, and consequent upward adjustment to the total returned income, as made in the draft order, shall continue. Penalty proceedings initiated on this issue. 9. In view of the order passed under section 144C(1) followed by order passed under section 144C(5) of the I.T. Act 1961, total income, as provided under section 144C(13) read with section 1.43(3) of the Income Tax Act 1961 is computed and assessed as under:

	Particulars	Amount (Rs.)
	Profits & Gains of Business/Profession as per Profit and Loss Account.	-563,809,000
Add;	Inadmissible items	5,795,104,378
Less:	Admissible Items{without considering deduction under section 36(i)(vii)(a) and section 44C of the Act)	-4,524,893,777
Less;	Deduction under section 80 G	-1,206,122
Add:	Total Business Income	705,195,479
Add:	As per TPO's order	83,04,51,395
Less:	Derivative Sales Credit	7,484,175
Less:	Deduction under section 36(1)(vii)(a) of the Act	7,35,39,865
Less:	Deduction under section 44C of the Act	7,35,39,865
	TOTAL TAXABLE INCOME	139,60,51,319

	Rounded off to	139,60,51,319

10. Assesse accordingly u/s. 143(3) r.w.s. 14C(13) of the Income-tax Act 1961. Give credit for prepaid taxes after due verification. Charge inters u/s. 234A/234B/234C of the Act, if applicable. Computation sheet shall form part of the assessment order. Issue demand notice and challan/RO accordingly. Issue, notice u/s. 274 r.w.s. 271(1)(c) of the Income tax Act, 1961."

4. As against the above, brief facts noted by the Ld.CIT in this order are as under:-

Barclays Bank Plc is a Branch of Barclays Bank based in the United Kingdom engaged in the business of Banking.

The case of M/s Barclays Bank Plc was selected for scrutiny assessment for A.Y. 2013-14. Further, the AO has made a reference under section 92 CA (1) of the IT Act 1961 to Transfer Pricing Officer (TPO). The TPO vide order under section 92CA of the IT Act 1961, has not proposed any adjustments. Thereafter, assessment order u/s 143(3) r.w.s I44C(13) of the I.T. Act was passed by the AO on 27.09.2017 on total income of Rs 1,396051,319/-.

5. On these background, Ld. CIT observed as under :-

"On examination of the case record in the case of M/s. Barclays Bank PLC for A.Y. 2013-14 in which the assessment order has been passed u/s 143(3) r.w.s 144C of the IT Act, 1961 on 27.09.2017, following discrepancies have been found:

(i) M/s. Barclays Bank PLC is a company incorporated in United Kingdom and is engaged in the business of banking and as such the provisions of section 36(1)(viia) are applicable to it. As per the provisions of section 36(1)(viia), a bank incorporated outside India can claim an amount not exceeding 5% of the total income in respect of any provision for bad and doubtful debts. Further as per the provisions of section 36(2)(i)money lent in the ordinary course of business which is not recoverable, can be claimed as bad debts as per the first proviso of section 36(1)(vii) subject to provisions of section 36(1)(viia)r.w.s 36(2)(v). Section 36(i)(vii) deals with actual write off and section 36(l)(viia) deals with provision of bad and doubtful debts. As per notes to the financial statements schedule 18(2), the bank decided not to originate any retail loans pertaining to the retail banking division with effect from 07.12.2011 till the finalisation of a new strategy and focused on servicing the existing retail loans portfolio. Based on a strategic review, during the year, management decided to dispose portfolio comprising of personal instalment loans, business instalment loans, home loans and loans against property. These were sold to unrelated third party banks and not to

any Asset Reconstruction Companies. As these loans were purchased by the third party bank, it clearly indicates that these loans were live and recoverable and capable of earning profit. The net loss on account of transfer of the these loans of Rs. 65,51,06,124/- has been debited to the Profit and loss account as loss on disposal of assets. From the records it is seen that the assessing officer had not made any enquiry regarding the loss of Rs.65,51,06,124/- claimed by the assessee. There is no submission of the assessee on record regarding the same except the notes to the financial statements. Further, it is also noticed that the assessee has made sale of the loan portfolio business as one time basis, therefore the same is to be classified as a Slump Sale within the meaning of the proviso to sub section 1 of Section 506 of the IT Act. It is also not clear whether this amount has been included for calculation of deduction u/s. 36(i)(viia). In this regard, you are requested to furnish information as to why the same should not be treated as Slump Sale within the meaning of the proviso to sub section 1 of Section 50B of the IT Act.

(ii) During the period relevant to the assessment year under consideration M/s. Barclays Bank PLC sold certain loans to Asset Reconstruction Companies (ARC). The aggregate value of such loans in the books was Rs.20,94,9 1,000/ -(rounded off) and the aggregate sale consideration of the said loan portfolio was *Rs. 15,32,70,000/- resulting in a*

net loss of Rs.5,62,21,000/-(rounded off). The assessee has claimed deduction of Rs 5,62,20,992/- in respect of Loss on sale of loan portfolios (Omega! Vishal) in Computation of Total Income. As per the guideline issued by the RBI, the said loss is to be transferred to provisions! Reserve account and not to be debited to the profit and loss account. There is nothing on the record whether the AO has verified the deduction made by the assessee in computation of income of Rs. 5,62,20,992 / - in respect of Loss on sale of loan portfolios and whether the amount required to be made as provision / Reserve accounts and per guideline of the RBI is allowable as business loss has not been verified by the Assessing Officer.

(iii). As per rule 6(3B) of CENVAT Credit Rules 2004, a banking company, engaged in providing services by way of extending deposits, loans or advances, shall pay an amount equal to 50 percent of the Cenvat credit availed on inputs and input services. Accordingly, a banking company is eligible to claim only 50 percent of the input credit available. During the financial year ended 31.03.2013, the assessee has written off the service tax credit to the extent of 50% amounting to Rs. 13,88,97,25l/- since it is not eligible to claim the said input creditand debited the P&L account as other expenditure. The Assessing officer has not verified whether such deduction being a type of tax paid by the assessee is allowable u/s. 37 **or** not.

iv). The Joint Commissioner of Income tax Range 1(2) had issued order u/s 144A dt. 13/12/2016 to the AO to verify the derivative Sales Credit (DSC)

claim of the Assessee Bank, wherein he observed that no evidence or supporting documents has been produced by the assessee Bank before him to establish its claim that the transactions in respect of the Indian clients actually originated from UK and Barclays Bank PLC UK referred these case to the assessee bank. The JCIT(11)- 1(2), Mumbai has also directed the AO to ask the assessec to furnish the details in respect of Sale of the Derivative Products for A.Y. 2013-14 in respect of Indian clients with details, production Description, Date of Sale, Amount received and Mode of Payment including the Modus Operandi. Further, *he has also* directed the AO to take into the consideration of the contents of the letters forwarded to him by the ITO (LT)-1(2)(2), Mumbai dated 09.11.2016 & 11. 11.2016 after verification of DSC Payment from the Form 15CA/CB filed the assessee.Ori a perusal of the draft assessment order, it is seen that although the directions in the order u/s 144A has been made a part of the draft order, no cognizance of the actual directions have been taken. The AO has not verified the claim of the assessee with cogent evidences to corroborate that:-

a) The transactions in respect of the Indian clients art uallv[1]originated'
from UK and Barclays UK 'referred' these eases to Barclay India.
b) Even if it is so Barclays UK actually performed any service in respect of such clients other than merely referring, and

c) Whatever services that Barclays UK performed can actually be termed as 'technical services'
In view of the above findings, the whole remittance of Rs.4,43,14,888/- equivalent of GBP *5,* 11,510 to Barclays UK towards Derivative Sales credit as discussed in the assessment order and the remittance of GBP 3,57,788 equivalent to Rs.3,10,35,265/- as intimated by the ITO 1(2)(2) is not an allowable expenditure and has to be disallowed. However, the AO has restricted the disallowance to GBP 1511 (Rs.130906) and GBP 84,876 (Rs. 73,53,269/-) on account of DSC payment witho9t properly verifying the claim of the assessee with corroborative evidence."

