

(2010) 03 P&amp;H CK 0363

**High Court Of Punjab And Haryana At Chandigarh****Case No:** Income Tax A. No's. 581, 582 and 583 of 2009

Commissioner of Income Tax

APPELLANT

Vs

Saluja Exim Ltd.

RESPONDENT

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**Date of Decision:** March 16, 2010**Acts Referred:**

- Income Tax Act, 1961 - Section 115 JB(2), 143(3), 263, 80HHC(1B)

**Citation:** (2010) 329 ITR 603**Hon'ble Judges:** M.M. Kumar, J; Jitendra Chauhan, J**Bench:** Division Bench**Final Decision:** Dismissed

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**Judgement**

M.M. Kumar, J.

This order shall dispose of I.T.A. Nos. 581 to 583 of 2009 which have been decided by the Income Tax Appellate Tribunal, Chandigarh Bench "A", Chandigarh (for brevity "the Tribunal") by a common order dated September 30, 2008 in respect of the assessment years 2002-03 and 2003-04. The Revenue has approached this Court challenging the aforesaid order claiming that the following substantial questions of law would arise for determination of this Court:

(i) Whether on the facts and in law, the hon"ble Income Tax Appellate Tribunal was justified in holding that the invoking of Section 263 of the Act was not justified ignoring the fact that the order of the Assessing Officer passed u/s 143(3) on March 30, 2006, was erroneous in so far as it was prejudicial to the interest of the Revenue ?

(ii) Whether on the facts and in law, the hon"ble Income Tax Appellate Tribunal was justified in considering the issue relating to the quantum of exclusion under Clause (iv) of the Explanation below Section 115JB(2) of the Income Tax Act, for computation of "book profits" in the light of the decisions in the case of (2007) 106 ITD 193 and Asst. CIT v. Ajanta Pharma Ltd. 21 SOT 101 (Mum) whereas the said decision has

been reversed by the hon'ble Bombay High Court in I.T.A. No. 1005 of 2008 dated May 7, 2009 in the case of [The Commissioner of Income Tax-9 Vs. Ajanta Pharma Ltd.,](#)

2. It is appropriate to mention that assessment was finalized u/s 143(3) of the Income Tax Act, 1961 (for brevity "the Act"). However, the Commissioner of Income Tax exercising power u/s 263, has taken the view that the Assessing Officer while computing book profits chargeable to tax u/s 115JB of the Act, has reduced the profits of export business without any justification. According to the Commissioner, "eligible profits of business" as computed in accordance with the provision of Section 80HHC(1B) was alone to be reduced to the extent of 50 per cent. only. After issuing show-cause notice, the Commissioner cancelled the assessment framed u/s 143(3) by the Assessing Officer on the limited issue of recomputing the "book profit" after excluding only eligible profits of business computed in accordance with the provisions of Section 80HHC(1B) of the Act.

3. Aggrieved by the order of the Commissioner, the Assessee approached the Tribunal challenging the invocation of power u/s 263 by the Commissioner in addition to the direction issued by him to the Assessing Officer for recomputing the "book profits" in accordance with the provisions of Section 80HHC(1B) of the Act, making them eligible to the extent of 50 per cent. The Tribunal placed reliance on the judgment delivered by Special Bench in the case of (2007) 106 ITD 193 and Asst. CIT v. Ajanta Pharma Ltd. (2008) 21 SOT 101 (Mum). It is appropriate to mention that in those decisions, the Tribunal has considered the issue relating to computation of "book profit" for the purposes of Section 115JB and in relation to Clause (iv) of the Explanation to Section 115JB of the Act. It has been observed that the amount referred to therein is the amount of profit eligible for deduction u/s 80HHC irrespective of the percentage of the profits that are eligible for deduction ultimately. The Mumbai Bench of the Tribunal in the case of Ajanta Pharma Ltd. (2008) 21 SOT 101 (Mum) has held that amount to be reduced in terms of Clause (iv) of the Explanation to Section 115JB(2) is not governed by Sub-section (IB) of Section 80HHC in the absence of any reference to it in Clause (iv) of the Explanation to Section 115JB(2) of the Act. The Tribunal after making reference to the aforesaid judgment observed in para 11 as under:

In this case, the plea of the Assessee is that on the dispute relating to the quantum of exclusion under Clause (iv) of the Explanation below Section 115JB(2), the interpretation placed by the Assessee as well as by the Assessing Officer in the order passed u/s 143(3) is supported by the decisions of the Tribunal in the case of Ajanta Pharma Ltd. (2008) 21 SOT 101 (Mum) and (2007) 106 ITD 193 . We have perused the said decisions, copies of which are on record and find that the stand of the Assessee is justified. The assessment framed by the Assessing Officer by excluding the book profits eligible for deduction u/s 80HHC in terms of Clause (iv) of the Explanation to Section 115JB(2) is in tune with the aforesaid two decisions of the Tribunal. On this

basis, factually speaking, it can be deduced that the view taken by the Assessing Officer while framing the assessment u/s 143(3) on March 30, 2006, is a possible view. No decision to the contrary has been brought to our notice and in any case, it cannot be said that the view of the Assessing Officer was unsustainable in law. We also find that the Commissioner has neither in the show-cause notice dated March 14, 2008, and nor in the impugned order dated March 31, 2008, made reference to any judicial order to support his interpretation, which is contrary to that of the Assessing Officer. In any case, having regard to the fact that the view adopted by the Assessing Officer was a possible view in the light of the cited Tribunal decisions, though rendered subsequently, the same in our considered opinion, does not enable the Commissioner to invoke Section 263 in the face of the law laid down by the hon"ble Supreme Court in the case of [MALABAR INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX,](#).