6. Based on the above observation CIT opined that aforesaid order was not only erroneous but prejudiced to the interest of Revenue. Accordingly notice was issued to the assessee. Ld. CIT thereafter referred to various submissions made by the assessee. Ld CIT addressed the assessee's submission that details were submitted to the AO. Further, ld CIT observed that it is seen that the assessee has filed certain submissions on various dates before that AO, however the AO has accepted the submission without examining the same or conducting further enquiries.

7. Ld CIT proceeded to reject the submissions by observing as under :-

11.1. The judicial precedents are contrary to the claim of the assessee that mere filing of details on an issue is sufficient to preclude the Commissioner of Income Tax from acquiring jurisdiction under section 263 of the Act. That is to say, such a proposition would be a misconceived one. In the case of *Mahatakshmi Liquor Promoters 'P Ltd us. Commissioner of Income To* [2013] 29 taxmann.com 70, the Id. Tribunal, found that there was no enquiry by the Assessing Officer on the issues raised by the CIT. It was held that the lack of enquiry or inadequate enquiry by the Assessing Officer was a valid reason for revision of the assessment order. The Id. Tribunal further held that it can safely be said that an order passed by the Assessing Officer becomes erroneous and prejudicial to the interests of the Revenue under section 263 if it is a stereotype order which simply accepts what the assessec has stated in his return **or where he fails to make the requisite enquiries or examine the genuineness of the claim** called for. In this case the Assessing Officer merely on the basis of the submissions made by the assessee has passed the assessment order without examining the nature and details of each transactions and the basis of various deductions claimed in the ROt like loss claimed for bad and doubtful debts, the genuineness of the loan portfolio sold to third parties claimed as Bad debts. Further the assessee has sold loan portfolio business as one time sale. The AO has not examined the nature of the said business and has simply accepted the submissions made by the assessee. The assessee has claimed deduction on loss on account of sale of loan to Asset Reconstruction Companies. The nature of such claim is *not examined by* the A.O. The A.O has allowed deduction u/s 37 for services tax written off without verifying the claim of assessee. The A.O has also failed to examine the incorrect claim of derivative sales credit DSC and has passed the assessment order without conducting any independent enquiry regarding the details of the above claims made by the assessee.

11.2. Further the *case* laws cited by assessee are not applicable to the facts of the case of the assessee as the facts are distinguishable for instance in the case of Coastal Gujarat Power Ltd 2019(103 taxmann.com *4*18 Bom) in the said case the there was *a* different interpretation of the provisions of that case whereas in the case of the assessee deductions have been claimed under various provisions of the act which has been allowed by the A.O without verifying the same.

11. 3. Further in the case of *Rameshchandra Malerarn Varrna us. Drn7' [20021* 121 Taxman 29 (Ahd.)(Mag.) it was held that the Commissioner was justified in passing order under section 263 of the Act where the Assessing Officer had not examined the issues or had

not conducted any enquiry on the submissions filed by the assessee. It was held that mere filing of an explanation was not sufficient given that there **was** no proper verification.

11.4. The two essential pre-requisites - Two prerequisites must be present before the Commissioner can exercise the revisional jurisdiction conferred on him. First is that the order passed by the AO must be erroneous. Second is that the error must be such that it is prejudicial to the interests of the revenue These two pre-requisite conditions were fulfilled in this case

11.5. Reliance is placed on the decision in the case of Pt. Lashkari Ram 272 ITR 309(Al1), wherein it has been held that failure to make sufficient enquiry with regard to the revised income justified revision u/s 263. In the case of Ramapyari Devi Saraogi 67 ITR 84(SC), it was held that where Assessment completed in undue haste and without making proper enquiry, the CIT can invoke revisional power under sec. 263.

11.6. In the case of CIT v. Pushpa Devi [19871 164 ITR 639 (Pat,): Non-enquiry into source of capital is an error - Enquiry into the source of the initial capital is crucial for the AO. If that is not done, the assessment is bound to be erroneous and hence prejudicial to the revenue.

11.7. In the case of Gee Vee Enterprises v. Addl. CIT 119751 99 ITR 375 (Delhi).-Omission to make further enquiries is an error - The Commissioner can regard the AO's order as erroneous on the ground that in the circumstances of the case the AO should have made further enquiries before accepting the statements made by the **assessee** in his return.

11.8. In the case of Arnbica Agro Suppliers 100 TTJ 405(Pune)-No enquiry regarding expenditure etc. Mere filing of explanation does not indicate application of mind-Acceptance of explanation without enquiry-Revision justified.

11.9. In the case of Shyarn Telelink Ltd vs ITO(2006) 101 TTJ 387(Del)Failure on the part of the AO to make necessary enquiries on certain important points connected with the ***assessment*** *would* certainly make the order erroneous.

11.10. In the case of ITO vs KJMC Capital Market Services Ltd(2006) 156 Taxman 187(Mum)-Order passed by the AO is rendered erroneous if he initiates an enquiry but abandons same half way or does not make requisite enquiries necessary for examination of claim under relevant provisions of law or does not judicially evaluate results of enquiries, 263 was rightly invoked.

11.11. Thus, the legal contentions of the assessee against the revision u/s.263 are not tenable.

8. Thereafter ld CIT held that each of the issues of assessment have been examined in detail as to whether they are actually erroneous and prejudicial to the interest of Revenue. Thereafter he held as under :-

> "Issue 1: Disallowance u/s 36(1)(viia) As seen the assessee has claimed Loss on transfer of retail loan portfolio amounting to Rs 65,51,06,135/-. The sale consideration is Rs 10.08,78,26,826 and the aggregate book value (net of provisions) of such loans stood at Rs 10,74,29,32,961 resulting in a net loss of Rs 65,51,06,135. The party-wise details of sale of such loans have been tabulated as under:

Particulars	Name of the Party (Amount in INR)	
	Standard Chartereded Bank (SCB)	Kotak Mahiridra Bank (Kotak)
No of accounts sold	9,495	3,897
Aggregate book value(net of Of provisions) of the accounts	6,35,95,40,508	4,38,33,92,453
Aggregate sale consideration	62389,52 182	384,88,74 644
Net loss on sale of retail loans	1 120588 326	1 5345 17 809
T o t a l l o s s -	65,51 06 135	

> The assessee has not explained why these financial assets i.e retail loans wcrc sold at a loss as these loans were recoverable. The A.O has not examined the valuation of these loans on the date of sale. Para 6.4 detailing Procedure for sale of banks/FIs' financial assets to SC/RC, including valuation and pricing aspects of the MASTER circular issued by RBI dated 1 July 2015 regarding prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances, lays down that banks which propose to sell their financial assets should ensure that the sale is conducted in a prudent manner in accordance with a policy approved by the Board. One of the key ingredients is that there has to be a "Valuation procedure to be followed to ensure that the realisable value of financial assets is reasonably estimated". The AO has not examined this aspect at all while allowing the loss of Rs.65.51 crores claimed by the assessee. No docents have been furnished before the A.O. Allowance of such a large

claim without adequate examination is not only erroneous but also prejudicial to the interests of Revenue.

14. Issue 2: Slump sale under Section 50B

The assessee has made sale of loan portfolio business as one time basis, therefore the same is in the nature of slump sale within the meaning of the proviso to sub section 1 of Section 50B of the Act.

The provisions of section 50B of the Act, any profits and gains arising from slump sale effected in the previous year, shall be chargeable to income tax as 'capital gains' arising from the transfer of long-term capital assets and shall be deemed to be the income of the previous year in which the transfer took place.

The term 'slump sale' has been defined in Section 2(42C) of the Act as the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sale.

Further, the term 'undertaking' is defined in Explanation 1 to Section 2(19AA) of the Act, to include any part of an undertaking, or a unit or division of an undertaking or a business activity taken as a whole but does not include individual assets or liabilities or any combination thereof not constituting a business activity.

In the case of Rohan Software Pvt. Ltd v ITO 304 ITR 314 (An (MUM) it has been held that the assessee had transferred its business including intellectual property, codes, formulae and designs, along with all the rights. However, it did not transfer all assets and liabilities pertaining to the undertaking The Hon'ble Income Tax Appellate Tribunal (Tribunal), Mumbal held that if the purchaser could carry on the business, which was carried by the seller prior to the business transfer, without acquiring all assets and liabilities of the undertaking, plea of the revenue that the seller has not sold the undertaking as a whole, is difficult to accept. The Tribunal has observed-

In brief, as discussed hereinabove, "slump sale" has been defined as transfer of one or more undertakings as a result of sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales. In the instant case of the assessee, though in the purchaser's books of account the individual assets have been priced independently, assessee had not assigned separate values and consequently sold the items for independent price. It is not the revenue's case also that individual also assets had the price fixed separately and charged. "Undertaking" is explained in Explanation Ito section 2(19AA). According to this Explanation, as we noted **already above,** includes any part of an undertaking or a unit or division of an undertaking or a business activity as a whole. Revenue's case is that some of the items like motor car and building has been retained by the assessee; as such this cannot be treated

as a slump sale. But the fact to be considered is assessee is in the field of intellectual property rights. Computers, furniture, etc. which is linked with the business of the assessee has. been sold. The items that the assessee kept separately, has nothing to do with assessees business, which is sold/ handed over to the purchaser, i.e., IISL. The business has been sold. The purchaser could very well carry on the business, which was carried by the assessee before the sale, without purchasing any independent items. In view of the above, the plea of the revenue that the assessee has not sold the undertaking as a whole, is difficult to accept".

The Honble Punjab & Haryana High court in case of Max India 319 ITR 68 held that the Tribunal held that the sale was a slump sale if it was a sale of a going concern, even if some of the assets were retained by the transferor and sections 50 and 50A of the Act were not applicable.

In this case, the assessee has transferred a business asset and the business asset was transferred for a lump sum consideration without any specific value assigned to each asset. This particular asset of the Bank comprising of retails loans portfolio was sold on lump sum consideration and the assessee has not been able to produce the basis of valuation of each asset. For treating a transaction as slump sale ant not itemised sale, one needs to consider the intention of the parties and facts and documents of each transaction. Even if liabilities are not transferred the transaction can be deemed to be a slump sale provided there is a transfer of an undertaking. In the case of a bank, the "retail loan portfolio" is a complete segment in itself. Media reports indicate that in December 2011, Barclays India decided to exit its retail business, a fact which has not been submitted by the assessee before the AO. Coupled with the fact that no valuation report has been furnished and that there is no iternised sale, it ought to have been examined by the AU whether this was one of slump sale. Non-examination of this issue by the AU is not only erroneous but also prejudicial to the interests of Revenue.

15. Issue 3: Business Loans sold to ARC debited to P& L Account:

It is observed that the assessee has sold loans to Asset Reconstruction Companies (ARC). The aggregate value of such loans in the books was Rs 20,94,91,000/-and the aggregate sale consideration of the said loan portfolio was Rs 15,32,70,000/- resulting in a net loss of Rs 5,62,21,000/.

The assessee has claimed deduction of Rs 5,62,20,992/ in respect of loss on sale of loan portfolio (Omega/Vishal) in computation of total income. As per the RBI Guidelines, the said loss is to be transferred to provisions/ Reserve account and not to be debited to the profit and loss account. The A.O has not verified this aspect whether the deduction claimed by the assessee in respect of loss on sale of loan portfolio and whether the amount required to be made as provision.

16. Issue 4: Service tax credit written off:

As per Rule 6(38) of Cenvat Credit Rules 2004, a banking Company, engaged in providing services by way of extending deposits, loans or advances, shall pay an amount equal to 50% of the Cenvat Credit availed on inputs and input services. Accordingly, a banking company is eligible to claim 50% of the input credit available. During the F.Y. ending 31.03.2013, the assessee has written off the service tax credit amounting to Rs 13,88,97,251/- since it is not eligible to claim the said input credit and debited the P& L account as other expenditure. Among others, the AO has not examined (i) whether such a deduction being a type of tax paid by the assessee is allowable u/s 37 or not; (ii) whether only the unavailed credits of the year under reference have been allowed or cumulative credits of various years has been allowed. Non-examination of this issue by the AO is not only erroneous but also prejudicial to the interests of Revenue.