4. On the other issue, as to whether the Commissioner was within his power to invoke Section 263, the Tribunal answered the issue against the Revenue, it has been held that the question concerning powers of the Commissioner to invoke Section 263 is no longer res integra. The Tribunal has placed reliance on the judgment of the hon"ble Supreme Court rendered in the case of [MALABAR INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX,](#), and has held for valid invocation of Section 263, the twin conditions are required to be satisfied simultaneously (a) that the order in question should be erroneous; and (b) it should be prejudicial to the interest of the Revenue. Both the conditions are required to be satisfied simultaneously and absence of any one of them would not be sufficient for exercising power u/s 263. The Tribunal, thus, concluded that where the Assessing Officer has adopted one of the two courses permissible in law then revisional power u/s 263 of the Act cannot be invoked by the Commissioner merely because the Commissioner prefers the other view than the one taken by the Assessing Officer.

5. It is pertinent to mention that in the case of [Commissioner of Income Tax Vs. Max India Ltd.,](#), the hon"ble Supreme Court has clarified that the position of law as it stood on the date when the Assessing Officer had passed the order has to be taken into consideration. No subsequent change in law could constitute basis for exercise of power u/s 263 of the Act. The views of the hon"ble Supreme Court are discernible from para 10 of [MALABAR INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX,](#) which discusses Section 80HHC and read thus (page 283):

In our view at the relevant time two views were possible on the word "profits" in the proviso to Section 80HHC(3). It is true that vide the 2005 amendment the law has been clarified with retrospective effect by insertion of the word "loss" in the new proviso. We express no opinion on the scope of the said amendment of 2005. Suffice it to state that in this particular case when the order of the Commissioner was passed u/s 263 of the Income Tax Act, 1961, two views on the said word "profits" existed. In our view, the matter is squarely covered by the judgment of this Court in

the case of [MALABAR INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX](#), as also by the judgment of the Calcutta High Court in the case of [Russell Properties Pvt. Ltd. Vs. A. Chowdhury, Addl. Commissioner of Income Tax and Others](#), .

At this stage, we may clarify that under paragraph 10 of the judgment in the case of [MALABAR INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX](#), this Court has taken the view that the phrase "prejudicial to the interests of the Revenue" u/s 263 has to be read in conjunction with the expression "erroneous" order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income Tax Officer is unsustainable in law. According to the learned Additional Solicitor General, on an interpretation of the provision of Section 80HHC(3) as it then stood the view taken by the Assessing Officer was unsustainable in law and therefore the Commissioner was right in invoking Section 263 of the Income Tax Act. In this connection, he has further submitted that in fact the 2005 amendment which is clarificatory and retrospective in nature itself indicates that the view taken by the Assessing Officer at the relevant time was unsustainable in law. We find no merit in the said contentions. Firstly, it is not in dispute that when the order of the Commissioner was passed there were two views on the word "profits" in that section. The problem with Section 80HHC is that it has been amended eleven times. Different views existed on the day when the Commissioner passed the above order. Moreover, the mechanics of the section have become so complicated over the years that two views were inherently possible. Therefore, subsequent amendment in 2005 even though retrospective will not attract the provision of Section 263 particularly when as stated above we have to take into account the position of law as it stood on the date when the Commissioner passed the order dated March 5, 1997, in purported exercise of his powers u/s 263 of the Income Tax Act.  
(Emphasis added)

6. Once the aforesaid legal position is clear and the law which was applicable on the date when the Assessing Officer passed the order has to determine the erroneous nature of the order passed by the Assessing Officer then it is obvious that the judgment of the Bombay High Court in Asst. CIT v. Ajanta Pharma Ltd. (2008) 21 SOT 101 (Mum), would not be attracted to the facts of the present case. On that basis the order passed by the Commissioner on March 31, 2008, cannot be justified by any subsequent pronouncement of law and consequently the order of the Assessing Officer cannot be held to be erroneous as law applicable on the date of passing the order by the Assessing Officer has to be applied. Admittedly, on that date, two views

were possible and according to the hon"ble Supreme Court, the mechanics of the section have become so complicated over the years that two views were inherently possible. Accordingly, we find that the order of the Tribunal does not suffer from any legal infirmity warranting interference of this Court. The appeals are wholly and without merit and are, thus liable to be dismissed.

7. As a sequel to the above discussions, the appeals are dismissed.