17. Issue 5: Disallowance related to DSC:

The then Joint Commissioner of Income Tax Range 1(2) had given direction u / s 144A vide order dated 13. 12.2016 to verify the derivative Sales Credit (DSC) claim of the assessee. He observed that no evidence or supporting documents has been produced by the assessee Bank before him to establish it's claim that the transaction in respect of the Indian clients actually originated from UK and Barclays Bank Plc UK referred these cases to the assessee bank. The assessee was asked to furnish the details in respect of Sale of Derivative Products for A.Y 2013-14 in respect of Indian clients with details, production description, Date of sales, Amount received and Mode of payment including the modus operandi. [it may be noted that no such details have been filed during the course of S.263 proceedings as well]. Further the JCIT had directed the A,O to take into consideration the contents of the letter forwarded to him by 1TO(IT) 1(2)(2) Mumbai and the inputs in his letter dated 09.2016 and 11.11.2016 after verification of DSC payments from FORM No I 5CA/CB filed by the assessee. it is a matter of fact that (i) the AO has not fully complied with the directions of the JCIT: (ii) the A.O has not verified the claim of the assessee with cogent evidences to *corroborate that (a) the transaction* in respect of Indian clients actually originated from UK and Barclays UK referred these cases to Barclays India, (b) whether Barclays UK actually performed any service in respect of such clients other than merely referring them to the assessee, (c) whatever Services that Barclays UK performed can actually be termed as "technical Services". The submissions of the assessee has been carefully perused the fact remains the assessee has not been able to substantiate with evidences that the transaction actually originated in UK for the Indian clients. Whether Barclays has actually performed any service in respect of clients are not supported by any evidences. Further A.O has not examined whether the nature of services rendered by Barclays UK can be termed as "technical services" in view of the information sent by ITO I (2)(2) regarding the allow ability of the same. The claim of the assessee that the entire excess payment *OBP has* been

appropriately recovered from Barclays U.K barring a few samples of SWIFT messages submitted needs proper examination with evidence.

18. In light of the above facts and circumstances and after taking into consideration the written submissions made by the assessee during the course of proceedings u/s.263 of the I.T.Act, 1961 the undersigned is of the opinion that the assessment order dated 27.09.2017 passed u/s.143(3) r.w.s 144C of the of the Act was erroneous and prejudicial to the interest of the revenue. Therefore, the same is hereby set aside with direction to the assessing officer to call for details of allowability of the various deductions claimed by the assessee in light of the observations as discussed above and examine the same after taking the necessary administrative approval as prescribed by relevant provisions. In doing so, it is reiterated that he will observe the principles of natural justice by affording adequate opportunity to the assessee to file details and explain its case, arriving at a lawful conclusion."

9. Against the above order the assessee is in appeal before us.

10. We have heard both the parties and perused the record. Ld counsel for the assessee has summarized his submission on the jurisdictional aspect as under :-

Re: Ground no 2:

The Assessee's Ground of Appeal No. 2 reads as follows:

"On the facts and in circumstances of the case in law, the learned CIT has erred in initiating proceedings under section 263 of the Act when the original assessment order has been passed under section 143(3) r.w.s. 144C(13) of the Act on the basis of the direction of the DRP".

In this regard, we submit as under:

1. An Order passed at the direction of Superior Officer can only be revised, if it comes within Explanation 1(a) to section 263 of the Act -

1.1. As per the provisions of section 263 of the Income-tax Act, 1961 (Act), the Principal Commissioner or Commissioner may revise an order passed by the Assessing Officer, if the same is erroneous in so far as it is prejudicial to the interest of the revenue.

1.2. Further, Explanation 1(a) of the Act has clarified the scope of what can be constituted as an order passed by the Assessing Officer, as mentioned below:

"Explanation 1. - For the removal of doubts, it is hereby declared that, for the purposes of this sub-section-

(a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include-
(b) (i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 1444-
(c) (7i) an order made by the Joint Commissioner in exercise of the powers or in the pemformance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General or Principal Commissioner or Commissioner authorised by the Board in this behalf under section 120;"
(d) 1.3. From the above explanation, it can be seen that the orders passed by the Assessing Officer pursuant to the directions of a superior officer can be revised under section 263 only in cases covered by clause (1) of the Explanation Ito section 263 of the Act.
(e) 1.4. Further, from the Finance Act, 2009, memorandum explaining the rationale behind the insertion of section 144C of the Act by the Finance Bill, 2009 as also the Circular No. 5 of 2010 dated 3 June 2010 issued explaining the said insertion, the notes on clauses, etc., it can be seen that consequential amendments have been made to various provisions of the Act as a result of insertion of section 144C in the Act. Such consequential amendments have been made to section 13 1, section 246A and section 253 of the Act. However, no amendment is made in section 263 of the Act as a consequence of insertion of section 144C of the Act to deem such orders being capable of being revised. Therefore, the memorandum, circular, etc. support the Assessee's stand that once the Assessing Officer passes an order in accordance with the Directions issued by a superior authority (being DRP) the same cannot be revised by the CIT under section 263 of the Act.
(f) 1.5.Reliance in this regard is placed on the following decision -
(g) Virendra Kumnar Jhamb v. N.K. Vohra [2009] 176 Taxman 11 (Born.) wherein it was held by the Jurisdictional High Court that the assessee had approached the DDIT (investigation) under the Direct tax Amnesty Scheme. The CIT had accepted that the taxable income be computed at 8 percent of the total receipts. A second CIT, on scrutiny and verification of the assessees records, found the decision of the earlier CIT to be fair and justifiable. A subsequent CIT, sought to revise the order under section 263, and tax income at 9 percent of the receipts. The Bombay High Court inter alia held that the assessment orders were solely based on the directives of the earlier CITs, and the same could not be revised by the subsequent CIT under section 263.
(h) 2. Trustees of Parsi Panchayat Funds & Properties v. Director of Income-tax [1996] 57 lTD 328 (Bombay,) wherein the Tribunal upheld the argument of the assessee that when an order is passed by the Assessing Officer pursuant to the directions of a superior authority, the same could not be the subject matter of revision under section 263 of the Act.

1.6. The appellant submits that in the case of Philips India Ltd. v. Pr, CIT [I.T. Appeal No 1142 (Kol) of 2016, dated 27-3-2019, the Tribunal has rejected the submission of the Appellant by holding in para 9.1 that the explanation only clarifies the powers that are inherently held by the PCIT under section 263 of the Act. In this regard it is submitted that the Kolkata bench of the Tribunal has not considered the decision of the Jurisdictional HC in the case of Virendra Kumar Jhamb v. N.K. Vohra (supra) as well as the fact that corresponding amendments were made in various sections when section 144C was inserted whereas no such amendment was made in section 263 of the Act.

2, DRP has power to consider all issues and, hence, no jurisdiction of CIT under section 263 of the Act.

2.1.The appellant submits that the order passed by the Assessing Officer merges into the order of the higher authority (DRP) and is deemed to become an order passed by the higher authority. The principle is statutorily accepted in Section 144C(13), wherein it is provided that upon receipt of the directions issued by DRP, the Assessing Officer shall, in conformity with the directions, complete the assessment without providing any further opportunity of being heard to the Appellant.

2.2.The power of the DRP is wide enough to even enhance the income computed by the Assessing Officer as can be seen from the Explanation to Section 144C(8) as provided below.

"Explanation.—For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Pane! to enhance the variation shall include and shall be deemed always to have included the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assesse. "

2.3.Thus, the Assessing Officer is statutorily bound to complete the assessment as directed by the DRP and has no power even to hear the assessee thereafter. In these circumstances, it is submitted that there is a complete merger of the assessment order into the directions of the DRP and, therefore, in the absence of an enabling provision in section 263 akin to clause (c) of Explanation I to section 263, power to revise the order does not lie.

3. Final Assessment Order passed under section 143(3) r.w.s. 144C(13) of the Act cannot be said to be erroneous if the same is in conformity of the direction issued under section 144C(5) of the Act -

3.1 The Appellant submits that as per the provisions of section 144C(5) of the Act, the Dispute Resolution Panel (DRP) shall in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.

3.2. Further, the provisions of sub-section (7) of section 144C empowers the DRP to make any further enquiry or cause any further enquiry to be made by the Income-tax authority as it thinks fit.

3.3, Section 144C(13) provides that upon receipt of the directions issued by DRP, the Assessing Officer shall, in conformity with the directions, complete the assessment without providing any further opportunity of being heard to the Appellant.

3.4. The Appellant submits that the Assessing Officer has followed the direction of the DRP and completed the assessment in conformity of the direction of the DRP. Therefore, the final Assessment order cannot be said to be erroneous. In fact, if the Assessing Officer had made any addition in the final assessment order which were not as per the direction of the DRP, the said assessment order would be held to be invalid and contrary to law.

3.5.The Appellant submits that, after the direction of the DRP, if the Assessing Officer would have made any addition or even any enquiry on the issues raised by the PCIT, the same would be contrary to law as being contrary to section 1 44C(1 3) of the Act. Therefore, there is no question of the PCIT holding that the final assessment Order is erroneous so as to come within the ambit of 263. The Appellant submits that the final assessment order can only be erroneous only when the Assessing Officer has not followed the mandate of section 144C(13) of the Act.

3.6. The Appellant submits that if the AO could not have directly made any change in the final assessment order after the direction of the DRP, then the PCIT also cannot indirectly make any change so as to circumvent the provision of section 144C(13) of the Act. Reliance in this regard is placed on the decision of the Apex Court **in** the case of Supertech Limited **v** Emerald **Court Owner** Resident **Welfare** Association and Ors. (MANU/SC/08643/2021) wherein the Apex Court after considering various decision has in para 12 held as under -

"Further, it is a settled legal principle that one cannot do indirectly what one cannot do directly **["** Quando aliquidprohibetur ex directo, prohibetur etper obiiquum 7.

[Copy **of the Supreme Court order is attached]**

3.7. The Appellant submits that if at all, the PCIT could have revised the draft assessment order passed under section 144C(l) of the Act. However, the PCIT has not revised the said order. Further, the time limit to revise the draft order had already expired when the PCIT passed the impugned order. Therefore, the Appellant submits that the order passed by PCIT is not sustainable in law.

3.8. Further, in Devas Multimedia (P.) Ltd. v. Pr. CIT [WP No. 11618 of 2016, dated 27-9-2019] (Kar) the Learned Single Judge of the Karnataka High Court held that though it may not be appropriate for the PCIT to review the decision of the DRP comprising of three CITs, unless there is a specific prohibition, there is no bar on the PCIT to invoke section 263 against the final assessment order passed pursuant to DRP directions. The Court also referred to

Explanation 1(c) prohibiting revision in respect of matters considered in appeal and held that similar clause was not forthcoming for matters examined by DRP. Accordingly, the CIT's power to revise the final assessment order was upheld. The Appellant submits that the Hon'ble Court has not considered the provision of section 144C(13) of the Act and, therefore, the Petitioner submits that the said decision ought not to be relied on to decide the issue on hand.

4. Members of DRP being equal in rank to that of CIT, revision of orders passed in conformity with the directions oldie DRP is not warranted

4.1 Section 1 44C(15) of the Act has defined DRP as below:

°144C(15) For the purposes of this section,—

(a) "Dispute Resolution Panel" means a collegium comprising of three Principal Commissioners or Commissioners of **Income-tax** constituted by the Board for this purpose,"

4.2 It can be seen from the above definition that DRP comprises of Principal Commissioners orCommissioners who are of same rank as that of CIT who is authorized to revise orders under section 263 of the Act. This fact is further clarified from the provisions of Section 253(1)(d) of the Act, which provides for an appeal from the order of the Assessing Officer pursuant to DRP's direction to the ITAT and bars an appeal before the Commissioner of Income-tax (Appeals). Hence, it is submitted that CIT does not hold jurisdiction under Section 263 to revisit the order of the DRP as they are of same rank.

5 In light of the above, we wish to submit that the order passed by the learned CIT under section 263 of the Act on 30 March 2021 is invalid and cannot be sustained in law for the reason that the learned CIT does not have the power to revise the order passed by the Assessing Officer in conformity with the directions of the DRP under section 144C of the Act using his revisionary powers under section 263 of the Act.

11. The Ld.CIT-DR has made following submission :-

This is an appeal by the assessee against the order u/s 263 of the CIT. This case was fixed for hearing on 04.10.2021 before the Hon'ble ITAT. The Hon'ble Bench directed the Ld. AR and DR to address it on the short issue of whether proceeding u/s.263 of the I.T. Act can be initiated when the assessment order is passed u/s. 143(3) r.ws.144C(13) on the direction of the DRP. It was further indicated that if the Hon'ble Bench is able to come to the conclusion that this ground can be allowed, the other grounds will not be adjudicated as infructuous and that in case the conclusion is that this ground cannot be allowed then the case will be fixed for

arguments to be heard in respect of the other grounds of this appeal of the assessee. Hence I am only addressing this limited legal issue.

2. The scope of sec. 263 and in particular what constitutes record before the CIT for initiating proceeding u/s. 263 had been a subject of litigation. Similarly, the issue of whether and to what extent the order passed giving effect to the appellate orders can be subjected to proceeding u/s. 263 had also been an area of litigation.

3. The amendment made to sec. 263 and the rationale for the amendment are as follows:

The scope of the substitution of Explanation to section 263(1) w.e.f 1.6.1988 was explained by CBDT Circular No 528 dated 16-12-1988. What constitutes record and the issue of what constitutes merger of the order of the assessing officer with the order of the appellate order was explained. The amendment was to clarify that records are that on record at the time the CIT exercises the power u/s 263 and also that the CIT would be competent and have power which will extend to all matters that were not considered and decided in appeal. This was in light of certain judicial decisions which had held otherwise and the amendment was intended to eliminate further litigation.

4. The Apex Court had an occasion to consider this issue post amendment in the reported case of (1998) 147 CTR (SC) 474 : (1998) 231 ITR 50 (SC) CIT vs Shri Arbuda Mills Ltd. Following is an extract from the decision.

"5. The main contention of the assessee which was considered by the Tribunal was whether or not the order of the ITO regarding the said three items in respect of which the assessee had no occasion to prefer an appeal had merged in that of the CIT(A) so as to exclude the jurisdiction of the CIT under s. 263 of the Act.

6. We may refer to the amendment made in s. 263 of the IT Act by the Finance Act, 1989, with retrospective effect from 1st June, 1988. The relevant part thereof for the present case is as under:

"Explanation.—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,--.

(c) where any order referred to in this sub-section and passed by the AO had been the subject-matter of any appeal filed on or before or after 1st June, 1988, the powers of the CIT 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 appeal.

7. The consequence of the said amendment made with retrospective effect is that the powers under s. 263 of the CIT shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in an appeal. Accordingly, even in respect of the aforesaid three items, the powers of the CIT under s. 263 shall extend and shall be deemed always to have extended to them because the same had not been considered and decided in the appeal filed by the assessee. This is sufficient to answer the question which has been referred.

8. The question referred is, therefore, answered in the negative, in favour of the Revenue and against the assessee."

5. This decision has been followed by several High Courts since then. In CIT vs Indo Persian Rugs 299 ITR 300(All) and CIT v Span International 270 ITR 538 (All), following the Apex Court decision in the case of CIT vs. Shri Arbuda Mills Ltd. (supra), it was held that power of CIT will extend to the matters not considered by the CIT(A), post amendment in 1988.

'Held In view of amendment of s. *263(1) Expln.(c) by the Finance Act, 1989, Tribunal was not justified in holding that since an appeal had been filed against the assessment order, CIT had no power to revise the order under s. 263.'*

6. Similar is the decision in the case reported in 271 ITR 15 (Del) AERENS INFRASTRUCTURE & TECHNOLOGY LTD. & ORS. vs. COMMISSIONER OF INCOME TAX. This was a case where block assessment order was passed on 31.3.2004. It was held that merely because appeal was filed against block assessment order, it does not mean that proceedings u/s 263 cannot be initiated. Therefore, it does not hold that in all cases, and, particularly where the issues in the revision are different from those in the appeal, proceedings under s. 263 would be invalid during the pendency of an appeal.

7. The decisions reported in 216 ITR 548(Bom) CIT v Paul Brothers and 216 ITR 833(Bom) Saraf Bandhu P Ltd in favour of assessee based on principles of merger holding restriction on the scope of the proceedings u/s 263 were passed before the Apex Court decision in the case of CIT vs. Shri Arbuda Mills Ltd. (supra).

8. The Apex Court in the case CIT vs Jayakumar Patil in 236 ITR 469(SC) against an appeal from the order of the Bombay HC held that CIT had the powers and jurisdiction to initiate proceedings u/s 263 in respect of issues not touched by the CIT(A) in his appellate order and that that issues not dealt with the CIT(A) cannot be treated as merged in the appellate order.

9. It is submitted that the powers of the DRP are analogous to the CIT(A). Just as the CIT(A) can do what an Assessing Officer can do and the CIT(A) has power of enhancement (refer 53 ITR 225(SC)), similarly the DRP has similar powers u/s 144C (8) (refer Delphi-TVS Diesel Systems Limited [TS-927-HC202 l(MAD)]).

10. If the Apex Court has held that scope of powers of CIT u/s 263 extends to all matters not touched by CIT(A), the scope in respect of order passed u/s 143(3) r.w.s. 144C as per directions of the DRP cannot be any different.

11. While though I am not aware of, even if there be any decision of the Hon'ble ITAT on the aspect of initiations of the proceedings u/s 263 in respect of order passed u/s. 143(3) r.w.s 144(C), there are no direct judgments of the High Court on this subject except the decision by Hon'ble Karnataka High Court in the case of Devas Multimedia P. Ltd. V/s. PCIT (2020) 268 Taxman 150, (2019) 111 Taxmann.com 494(Kar). In this decision the Hon'ble Karnataka High Court has held quoting from the head notes that---

No-doubt DRP panel consists of three Commissioners and Principal Commissioner examining or sitting over decision of the DRP may not be appropriate. At the same time, one cannot lose sight off, of a statutory provision like section 263 unless and until section 263 prohibits to examine the final assessment order, pursuant to the DRP decision. One cannot go beyond the statutory provision and so also 'read' or 'add' words by the Courts while interpreting a statutory provision. Time and again, Supreme Court and other Courts have held that in a matter of interpretation of statutory provisions, Court cannot 'add any words or sentence'. Even if there is any ambiguity, at the best Court can read down or struck down such statutory provision. In the present case, reading of section 263, it is crystal clear that there is no bar for the **Principal**

Commissioner to invoke section 263 in order to examine the final assessment order passed by the Assessing Officer pursuant to the DRP decision. [Para 18]

12. It may be pointed out that the Hon'ble High Court has considered the judicial decisions holding that when a statute vests certain power in an authority to be exercised in a particular manner then the only that said authority has to exercise it and only in the manner provided in the statute itself. The Hon'ble Karnataka HC held that as regards revision of an assessment order, statute has granted that power to the CIT u/s 263 and only that authority can exercise that power in the manner indicated. The High Court has upheld the power of CIT to invoke proceedings u/s 263 in respect of order passed u/s. 143(3) r.w.s 144(C).

13. It is further submitted that when there is no other decision of any other High Court, including the jurisdictional High Court, directly on the subject, then the decision of the High Court on the issue has to be followed by the ITAT. Reliance is placed on the following decisions for this contention.

i) ACCE V/s. Dunlop India Ltd. (1995) 154 ITR 172 (SC).

ii) CIT v/s. Godavaridevi Saraf (1979) 113 ITR 589 (Born) where it was held that until the contrary decision is given by any other competent High Court, which is binding on our Tribunal in the state of Bombay, it has to be proceed on the footing that the law declared by the High Court, though of another state, is the final law of land.

iii) Tej Intr. V/s. DCIT 2000 69 TTJ 650 (Del).

12. We have carefully gone through the submissions in the case laws and the records.

13. First, we note that in this case, the assessment order was passed after transfer pricing adjustment were made by the TPO. These have been detailed in the assessment order para ‘7’ of the assessment order referred above. The TP adjustment

made by TPO were in total Rs. 83,045,395/-. Assessee had made objection before the DRP and pursuant to DRP direction, the assessment was framed as per section 144C(13).

14. As against the above, Ld.CIT has noted that in this case TPO has not proposed any adjustment. This is contrary to the facts in this case, the above shows that Ld.CIT has exercised his jurisdiction u/s 263 without properly appreciating the assessment order passed. He also seems to be ignoring the fact that assessee has chosen to file objection before the DRP. When the assessment order has been passed pursuant to the direction of DRP, the appeal from the said assessment order does not lie with the ld.CIT(A), but lies directly to the ITAT as per provision of section 253(d). Now, the issue to be addressed in this case is whether, the Ld.CIT has erred in initiating proceedings u/s. 263 of the Act, when the original assessment order has been passed u/s. 143(3) r.w.s. 144C(13), on the basis of the directions of the Dispute Resolution Panel(DRP).

15. We may gainfully refer to the provision of section 263 in this regard.

> **"263.** (1) The Principal Commissioner or 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 in so far 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 1.—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—
>
> (a) an order passed [on or before or after the 1st day of June, 1988] by the Assessing Officer shall include
>
> (i) an order of assessment made by the Assistant Commissioner [or Deputy Commissioner] or the Income tax officer on the basis of the directions issued by the [Joint] Commissioner under section 144A.

(ii) an order made by the [Joint] Commissioner in exercise of the powers or in the performance of the functions of an Assessing officer conferred on, or assigned to, him under the orders or directions issued by he Board or by the [Principal] Chief Commissioner or] Chief Commissioner or[Principal Director General or] Director General or[Principal Commissioner or] Commissioner authorized by the Board in this behalf under section 120.

(b) "record" [shall include and shall be deemed always to have included] all records relating to any proceeding under this Act available at the time of examination by the [Principal [Chief Commissioner or Chief Commissioner or Principal] Commissioner or] Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal [filed on or before or after the 1st 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 appeal.]"

16. A reading of the above shows that the Principal Chief Commissioner or Chief commissioner may revise order passed by the AO, if the same is erroneous in so far as prejudicial to the interest of the revenue. The Explanation 1(a) of the Act referred above explains the order passed by the AO which can be subject matter of section 263 revision. The above explanation explains/clarifies that order of the AO in certain cases passed on the direction of certain superior officers can also be subject matter of section 263. The above explanation does not include the order passed under the direction of DRP u/s. 144C(13) of the Act. The legislature in its wisdom has thought it appropriate to include orders passed by the AO under direction u/s. 144A, but not under direction u/s. 144C(13). This is also in accordance with the provisions of the Act contained in section 144C, which we shall detailed at a later stage. The Ld.CIT in this case seems to be quiet conscious of this fact as he has mentioned on one of the issues, that AO has not properly followed the direction u/s. 144A. But, he is quiet silent and has nowhere mentioned that the final assessment order is passed after the direction of DRP. Admittedly, this is not a case, where draft assessment order is being revised. This is a case where final assessment order passed pursuant to the

direction of DRP u/s. 144(3) is being revised by Ld.CIT. Ld. Counsel of the assessee in this regard submits that from the Finance Act, 2009, memorandum explaining the rationale behind the insertion of section 144C of the Act by the Finance Bill, 2009 as also the CBDT Circular No. 5 of 2010 dated 3 June 2010 issued explaining the said insertion, the notes on clauses, etc., it can be seen that consequential amendments have been made to various provisions of the Act as a result of insertion of section 144C in the Act. Such consequential amendments have been made to section 13 1, section 246A and section 253 of the Act. That however, no amendment is made in section 263 of the Act as a consequence of insertion of section 144C of the Act to deem such orders being capable of being revised. That therefore, the memorandum, circular, etc. support the Assessee's stand that once the Assessing Officer passes an order in accordance with the Directions issued by a superior authority (being DRP) the same cannot be revised by the CIT under section 263 of the Act. The above submission has sufficient cogency as our following discussion will further oxygenate the same.

17. It will also be gainful to refer to the provision of section 144C dealing with the reference to DRP

> (1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee.
> (2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order,—
> (*a*) file his acceptance of the variations to the Assessing Officer; or
> (*b*) file his objections, if any, to such variation with,—
> (*i*) the Dispute Resolution Panel; and
> (*ii*) the Assessing Officer.
> (3) The Assessing Officer shall complete the assessment on the basis of the draft order, if—
> (*a*) the assessee intimates to the Assessing Officer the acceptance of the variation; or
> (*b*) no objections are received within the period specified in sub-section (2).

(4) The Assessing Officer shall, notwithstanding anything contained in section 153 [or section 153B], pass the assessment order under sub-section (3) within one month from the end of the month in which,—
(*a*) the acceptance is received; or
(*b*) the period of filing of objections under sub-section (2) expires.
(5) The Dispute Resolution Panel shall, in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.
(6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely:—
(*a*) draft order;
(*b*) objections filed by the assessee;
(*c*) evidence furnished by the assessee;
(*d*) report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority;
(*e*) records relating to the draft order;
(*f*) evidence collected by, or caused to be collected by, it; and
(*g*) result of any enquiry made by, or caused to be made by, it.
(7) The Dispute Resolution Panel may, before issuing any directions referred to in sub-section (5),—
(*a*) make such further enquiry, as it thinks fit; or
(*b*) cause any further enquiry to be made by any income-tax authority and report the result of the same to it.
(8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.
[*Explanation.*—For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Panel to enhance the variation shall include and shall be deemed always to have included the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee.]
(9) If the members of the Dispute Resolution Panel differ in opinion on any point, the point shall be decided according to the opinion of the majority of the members.
(10) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.
(11) No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.
(12) No direction under sub-section (5) shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.
(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153 [or section 153B], the assessment without providing

any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.

(14) The Board may make rules for the purposes of the efficient functioning of the Dispute Resolution Panel and expeditious disposal of the objections filed under sub-section (2) by the eligible assessee.

(14A) The provisions of this section shall not apply to any assessment or reassessment order passed by the Assessing Officer with the prior approval of the Commissioner as provided in sub-section (12) of section 144BA.

(14b) The central Government may make a scheme, by notification in the Official Gazette, for the purposes of issuance of directions by the dispute resolution panel, so as to impart greater efficiency, transparency and account ability by-

(a) eliminating the interface between the dispute resolution panel and the eligible assessee or any other person to the extent technologically feasible;

(b) optimizing utilization of the resources through economies of scale and functional specialization;

(c) introducing a mechanism with dynamic jurisdiction for issuance of directions by dispute resolution panel

(14C) The Central Government may, for the purpose of giving effect to the scheme made under sub-section(14B), by notification in the Official Gazette direct that any of the provisions of this act shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notifications.

Provided that no direction shall be issued after the 31st day of March, 2022

(14D) Every notification issued under sub-section(14B) and sub-section (14C) shall, as soon as may be after the notification issued, be laid before each House of parliament]

(15) For the purposes of this section,—

(*a*) "Dispute Resolution Panel" means a collegium comprising of three Commissioners of Income-tax constituted by the Board for this purpose;

(*b*) "eligible assessee" means,—

(*i*) any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and

(*ii*) any non-resident not being a company, or any foreign company.]

18. A reading of the said section brings to the fore following:-

The assessee has option to go to the DRP by filing objection before it.

As per the provisions of section 144C(5) of the Act, the Dispute Resolution Panel (DRP) shall in a case where any objection is received under sub-section (2), issue

such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.

Further, the provisions of sub-section (7) of section 144C empowers the DRP to make any further enquiry or cause any further enquiry to be made by the Income-tax authority as it thinks fit. Explanation to sub-section (8) of section 144C duly provides that DRP has power to enhance the variation and the power includes to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee. Section 144C(13) provides that upon receipt of the directions issued by DRP, the Assessing Officer shall, in conformity with the directions, complete the assessment without providing any further opportunity of being heard to the Appellant. As noted above, it is now nobody's case that the Assessing Officer has not followed the direction of the DRP and completed the assessment not in conformity with the direction of the DRP. Therefore, the final Assessment order cannot be said to be erroneous. In fact, if the Assessing Officer had made any addition in the final assessment order which were not as per the direction of the DRP, the said assessment order would be held to be invalid and contrary to law.

After the direction of the DRP, if the Assessing Officer would have made any addition or even any enquiry on the issues raised by the PCIT, the same would be contrary to law as being contrary to section 144C(1 3) of the Act. Therefore, there is no question of the PCIT holding that the final assessment Order is erroneous so as to come within the ambit of 263. Hence the final assessment order can only be erroneous only when the Assessing Officer has not followed the mandate of section 144C(13) of the Act.

"Further, it is a settled legal principle that one cannot do indirectly what one cannot do directly [" Quando aliquidprohibetur ex directo, prohibetur etper obiiquum]

If the AO could not have directly made any change in the final assessment order after the direction of the DRP, then the PCIT also cannot indirectly make any change so as to circumvent the provision of section 144C(13) of the Act. Reliance in this regard is placed on the decision of the Apex Court **in** the case of Supertech Limited **v** Emerald Court Owner Resident Welfare Association and Ors. (MANU/SC/08643/2021).

19. Further, the scheme of the Act itself does not provide any interference in the direction of the DRP as the law containing section 144C(13) directs that the AO shall pass an order inconformity with the directions of the DRP without providing any further opportunity of being heard to the assessee. When the Act itself provide, that order has to be passed by the AO without providing any opportunity to the assessee pursuant to the direction of the DRP, the direction given in this order u/s. 263 by the Ld.CIT to the AO to call for the details of allowability of various deductions claimed by the assessee, in light of the observations discussed by him is quiet contrary to the sanguine provisions of law. Even otherwise, the order passed by the Ld.CIT is an exercise in futility inasmuch as, if the AO proceeds to pass an order by giving the assessee an opportunity of being heard, the same will be against the mandate of section 144C(13). Furthermore, it is also settled law that in assessment u/s. 144C, AO has to invariably pass a draft assessment order and give the same to the assessee for filing objection before DRP. Hence, the direction by the Ld.CIT to the AO to pass an order by-passing the provisions of passing the draft assessment order is also not sustainable in law.

20. Now, we examine the constitution of DRP. As evident from the above, the DRP constitutes a collegium comprising of three Principal Commissioners or Commissioners of Income-tax, the directions given by them is binding upon by the AO. Hon'ble Bombay High Court in the case of Vodafone India Services Pvt.Ltd. vs Union of India & Others 2013 SCC online Bom 1534 has expounded upon the proceedings at DRP as under:-

> "The proceeding before the DRP is not an appeal proceeding but a correcting mechanism in the nature of a second look at the proposed assessment order by high functionaries of the revenue keeping in mind the interest of the assessee. It is a continuation of the Assessment proceedings till such time a final order of assessment which is appelable is passed by the Assessing Officer. This also finds support from Section 144C(6) which enables the DRP to collect evidence or cause any enquiry to be made before giving directions to the Assessing Officer under Section 144C(5). The DRP procedure can only be initiated by an assessee objecting to the draft assessment order. This would enable correction in the proposed order (draft assessment order) before a final assessment order is passed. Therefore, we are of the view that in the present facts this issue could be agitated before and rectified by the DRP."
>
> [underline ours]

21. The above exposition duly elaborates upon the provisions of the Act contained under section 144C.

22. From the above, it is also apparent that members of the DRP are three in numbers and are individually equivalent in rank to the CIT, who is initiating proceedings u/s. 263 against the order passed by the AO pursuant to their direction. Now as far as equivalence of single CIT to a 'colliguem of 3 CIT is concerned, it is settled law that bench comprising single persons is not higher/superior than a collegiums of three persons. Hence, it is abundantly clear that the DRP stands at a higher pedestal than the CIT passing an order alone.

23. Furthermore, we may refer to the decision of Hon'ble Bombay High court in the case of Virendra Kumar Jhamb vs. N.K.Vohra (supra). In this case, the Jurisdictional High Court held that the assessee had approached the DDIT (investigation) under the Direct tax Amnesty Scheme. The CIT had accepted that the taxable income be computed at 8 percent of the total receipts. A second CIT, on scrutiny and verification of the assesses records, found the decision of the earlier CIT to be fair and justifiable. A subsequent CIT, sought to revise the order under section 263, and tax income at 9 percent of the receipts. The Bombay High Court inter alia held that the assessment orders were solely based on the directives of the earlier CITs, and the same could not be revised by the subsequent CIT under section 263.

24. In light of the above discussion and case laws, the case laws referred by the Ld.CIT-DR are not applicable on the facts of the case. As, we have already noted that the submission of Ld.CIT-DR are at variance with the exposition by Hon'ble Bombay High Court in Vodafone India Services Pvt.Ltd.(supra). The Ld.CIT-DR in his submission has emphasized that proceeding before DRP is akin to appeal before Ld.CIT(A). This is quiet contrary to the Hon'ble Bombay High Court exposition noted above and the other decisions of Hon'ble Jurisdictional High court referred above.

25. The case of Devas Multimedia Pvt.Ltd.(supra) by the Hon'ble Karnataka High Court was in connection with the writ petition filed by the assessee, where assessee has objected to the notice issued u/s. 263 of the Act. Furthermore, Hon'ble High Court has expounded that writ court cannot examine the validity of notice on merits. Furthermore, the said decision has distinguished following decision of Hon'ble Bombay High Court, i) Vodafone Services Pvt.Ld.(supra) wherein Hon'ble Bombay Court has expounded that proceedings before the

DRP is not an appeal proceedings, but correction mechanism in the nature of a second look at the proposed assessment order by high functionaries of revenue (ii)Vodafone India Services Pvt.Ltd. vs. Union of India (2014) 368 ITR 1(Bom.). In the present case, this Tribunal is under the jurisdiction of Hon'ble Bombay High Court. Hence, we do not have any authority whatsoever to deviate from the exposition of the Hon'ble jurisdictional High Court that the proceedings at DRP is not an appeal proceedings, but a correcting mechanism. Furthermore, the ratio from the Hon'ble Bombay High Court in the case of Virendra Kumar Jamb(supra) also support this view. Hence, the submission of Ld. DR that subject under discussion here has not been subject matter of Hon'ble jurisdictional High Court elaboration is not acceptable. Once, this is accepted, that the assessment order having been corrected by colligeum of three commissioner of income tax, the same can by no stretch of imagination be subject to revision by commissioner of income tax sitting alone. More so, in light of provision of section 144C(13) which clearly mandates that AO has to pass an order in accordance with the direction of the DRP without giving any opportunity to the assessee to so in the present case. If this order passed by the Ld.CIT is upheld and AO starts giving opportunity of hearing to the AO in accordance with the direction of the CIT, the same will be in violation of the sanguine provision of section 144C(13).

26. Hence, in light of the aforesaid discussions and precedents from Hon'ble jurisdictional High Court, we set aside the orders of Ld.CIT and hold that he cannot legally assume jurisdiction u/s. 263 of the act on an order passed by the AO pursuant to the direction of DRP. This is over and above our other observations in para '14' of this order, where we have noted that Ld.CIT has passed this order without properly appreciating the assessment order. Since, we

have quashed assessment order on jurisdiction itself, we are not dealing with the merits of the case.

27. In the result, the appeal by the assessee stands partly allowed.

Pronounced in the open court on 03.01.2022.

Sd/-	Sd/-
(AMARJIT SINGH)	(SHAMIM YAHYA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 03.01.2022
Thirumalesh, Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai