IN THE INCOME TAX APPELLATE TRIBUNAL 'G' BENCH, MUMBAI
BEFORE SHRI G.S. PANNU, AM AND SHRI RAVISH SOOD, JM

आयकर अपील सं./ I.T.A. No(s).2370/Mum/2017
(**निर्धारण वर्ष /** Assessment Year: 2007-08)

Wind World India Infrastructure Pvt. Ltd. A-9, Enercon Tower, Veera Desai Road, Veera Industrial Estate, Andheri (W), Mumbai-400053	**बनाम/ Vs.**	Principal CIT(C)-2, Mumbai
स्थायीलेखासं ./जीआइआरसं ./**PAN/GIR No.** AABCE5226C		
(अपीलार्थी**/Appellant)**	:	**(**प्रत्यर्थी / **Respondent)**

आयकर अपील सं./ I.T.A. No(s).2371 -2372/Mum/2017
(**निर्धारण वर्ष /** Assessment Year(s): 2011-12 & 2012-13)

Wind World Wind Resources Development Pvt. Ltd., A-9, Enercon Tower, Veera Desai Road, Veera Industrial Estate, Andheri (W), Mumbai-400053	**बनाम/ Vs.**	Principal CIT(C)-2, Mumbai
स्थायीलेखासं ./जीआइआरसं ./**PAN/GIR No.** AACCP5701E		
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी / **Respondent)**
आयकर अपील सं./ I.T.A. No(s)2373/Mum/2017 (**निर्धारण वर्ष /** Assessment Year(s): 2011-12)		
J.N Investment & Trading Co. Pvt. Ltd. Akaysons -1, Mehta Estate, LBS Marg, Vikhroli (W), Mumbai-400 079	**बनाम/ Vs.**	Principal CIT(C)-2, Mumbai
स्थायीलेखासं ./जीआइआरसं ./**PAN/GIR No.** AAACJ2646L		
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी / **Respondent)**
अपीलार्थी की ओर से/**Appellant by**		Shri. A. K. Ghosh, A.R
प्रत्यर्थी की ओर से/ **Respondent by**		Mrs. Vidisha Kalra, D.R

सुनवाई की तारीख/ **Date of Hearing**		29.06.2017
घोषणा की तारीख / **Date of Pronouncement**		27.09.2017

आदेश / **O R D E R**

PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeals filed by the abovementioned assesses are directed against the order passed by the Principal Commissioner of Income tax, Central-2, Mumbai under Sec. 263 of the Income tax 1961, (for short 'Act') for A.Y 2007-08, dated. 24.03.2017, which in itself arises from the assessment order passed by the Dy. Commissioner of Income tax, Central Circle-3(1), Mumbai u/s. 153A r.w.s. 143(3) of the 'Act', dated 27.03.2015, in the case of **Wind World India Infrastructure Pvt. Ltd., Mumbai**, which had been assailed before us as I.T.A. No(s).2370/Mum/2017; against the order passed by the Principal Commissioner of Income tax, Central-2, Mumbai under Sec. 263 of the Income tax 1961, (for short 'Act') for A.Y 2011-12 and A.Y 2012-13, dated 21.03.2017 and 23.03.2017, respectively, which in itself arises from the respective assessment orders passed by the Dy. Commissioner of Income tax, Central Circle-3(1), Mumbai u/s. 153A r.w.s. 143(3) of the 'Act', each dated 30.03.2015, in the case of **Wind World Wind Resources Development Pvt. Ltd.**, **Mumbai**, which had been assailed before us as I.T.A. No(s).2371-2372/Mum/2017; AND the order passed by the Principal Commissioner of Income tax, Central-2, Mumbai under Sec. 263 of the Income tax 1961, which in itself arises from the order passed by the Dy. Commissioner of Income tax, Central Circle-3(1),

Mumbai u/s. 153A r.w.s. 143(3) of the 'Act', dated 24.03.2015, in the case of **J.N Investment & Trading Co. Pvt. Ltd.**, **Mumbai**, which had been assailed before us as I.T.A. No.2373/Mum/2017. That as certain common issues are involved in the aforesaid appeals, therefore, they are taken up and being disposed of by way of a consolidate order. We first take up the appeal for A.Y. 2007-08 in I.T.A. No.2370/Mum/2017. The assessee assailing the order passed by the Principal Commissioner of Income tax, Central-2, Mumbai, had raised before us the following grounds of appeal:-

"*The following grounds of appeal are without prejudice to one another:-*

1. On the facts and in the circumstances of the appellant's case and in law the Ld. Principal CIT erred in passing the impugned order by invoking the provisions of section 263 of the Act, which is illegal, bad-in-law or otherwise void for want of jurisdiction.

2. On the facts and in the circumstances of the appellant's case and in law the Ld. Principal CIT erred to hold that the assessment order passed by the AO u/s. 143(3) r.w.s 153A is erroneous and prejudicial to the interest of the revenue.

3. The Ld. Principal CIT failed to appreciate that as on the date of search, the assessment or reassessment for the assessment year under consideration was not pending and no addition/disallowance is permissible in respect of such unabated assessment year in the absence of any incriminating material found during the course of search.

4. The appellant craves leave to add to, alter, amend and /or delete all or any of the foregoing grounds of appeal.

The appellant prays this Hon'ble Tribunal to quash the impugned order passed by the Ld. Principal CIT by invoking the provisions of section 263 of the Income Tax Act, 1961".

2. Briefly stated, the facts of the case are that the assessee company is engaged in the business of setting of Infrastructure facilities for evacuation of power generator through power projects. Search and seizure action u/s. 132 of the 'Act' was carried out on

14.03.2013 at the premises of M/s. Enercon India Ltd. (EIL) and its groups companies. The assessee company being one of the group company of M/s. Enercon India Ltd. [now known as M/s. Wind World (India) Ltd.] was covered in the aforesaid search proceedings.

3. The assessee had filed its 'return of income' for A.Y. 2007-08 on 31.10.2007, declaring a loss of Rs.9,53,44,278/-. That subsequent to the aforesaid search and seizure proceedings the assessee filed its 'return of income' u/s 153A of the 'Act' on 27.02.2014, declaring a loss of Rs. 9,53,44,278/-. That during the course of the assessment proceedings it was observed by the A.O that the assessee had not shown any income from its business activities. The A.O thereafter proceeded with and framed assessment u/s. 153A r.w.s. 143(3) at the returned loss of Rs. 9,53,44,278/-.

4. The Principal Commissioner of Income tax, Central-2, Mumbai deliberated on the assessment records of the assessee for the year under consideration, viz. A.Y. 2007-08, and observed that the assessee during the year under consideration had reflected 'business operating income' at Rs. Nil. That it was noticed by the Principal CIT that the assessee in its 'Profit & loss a/c' for the year under consideration, viz. AY: 2007-08, had after debiting operating and other expenses of Rs. 2,40,70,708/- and depreciation of Rs.1,03,03,651/-, shown a 'business loss' of Rs.3,43,74,359/-. The A.O further observed that the assessee in its 'Computation of income' after claiming 'depreciation' of Rs.7,14,98,291/ on the 'fixed assets' as per the provisions of the Income-tax Act, had computed the 'business loss' at Rs. 9,53,44,278/-, which was carried forward by it for further adjustment/set off in the subsequent years. The Principal CIT on the perusal of the records

noticed that though the assessee company had not carried out/commenced any business during the year under consideration, but the expenses debited in its 'Profit & loss a/c' were not disallowed by the A.O while framing the assessment. It was further gathered by the Principal CIT that though the assessee had claimed depreciation of Rs.7,14,98,291/- in respect of addition of 'fixed assets' amounting to Rs.75,69,32,795/- during the year, however, no certificate of installation/commissioning of the said assets was available on record. The Principal CIT thus observed that it was evident from the records that no commercial production was started by the assessee during the financial year 2006-07, as the operating business income was shown by the assessee at Rs. Nil.

5. The Principal CIT after deliberating on the aforesaid facts, thus, being of the considered view that as the assessee had not carried out/commenced any business during the year under consideration, therefore, the operating and other expenses debited by the assessee in its 'Profit & loss a/c' ought to have been disallowed, and the 'business loss' of Rs.9,53,44,278/- should have been taken by the A.O as Nil. The Principal CIT further observed that though the assessee had claimed depreciation of Rs.7,14,98,291/- in respect of 'fixed assets' addition of Rs.75,69,32,795/- during the year, however, the A.O had neither made any verification, nor called for the certificate of installation/commissioning of the said assets for verifying the entitlement of the assessee as regards the allowability of deprecation in its hands. The Principal CIT on the basis of his aforesaid observations concluded that as the A.O had failed to examine the issues and carry out necessary verifications, therefore, the assessment order passed u/s. 143(3) r.w.s. 153A, dated 27.03.2015 was rendered

as erroneous and prejudicial to the interest of the revenue. The Principal CIT thus in the backdrop of his aforesaid conviction initiated proceedings u/s. 263 and issued a 'Show cause' notice ('SCN'), dated 02.03.2017 to the assessee.

6. That during the course of the revision proceedings the assessee submitted before the Principal CIT that as it had installed the Plant and machinery during the year under consideration, therefore, it had rightly claimed the expenses emerging there from. During the course of the revision proceedings it was submitted by the assessee that as on the date of initiation of the Search & Seizure proceedings under Sec. 132 in its case, no proceedings for the year under consideration, viz. AY: 2007-08 were pending, therefore, in the absence of any incriminating evidence found during the course of the search & seizure proceedings, no addition/disallowance was permissible in respect of the unabated assessment of the assessee for the year under consideration. The assessee in support of its contention relied on the following judgments/orders of the **Hon'ble High Court of Bombay** and the **'Special Bench'** of **ITAT, Mumbai**:-

(i) CIT Vs. Murli Agro Product (ITA No. 36 of 2009) (Bom)

(ii) CIT Vs. All Cargo Global Logistics Ltd. 374 ITR 645 (Bom)

(iii) All Cargo Global Logistics Ltd. Vs. DCIT (2012) 137 ITD 287 (SB) (Mum).

(iv) ACIT Vs. Pratibha Industries Ltd. (2013) 141 ITD 151 (Mum).

7. The Principal CIT after deliberating on the aforesaid contentions of the assessee, though did not deny the factual position that no incriminating material was found during the course of the Search &

Seizure proceedings conducted on the assessee u/s. 132(1), but however, being of the view that the A.O had wrongly allowed the carry forward of the business loss of Rs.9,53,44,278/-(supra) for being 'set off' against the income of the assessee in the subsequent years, as well as had failed to verify the allowability of depreciation of Rs.7,14,98,291/- in the hands of the assessee, therefore, held that the order passed by the A.O was erroneous in so far as it was prejudicial to the interest of the revenue. The Principal CIT though took cognizance of the judgments of the Hon'ble High Court of jurisdiction and the order of the 'Special Bench' of the Tribunal, as was relied upon by the assessee before him, but however, held that the judgment of the **Hon'ble High Court of Bombay** in the case of **Murli Agro Products (supra)** had not been accepted by the department and a 'Special Leave Petition' (SLP) filed against the same was pending before the **Hon'ble Supreme Court.** The Principal CIT further observed that the decisions of the Income Tax Appellate Tribunal, Mumbai, in the case of **All Cargo Global Logistics (supra)** and **Pratibha Industries Ltd. (supra)** relied upon by the assessee had also not been accepted by the department, and the matter was sub judice before the Hon'ble High Court. The Principal CIT thus characterising the order passed by the A.O u/s. 143(3) r.w.s. 153A as erroneous and prejudicial to the interest of the revenue, therefore, set aside the assessment order to the file of the A.O, with a direction to examine the issue afresh and complete the assessment, as per law.

8. The assessee being aggrieved with the order passed by the Principal CIT u/s. 263 of the 'Act', had carried the matter in appeal before us. That during the course of hearing of the appeal it was submitted by the ld. Authorised Representative (for short 'A.R') for the

assessee that the issue on the basis of which revisional jurisdiction had been exercised by the Principal CIT under Sec. 263 was at length deliberated upon by the A.O during the course of the assessment proceedings. It was thus averred by the ld. A.R that now when the A.O while framing the assessment had arrived at a plausible view in respect of the issue under consideration, therefore, the Principal CIT was divested of his jurisdiction to exercise the powers vested with him u/s 263 and dislodge the well reasoned order of the A.O. The ld. A.R deliberating on the nature of business of the assessee company, therein submitted that it was engaged in the business of setting of infrastructure facilities for evacuation of power generator through wind power projects. The ld. A.R submitted that during the year under consideration the assessee company had installed a Sub-station at a cost of Rs.75,95,76,905/-, and to fortify his said contention took us through the 'Schedule' of 'Fixed assets' forming part of the 'balance sheet' of the assessee company for the year under consideration (Page 10 of 'APB'). It was averred by the ld. A.R that though the aforesaid sub-station was put to use during the year under consideration, however, the assessee had started billing the parties in the next year. The ld. A.R in order to drive home his contention that the installation of the sub-station had taken place during the year under consideration, drew our attention to a 'Provisional certificate' issued by the Dy. Chief Electrical Inspector (Rajkot), wherein the latter had verified that the inspection of the electrical installations of the transformer of M/s. Enercon (India) Ltd. at Village Bhogot, Near Bhatia, District Jamnagar, was carried out by the department on 29.12.2006 (Page 251 of 'APB'). The ld. A.R further in his attempt to fortify his contention that the sub-station was installed and put to use

during the year itself, therein took us through the copies of ledger accounts, installation certificates etc. placed at Page 19 to Page 259 of the APB. It was submitted by the ld. A.R that as on the date on which the search & seizure proceedings under Sec. 132 were conducted on the assessee, viz. 14.03.2013, no assessment or reassessment proceedings for the year under consideration i.e. A.Y. 2007-08 were pending, therefore, in the absence of any incriminating material found during the course of the search & seizure proceedings, no addition in respect of the unabated assessment for the year under consideration could have been made in the hands of the assessee company. The ld. A.R in support of his contention heavily relied on the following judgments of the **Hon'ble High Court of Bombay** and the orders of the Tribunal:-

(i) CIT Vs. Murli Agro Product (ITA No. 36 of 2009) (Bom)

(ii) CIT Vs. All Cargo Global Logistics Ltd. 374 ITR 645 (Bom)

(iii) All Cargo Global Logistics Ltd. Vs. DCIT (2012) 137 ITD 287 (SB) (Mum).

(iv) ACIT Vs. Pratibha Industries Ltd. (2013) 141 ITD 151 (Mum).

It was further averred by the Ld. A.R that during the course of the assessment proceedings it was submitted before the A.O that in the absence of any incriminating material found during the course of the Search & seizure proceedings conducted u/s 132(1), no addition/disallowance was permissible in respect of the unabated assessment of the assessee for the year under consideration. The ld. A.R submitted that the A.O after deliberating upon the said contention of the assessee, in the backdrop of the order of the **'Special Bench'** of the Tribunal in the case **of All Cargo Global Logistics Ltd. Vs. DCIT (2012)137 ITD 287 (SB)(Mum)** and the order of the ITAT, Mumbai in

the case of **ACIT Vs. Pratibha Industries Ltd. (2013) 141 ITD 151 (Mum)**, as were available at the time of the assessment proceedings, had accepted the same and did make not any addition/disallowance in the hands of the assessee. The ld. A.R drew our attention to the reply filed by the assessee with the A.O on 27.03.2015, wherein the said contention was specifically raised before him and heavy reliance was placed on the aforementioned orders of the Tribunal (Page 16-18) of 'APB'. It was thus averred by the ld. A.R that the A.O after deliberating on the facts of the case in light of the aforesaid settled position of law, had thus taken a plausible view and concluded that in the absence of any incriminating material having been found during the course of the Search & seizure proceedings conducted on the assessee u/s 132(1), no other addition could be made in respect of the unabated assessment of the assessee for the year under consideration. It was thus submitted by the ld. A.R that the said plausible view of the A.O which was backed by the order of the 'Special bench' of the jurisdictional Tribunal, which was specifically relied upon by the assessee during the course of the assessment proceedings, thus, could not be characterized as an erroneous view. The ld. A.R further submitted that the issue that in case of an unabated assessment no addition in the absence of any incriminating material emerging during the course of the Search & seizure proceedings conducted u/s 132(1) can be made in the hands of an assessee, is no more *res integra* in light of the judgments of the **Hon'ble Jurisdictional High Court** in the case of **(i). CIT Vs. Murli Agro Products Ltd. (ITA No. 36 of 2009); dt. 29.10.2010; (ii). CIT Vs. Continental Warehousing Corporation (2015) 374 ITR 645 (Bom);** and **(iii). CIT Vs. All Cargo Global Logistics Ltd.(2015) 374 ITR 645 (Bom).** It was submitted by

the ld. A.R that though the judgment of the Hon'ble High Court was binding on the Principal CIT, however, the latter had declined to follow the same for the reason that the 'SLP' filed against the said order was pending before the Hon'ble Supreme Court. It was further submitted by the ld. A.R that on a similar footing the Principal CIT had declined to follow the order of the 'Special Bench' of the Tribunal in the case of **CIT Vs. All Cargo Global Logistics Ltd. (2012) 137 ITD 287 (SB) (Mum), ACIT Vs. Pratibha Industries Ltd. (2013) 141 ITD 151 (Mum)**, for the reason that the said respective orders had not been accepted by the department and had been assailed before the High Court. It was averred by the ld. A.R that now when it remains as a matter of an undisputed fact that no incriminating material was found during the course of the search & seizure proceedings conducted on the assessee, therefore, no mistake could be related to the assessment framed by the A.O, who being guided by the aforesaid binding order of the 'Special bench' of the Tribunal, had thus refrained from making any disallowance/addition in respect of the unabated assessment of the assessee for the year under consideration.

9. Per contra, the ld. Departmental Representative (for short 'D.R') though did not controvert the fact that no incriminating material was found during the course of the Search & seizure proceedings conducted u/s 132(1) on the assessee, but however, vehemently submitted that as the framing of the assessment u/s. 153A r.w.s. 143(3) in the hands of the assessee was merely preceded by an intimation u/s. 143(1), therefore, the facts of the case were distinguishable as against those which were involved in the aforementioned cases before the Hon'ble High Court and the Tribunal. It was thus the contention of the ld. D.R that as in the case of the

assessee no order u/s. 143(3) for the year under consideration was passed prior to the date on which Search & seizure proceedings were initiated against the assessee u/s 132(1), i.e on 14.03.2013, therefore, the assessment framed by the A.O u/s 153A r.w.s. 143(3) was a 'first time' assessment framed as per the provisions of section 153A. The ld. D.R had tried to impress upon us that despite absence of any pending assessment or reassessment proceedings, in a case where earlier no assessment or reassessment had been framed prior to the Search & seizure proceedings conducted on the assessee u/s 132(1), but the same is preceded by a mere processing of the 'return of income' by way of an intimation u/s. 143(1), there would thus be no occasion to characterise the same as an unabated assessment. It was thus submitted by the ld. D.R that in a case where the 'return of income' of the assessee had merely undergone a summary acceptance u/s 143(1), then in the backdrop of the absence of any assessment earlier having been framed, the entire assessment in the case of the assessee would be *qua* open before the A.O. Thus, it was the case of the Ld. D.R. that in the absence of an assessment in a case where the 'return of income' had been summarily processed u/s. 143(1), the same despite absence of any pending assessment or reassessment proceedings in the hands of the assessee cannot be characterised as an unabated assessment. The ld. D.R in her attempt to fortify her contention, therein referred to Para 58(b) of the order passed by the 'Special Bench' of the Tribunal in the case of **All Cargo Global Logistics (supra)** and submitted that as in a case where no assessment or reassessment had earlier been framed in the case of an assessee, there would have been no occasion for the assessee to have produced any 'books of accounts' and 'documents' before the A.O prior

to the initiation of the Search & seizure proceedings, therefore, the scope of characterising the same as 'Incriminating material', or not, on the ground that they had never been produced before the A.O could never arise. The ld. D.R referring to the order passed by the 'Special Bench' of the Tribunal in the case of **All Cargo Global Logistics (supra)**, which had been approved by the Hon'ble High Court, submitted that only the cases where assessment or reassessment had earlier been framed can be brought within the sweep of '.....in other cases' as finds mentioned in Para 58(b) of the order of the Tribunal. The Ld. A.R submitted that in a case which prior to the date of initiation of the Search & seizure proceedings conducted u/s 132(1) is witnessed only by a mere processing of the 'return of income' u/s 143(1), is brought within the gamut of 'Other cases', then in the backdrop of the fact that there would be no basis for characterising the 'books of accounts' and 'documents' found during the course of search & seizure proceedings in such a case as an 'incriminating material', would thus lead to incongruous results. The ld. D.R thus on the basis of her aforesaid contentions submitted that as in the case of the present assessee there was no concluded assessment or reassessment for the year under consideration prior to the date of the initiation of the Search & seizure proceedings, but only an intimation u/s 143(1) existed, therefore, unlike a case where a concluded assessment or reassessment for the year under consideration was available as on the date of initiation of the Search & seizure proceedings u/s 132(1), the processing of the 'return of income' u/s 143(1) could not be characterized as an unabated assessment. It was thus submitted by the Ld. D.R that in the absence of a concluded assessment, the assessment framed by the A.O u/s 153A r.w.s. 143(3)

would be a 'first time' assessment framed as per the provisions of section 153A. The ld. D.R submitted that in the case of 'first time' assessment framed by the A.O as per the provisions of section 153A, the entire assessment for the year under consideration would be *qua* open before the A.O. The ld. D.R thus submitted that the appeal of the assessee was devoid of any force, both on merits and on law. The ld. D.R averred that the Principal CIT after duly appreciating that the A.O in the absence of the necessary verifications had failed to disallow expenses and had wrongly allowed depreciation as claimed by the assessee, had thus rightly held the assessment order as erroneous and prejudicial to the interest of revenue and revised the same u/s. 263 of the 'Act'.

10. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We have given a thoughtful consideration to the facts of the case and find that the fact that no incriminating material was found during the course of search and seizure action conducted u/s. 132(1) on the assessee on 14.03.2013, had neither been disputed by the Principal CIT, nor controverted by the ld. D.R before us. We find that our indulgence in the present case is sought on the issue that if on the date of the initiation of the Search & seizure proceedings u/s 132(1), no assessment or reassessment had earlier been framed in the hands of the assessee for the said year, but the return of income of the assessee had summarily been processed u/s. 143(1) for the year under consideration, then, whether in the absence of any pending proceedings, the case of the assessee for the said year can be characterised as an Unabated assessment?.

11. We have given a thoughtful consideration to the issue before us, and before adjudicating the same, therein deem it fit to refer to the relevant statutory provision, viz. Section 153A, which reads as under:-

*"**Assessment in case of search or requisition.***

153A (1) Notwithstanding anything contained in section 139, section 147 section 148, section 149, Section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—

(a) Issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years [and for the relevant assessment year or years] referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be apply accordingly as if such return were a return required to be furnished under section 139;

(b) Assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made [and for the relevant assessment year or years]:

***Provided** that the Assessing Officer shall asses or reassess the total income in respect of each assessment year falling within such six assessment years :*
***Provided further** that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years [and for the relevant assessment year or years] referred to in this [sub-section] pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate".*
***Provided also** that the Central government may by rules made by it and published in the official Gazette (except in cases where any assessment or reassessment has abated under the second proviso), specify the class or classes of cases in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year*

relevant to the previous year in which search is conducted or requisition is made

(2) If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has been abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the [Principal Commissioner or] Commissioner":

***Provided** that such revival shall cease to have effect, if such order of annulment is set aside.*

Explanation – For the removal of doubts, it is hereby declared that –

(i) save as otherwise provided in this section, section 153B and section 153C, all other provisions of this Act shall apply to the assessment made under this section;

(ii) in an assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year."

12. We have deliberated on the aforesaid statutory provision and are of the considered view that a bare perusal of the same reveals that it has been clearly provided that an assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in Sec. 153A(1), pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate. We further find that Sub-section (2) of Sec. 153A provides that where any proceedings initiated or any order of assessment or reassessment made under Sec. 153A(1) is annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) of Sec.153A or Section 153, the assessment or reassessment relating to any such assessment year which had abated under the *second proviso* of Sec. 153A, shall stand revived with effect from the date of receipt of the

order of such annulment by the Principal Commissioner or Commissioner. Thus, a consideration of the aforesaid statutory provision reveals that the legislature in all its wisdom has provided that it is only where the assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in Section 153A is pending on the date of initiation of the search u/s. 132, the same shall stand abated. The only inescapable view as can be gathered from a perusal of the aforesaid statutory provision is that except for assessment or reassessment which is pending on the date of initiation of the search & seizure proceedings u/s 132(1), in no other case the abatement shall take place. Thus, logically the sole plausible inference which can be drawn is that in a case where neither any assessment or reassessment is pending on the date of search, the issue of abatement cannot arise at all. We thus are of the considered view that in a case where no assessment or reassessment respect of a year is pending in the hands of the assessee on the date of initiation of the Search & seizure proceedings, then, irrespective of the fact that the return of income of the assessee had only been summarily processed under Sec. 143(1), the proceedings for the said year can safely be held to be unabated.

13. We find that our aforesaid view also stands fortified from the very fact that sub-section (2) of Section 153A further contemplates that where any order of assessment or reassessment made u/s. 153A(1) is annulled on a further appeal or any other legal proceedings, then, notwithstanding anything contained in Sec.153A(1) or section 153, the assessment or reassessment relating to any assessment order which had earlier abated under the *second proviso* of sub-section (1), shall stand revived with effect from the date of receipt of the order of such

annulment by the Principal Commissioner of Income tax or Commissioner of Income tax. We are of the considered view that a revival of an assessment or reassessment relating to any assessment year which had earlier abated under the *second proviso* of Sec. 153A(1), in a situation where the proceedings initiated or any order of assessment or reassessment made under Sec. 153A(1) is annulled on a further appeal or any other legal proceedings, thus, would therein lead to resurfacing of the assessment or reassessment proceedings relating to any such assessment year, which was pending on the date of initiation of the Search & seizure proceedings u/s. 132, but had abated due to the initiation of the search proceedings. We further find that as per Sec. 153A(2), the framing of such resurfaced assessment or reassessment would not be fettered by the 'time limit' contemplated in section 153(1), which shall stand lifted. Thus, it can safely be concluded that an annulment of an order passed u/s. 153A would lead to revival of the assessment and reassessment proceedings which earlier stood abated, and the time limits contemplated u/s. 153(1) for proceeding with and framing of such revived assessment and reassessment, would stand lifted. We find that if the contention of the ld. D.R that in a case which on the date of initiation of Search & seizure action is preceded by a processing of the 'return of income' u/s 143(1), despite absence of any pending assessment or reassessment proceedings is to be construed as abated, and the entire assessment in the case of the assessee is thrown upon before the A.O in the course of assessment proceedings u/s 153A, is accepted, then it is beyond our comprehension that how in case of annulment of the assessment framed u/s 153A, the processing of the 'return of income' u/s 143(1) can by any means lead to revival of any assessment or reassessment

as contemplated u/s 153A(2). We had consciously, purposively and intentionally referred to Sec. 153A(2), in order to fortify our view that what stands abated on the initiation of Search & seizure proceedings u/s. 132(1) is only an assessment or reassessment pending on the date of search & seizure proceedings, which on annulment of the assessment framed u/s 153A(1), on an appeal or in the course of any legal proceedings, shall stand revived, without being fettered by the time limitation for framing of such assessment or reassessment, as provided in Sec. 153(1). We find that as processing of a 'return of income' u/s 143(1) does not fit anywhere in the aforesaid scheme, therefore, on the said basis too our aforesaid view that a processing of a 'return of income' u/s. 143(1), in the absence of any pending assessment or reassessment proceedings on the date of initiation of the search & seizure action, cannot be held to have been abated, stands fortified.

14. We further find that our aforesaid view that in a case where on the date on which Search & seizure proceedings had been initiated no assessment or reassessment is pending, then without prejudice to the fact that prior to the date of Search & seizure proceedings, the income of the assessee for the year under consideration was only processed under Sec. 143(1) and no assessment or reassessment had earlier been framed, the assessment under Sec. 153A for the said year can only be proceeded with on the basis of the incriminating material found during the course of the said Search & seizure proceedings, is squarely covered by the order of a coordinate bench of ITAT, Mumbai in the case of **Shri Anil Mahavir Gupta Vs. ACIT, Mumbai (2016) 47 CCH 0773 (Mum),** wherein it was observed as under:

"7.12 Before parting, we may refer to the argument set up by the Ld. Departmental Representative to the effect that the aforesaid proposition of law laid down by the Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (NHAVA SHEVA) Ltd. (supra) is not applicable in the instant case, because, in this case, the original assessment was completed under section 143(1) of the Act itself and not as a scrutiny assessment under section 143(3) of the Act. In this context, Ld. Representative for the assessee had relied upon the decision of our Co-ordinate Bench in the case of Govind Agarwal in ITA No.3389&3390/Mum/2011 dated 10/01/2004, wherein under identical circumstances the addition made in assessment under section 153A of the Act without support of the incriminating material was held unsustainable even when the original assessment was completed under section 143(1) of the Act."

We may herein observe that a similar view, as hereinabove, had also been taken by the coordinate benches of the Tribunal in the following cases:-

(i) Govind Agarwal Vs. ITO (ITA No. 3389 & 3390/Mum/2011; dated.10/01/2004 (Mumbai-Trib).

(ii). Gurinder Singh Bawa Vs. DCIT (2012) 28 Taxmann.com 328 (Mumbai-Trib).

15. We have given a thoughtful consideration to the issue before us, and in the backdrop of our aforesaid observations are persuaded to observe that the A.O after deliberating upon the contention of the assessee that as on the date on which the Search & seizure proceedings under Sec. 132 were conducted on it, viz. 14.03.2013, no assessment or reassessment proceedings for the year under consideration i.e. A.Y. 2007-08 were pending, therefore, in the absence of any incriminating material found during the course of the Search & seizure proceedings, no addition in respect of the unabated assessment for the year under consideration could be made in the hands of the assessee company, had thus in the backdrop of the order

of the **'Special Bench'** of the Tribunal in the case of **All Cargo Global Logistics Ltd. Vs. DCIT (2012)137 ITD 287 (SB)(Mum)** and the order of the ITAT, Mumbai in the case of **ACIT Vs. Pratibha Industries Ltd. (2013) 141 ITD 151 (Mum)**, as were available at the time of the assessment proceedings and were specifically relied upon by the assessee before him, rightly refrained from making any addition in the hands of the assessee. We find that as observed by us hereinabove, the aforesaid view of the Tribunal that in case of an unabated assessment no addition in the absence of any incriminating material emerging during the course of the Search & seizure proceedings conducted u/s 132(1) can be made in the hands of an assessee, had been approved by the **Hon'ble Jurisdictional High Court** and the issue is no more *res integra* in light of the judgments delivered in the case of **(i). CIT Vs. Murli Agro Products Ltd. (ITA No. 36 of 2009); dt. 29.10.2010; (ii). CIT Vs. Continental Warehousing Corporation (2015) 374 ITR 645 (Bom);** and **(iii). CIT Vs. All Cargo Global Logistics Ltd.(2015) 374 ITR 645 (Bom).** We have deliberated on the facts r.w the settled position of law and are of the considered view that as the A.O remaining within the four parameters of law had passed the assessment order u/s. 153A r.w.s 143(3), dated, 27.03.2015, therefore, the said assessment cannot be faulted with and held to be "erroneous". We thus are of the considered view that now when the assessment order passed by the A.O is not found to be "erroneous", therefore, the Principal CIT had wrongly assumed jurisdiction and revised the order in exercise of the powers vested with him u/s 263 of the 'Act'. We thus set aside the order passed by the Principal CIT under Sec. 263 of the 'Act' and restore the order passed by the A.O under Sec. 153A r.w.s 143(3), dated. 27.03.2015. The **Grounds of**

appeal No. 1 to 3 raised by the assessee are allowed. That as the **Ground of appeal No. 4** is general, therefore, the same is dismissed as not pressed.

16. The appeal of the assessee is allowed in terms of our aforesaid observations.

ITA No.2371/Mum/2017
A.Y: 2011-12

17. We shall now take up the appeal of the assessee, viz. Wind World Wind Resources Development Pvt. Ltd., for A.Y. 2011-12. The assessee assailing the order passed by the Principal Commissioner Of Income-tax (Central-2), Mumbai dated 23.03.2017, under Section 263 of the 'Act', had raised before us the following grounds of appeal:

The following grounds of appeal are without prejudice to one another:-

1. *On the facts and in the circumstances of the appellant's case and in law the Ld. Principal CIT erred in passing the impugned order by invoking the provisions of section 263 of the Act, which is illegal, bad-in-law or otherwise void for want of jurisdiction.*
2. *on the facts and in the circumstances of the appellant's case and in law the Ld. Principal CIT erred to hold that the assessment order passed by the A.O u/s. 143(3) r.w.s 153A is erroneous and prejudicial to the interest of the revenue.*
3. *on the facts and in the circumstances of the appellant's case and in law the Ld. Principal CIT erred to hold that the addition to fixed assets call for further examination despite the fact that this issue was not raised in the show cause notice.*
4. *The Ld. Principal CIT failed to appreciate that as on the date of search, the assessment or reassessment for the assessment year under consideration was not pending and no addition/disallowance is permissible in respect of such unabated assessment year in the absence of any incriminating material found during the course of search.*
5. *The appellant craves leave to add to, alter, amend and /or delete all or any of the foregoing grounds of appeal.*

The appellant prays this Hon'ble Tribunal to quash the impugned order passed by the Ld. Principal CIT by invoking the provisions of section 263 of the Income Tax Act, 1961.

18. Briefly stated, the facts of the case are that the assessee company is engaged in the business of purchase and sale of Development rights required for generation of power by wind farms and generation of power. Search and seizure action u/s. 132 of the 'Act' was carried out on 14.03.2013 at the premises of M/s. Enercon India Ltd. (EIL) and its groups companies. The assessee company being one of the group company of M/s. Enercon India Ltd. [now known as M/s. Wind World (India) Ltd.] was covered in the aforesaid search proceedings.

19. The assessee had filed its original 'return of income' for A.Y. 2011-12 on 29.09.2011, declaring an income of Rs.8,82,69,613/- under normal provisions and 'Book profit' of Rs. 17,54,27,378/- u/s 115JB of the 'Act'. That subsequent to the aforesaid search and seizure proceedings the assessee filed its 'return of income' u/s 153A of the 'Act' on 28.02.2014, declaring an income of Rs. 8,82,69,613/- under the normal provisions and 'Book profit' of Rs. 17,54,27,378/- u/s 115JB as per the MAT provisions. The assessment in the case of the assessee was framed by the A.O vide order dated 30.03.2015 passed u/s 153A r.w.s. 143(3) of the 'Act' and the income of the assessee was assessed at Rs. Nil under the normal provisions, while for the 'book profit' u/s 115JB was computed at Rs. 17,54,27,378/-.

20. The Principal Commissioner of Income tax, Central-2, Mumbai deliberated on the assessment records of the assessee for the year under consideration, viz. A.Y. 2011-12, and observed that the A.O had allowed total depreciation of Rs. 8,72,84,028/- as claimed by the assessee. It was observed by the Principal CIT that the assessee had made addition of Rs. 13,09,26,042/- and Rs. 4,36,42,014/- in the

'fixed assets' on 26.03.2011 and 30.03.2011, respectively. The Principal CIT being of the view that as the respective assets were put to use by the assessee for a period of less than 180 days, therefore, depreciation @ 40% (50% of 80) amounting to Rs. 6,98,27,222/- was allowable, however, the A.O while framing the assessment had allowed depreciation of Rs. 8,72,84,028/- (including additional depreciation of Rs. 1,74,56,802/-) as claimed by the assessee. The Principal CIT observed that as per the provisions of Sec. 32(1)(iia) additional deprecation @20% of actual cost of plant and machinery acquired and installed after 31.03.2005 was though allowable to an assessee who was engaged in the business of manufacture or production of any article or thing, but however, where such plant and machinery were not used in manufacturing or production of any article or thing, the assessee would not qualify for additional depreciation. It was further observed by the Principal CIT that Sec. 36(1)(iia) was amended by the Finance Act, 2012 to allow the additional depreciation to the assesses who were engaged in the business of generation or generation and distribution of power w.e.f. April,2013, i.e. from A.Y. 2013-14. The Principal CIT on the basis of his aforesaid conviction, observed that the additional depreciation was not allowable to the assesses who were engaged in the business of generation or generation and distribution of power prior to A.Y. 2013-14. The Principal CIT on the basis of his aforesaid observations concluded that the assessee was not eligible for additional depreciation on "Wind Turbine Generator" during the year under consideration, viz. A.Y. 2011-12.

21. The Principal CIT thus held a view that the A.O while framing the assessment u/s 143(3) r.w.s. 153A, dated 30.03.2015, had wrongly allowed the additional depreciation of Rs. 1,74,56,805/- to the

assessee. The Principal CIT holding a conviction that the allowing of additional depreciation of Rs. 1,74,56,805/- by the A.O in the assessment order passed u/s 143(3) r.w.s. 153A had rendered the order as erroneous and prejudicial to the interest of the revenue, therefore, invoked his revisional jurisdictional u/s 263 of the 'Act'.

22. The Principal CIT vide his notice u/s 263 of the 'Act', therein called upon the assessee to show cause as to why the assessment framed u/s 153A r.w.s. 143(3) may not be revised in order to withdraw the additional depreciation of Rs. 1,74,56,805/-, which as per him was wrongly allowed by the A.O while framing the assessment. The assessee in his reply filed before the Principal CIT, taking support of various judicial pronouncements, submitted that as electric energy had all trappings of an article or thing, therefore, the process of its generation was also akin to manufacture or production of articles or things. The assessee thus tried to impress upon the Principal CIT that the wind turbine generators were used for generation of electricity, which is akin to manufacturing of an article or thing as the electricity is intangible and its effect can be seen and felt, transferred, delivered, stored, processed etc. It was thus submitted by the assessee that it was entitled towards the claim of additional depreciation in respect of the new plant and machinery purchased and installed by it for generation of electricity. It was averred by the assessee that though the amendment in Sec. 32(1)(iia) to include the business of generation or generation and distribution of power is applicable w.e.f. 01.04.2013, the basic concept for claim of additional deprecation remained the same, and thus now when the assessee duly satisfied all the requisite conditions therein entitling it to claim additional depreciation, therefore, the order passed by the A.O u/s 153A r.w.s. 143(3), allowing

the additional depreciation could not be held to be erroneous. The assessee in order to drive home his contention that electricity was an article or thing, submitted that it had generated electricity by harnessing wind energy and earned income from sale of electricity generated, which was measured and traded in units known as 'Kilowatts'. The assessee in order to drive home its aforesaid contention that it stood duly entitled for claim of additional depreciation on the new plant and machinery purchased and installed for generation of electricity, therein relied on a host of judicial pronouncements. The Principal CIT after deliberating on the contentions of the assessee, however, did not find favour with the same and holding a conviction that now when the allowability of additional depreciation to the assesses engaged in the business of generation or generation and distribution of power had been brought within the sweep of Sec. 32(1)(iia), vide the Finance Act, 2012, w.e.f. 1st April, 2013, i.e. from A.Y. 2013-14, therefore, the assessee was not eligible for additional depreciation on wind turbine generators during the year under consideration, viz. A.Y. 2011-12. The Principal CIT thus being of the view the A.O had failed to look into the claim of depreciation properly while framing the assessment, specifically the impact of amendment of Sec. 32(1)(iia) vide the Finance Act, 2012, w.e.f 01.04.2013, i.e. A.Y. 2013-14, nor had called for any explanation of the assessee on the issue of allowability of additional depreciation, therefore, held that the assessment order passed u/s 143(3) r.w.s. 153A was erroneous and prejudicial to the interest of the revenue. The Principal CIT while concluding as hereinabove, also took support of the *Explanation 2* of Sec. 263 of the 'Act'. The Principal CIT on the basis of his aforesaid observations, holding the order passed by the

A.O u/s 153A r.w.s 143(3) as erroneous to the extent prejudicial to the interest of the revenue, therefore, set aside the assessment order to the file of the A.O, with the direction to examine the claim of the assessee towards additional depreciation afresh and complete the assessment, as per law.

23. The assessee being aggrieved with the order passed by the Principal CIT under Section 263, had carried the matter in appeal before us. That the Ld. Authorized representative (for short 'A.R') for the assessee assailing the order of the Principal CIT, therein averred that as the assessee was engaged in the business of generation of electricity by harnessing wind energy and the electricity so generated was an "article or thing" within the meaning of Sec. 32(1)(iia), therefore, its claim for additional depreciation was rightly allowed by the A.O while framing the assessment. It was thus submitted by the Ld. A.R that now when the electricity generated by the assessee is an "article or thing", which can be traded, which can be measured, which can be stored and also exchanged, therefore, the claim of the assessee towards additional depreciation u/s 32(1)(iia) on satisfaction of all the requisite conditions contemplated under the said statutory provision, thus, could not be characterized as erroneous. It was thus in the backdrop of the aforesaid contentions submitted by the Ld. A.R that the additional depreciation u/s 32(1)(iia) was allowable on "Wind Turbine Generator" for generation of electricity prior to 01.04.2013, and the A.O had correctly allowed the claim of the assessee while framing the assessment under Sec. 143(3) r.w.s. 153A, dated 24.03.2015. It was averred by the ld. A.R that as the order passed by the A.O was neither erroneous nor prejudicial to the interest of the revenue, therefore, the Principal CIT had wrongly assumed jurisdiction

and set aside the assessment in exercise of the powers vested with him u/s 263 of the 'Act'. The ld. A.R in the backdrop of his aforesaid contentions submitted that the order passed by the Principal CIT u/s 263 of the 'Act' may therein be vacated. Per contra, the Ld. Departmental representative (for short 'D.R') relied on the order passed by the Principal CIT under Section 263 of the 'Act'. It was submitted by the Ld. D.R that as the business of generation or generation and distribution of power had been brought within the sweep of Sec. 32(1)(iia), vide the 'Finance Act, 2012' w.e.f. 01.04.2013, therefore, the assessee would not be entitled to claim the additional depreciation during the year under consideration, viz. A.Y. 2011-12. It was submitted by the Ld. D.R that as the A.O had gravely erred in law by summarily accepting the wrong claim of the assessee towards additional depreciation u/s 32(1)(iia) and consequently allowed excess depreciation of Rs. 1,74,56,802/-, therefore, the Principal CIT duly appreciating that the order passed by the A.O was erroneous and prejudicial to the interest of the revenue, had thus rightly revised the order in exercise of the powers vested with him u/s 263 of the 'Act'.

24. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We have given a thoughtful consideration to the facts of the case and find that the issue involved in the present appeal is as to whether the assessee which is engaged in the business of generation of electricity by harnessing wind energy would be entitled to claim additional depreciation u/s 32(1)(iia) on new plant and machinery, viz. Wind Turbine Generator purchased and installed by it for generation of electricity, prior to 01.04.2013, or not. We have deliberated on the scope and gamut of Sec. 32(1)(iia) as was available

on the statute prior to 01.04.2013. We find that as per the pre-amended Sec. 32(1)(iia), the additional depreciation of a further sum equal to twenty percent of the actual cost of such machinery and plant was available in the case of any new machinery or plant (other than ships and aircrafts) which had been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing. We are of the considered view that for adjudicating as to whether the assessee would be entitled to claim additional depreciation in A.Y 2011-12, our focus has to be confined to the conditions contemplated in the said statutory provision, viz. Sec. 32(1)(iia), as was available on the statute at the relevant point of time. We are of the considered view that cumulative satisfaction of the conditions contemplated in the said statutory provision, viz. Sec. 32(1)(iia), as was applicable during A.Y. 2011-12, would duly entitle an assessee for claim of additional depreciation contemplated therein.

25. We thus in the backdrop of our aforesaid observations, confine ourselves to the requisite conditions which were required to be satisfied by an assessee in order to entitle it to claim additional depreciation u/s 32(1)(iia). We find that the only issue which is in dispute in the present appeal is as to whether the business of generation of electricity carried on by the assessee can be construed as a manufacturing or production of any article or thing by the assessee. We have deliberated on the issue and find substantial force in the contention of the Ld. A.R. We find that the **Hon'ble Supreme Court** in the case of **CST Vs. MP Electricity Board (1969) 1 SCC 200 (SC)** had way back held that electric energy has all trappings of an article or thing. We find that before the **Hon'ble High Court of Madras** in the

case of **CIT Vs. Atlas Export Enterprises (2015) 373 ITR 414 (Mad)**, in an appeal filed by the revenue against the order dated 26.06.2014 passed by the Tribunal in ITA No. 154 and 155/Mds/2014 for the A.Y(s). 2005-06 and 2006-07, the following substantial question of law was raised:

> *"Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the generation of electricity by wind mill amounts to production of an article or thing and consequently holding that the assessee is entitled for additional depreciation as per Section 32(1)(iia)?"*

The Hon'ble High Court after deliberating on the facts involved in the case before it, observed as under:

"2. The brief facts of the case in a nutshell are as follows: The assessee is a partnership firm engaged in the business of textiles and generation and distribution of power. The assessee filed return of income claiming additional depreciation on windmill. The Assessing Officer disallowed the assessee's claim of additional depreciation on windmill under Section 32(1)(iia) of the Income Tax Act holding that the assessee failed to satisfy one of the condition, namely, the assessee should be engaged in the business of manufacture and production of an article or a thing. The Assessing Officer further held that the production of electricity through windmill was not production of an article or thing. Aggrieved by the same, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals), who, by following the decisions of this Court in the case of CIT V. VTM Ltd. and CIT V. Hi Tech Arai Ltd., allowed the appeal. As against the same, the Revenue preferred an appeal before the Income Tax Appellate Tribunal, which dismissed the appeal following the decision of this Court in the case of CIT V. VTM Ltd. It is stated by the Tribunal that as against the said decision of this Court, the Revenue preferred an appeal before the Supreme Court and the Supreme Court dismissed the same in the SLP stage itself. Hence, the Tribunal held that no material has been brought on record to show that the said decision of this Court in the case of CIT V. VTM Ltd. has been either modified or reversed by the Supreme Court.

3. Aggrieved by the said order of the Tribunal, the Revenue is before this Court.

4. Heard learned Standing Counsel appearing for the Revenue and perused the materials placed before this Court.

5. In the decision reported in [2010] 321 ITR 477 (Mad) (COMMISSIONER OF INCOME-TAX v. HI TECH ARAI LTD.), this Court, while considering the scope and application of Section 32(1)(iia) of the Income Tax Act, held as follows:

> *"As far as application of section 32(1)(iia) of the Act is concerned, what is required to be satisfied in order to claim the additional depreciation is that the setting up of a new machinery or plant should have been acquired and installed after March 31, 2002 by an assessee, who was already engaged in the business of manufacture or production of any article or thing. The said provision does not state that the setting up of a new machinery or plant, which was acquired and installed up to March 31, 2002, should have any operational connectivity to the article or thing that was already being manufactured by the assessee. Therefore, the contention that the setting up of a wind mill has nothing to do with the power industry, namely, manufacture of oil seeds, etc., is totally not germane to the specific provision contained in section 32(1)(iia) of the Act.*
>
> *6. In such circumstances, we are not able to appreciate the contention of the learned standing counsel for the appellant on the ground that the order of the Commissioner of Income-tax (Appeals) as confirmed by the Tribunal should be interfered with. It cannot also be said that setting up of a wind mill will not fall within the expression setting up of a new machinery or plant. We do not find any error in the conclusion of the Tribunal in confirming the order of the Commissioner of Income-tax (Appeals). We, therefore, do not find any question of law much less substantial question of law to entertain these appeals. These appeals fail and the same are dismissed. Consequently, M.P.No. 1 of 2009 is also dismissed."*

6. The facts in the present case are no different from the above-said decision. In the present case, the core business of the assessee is manufacturing and export of textile goods. During the assessment year 2006-07, the assessee had entered into the business of generation of power and installed one wind mill. The assessee maintained separate books of accounts for export division and the wind mill division. Since the assessee has treated the windmill division as separate business, the claim of additional depreciation has to be seen in the context of

generation of power through windmill only and the production of textiles and its export has nothing to do with the generation of power for the purpose of considering additional depreciation. Further as rightly held by the Tribunal, the Revenue has not brought in any new or contra material to differ from the view of this Court in the decision reported in [2010] 321 ITR 477 (Mad) (COMMISSIONER OF INCOME-TAX ***v.*** *HI TECH ARAI LTD.).*

In this regard it would be relevant and pertinent to point out that the **Hon'ble High Court of Madras** had earlier in the case of **CIT Vs. VTM Ltd. (2009) 319 ITR 336 (Mad)**, had upheld the order of the Tribunal and therein concluded that as the business of generation of electricity by wind mill amounts to production of an article or thing, therefore, the assessee would be entitled to additional depreciation u/s 32(1)(iia). The revenue being aggrieved with the order of the Hon'ble High Court had preferred a 'Special Leave Petition' (SLP), which was dismissed by the Hon'ble Apex Court. That still further the **Hon'ble High Court of Madras** in the case of **Principal CIT Vs. Kanishk Steel Industries (2016) 96 CCH 0292 (Mad),** vide its order dated 22.08.2016, had dismissed the appeal filed by the revenue on the issue pertaining to the admissibility of additional depreciation u/s 32(1)(iia). We further find that a coordinate bench of the Tribunal in the case of **DCIT Vs. J.K Cement (2016) 45 ITR (Trib) 50 (Lucknow)**, adjudicating on the issue as regards the admissibility of additional depreciation under Sec. 32(1)(iia) in the case of the assessee who had installed power generating units for captive use, had therein relying upon the judgment of the Hon'ble Apex Court in the case of MP Electricity Board (supra) and after deliberating on the order of the CIT(A) who had observed that though the amendment to include the business of generation or generation and distribution of power was applicable w.e.f. 01.04.2013, the basic concept for additional depreciation

remained the same, and what was required to be satisfied by the assessee in order to claim additional depreciation u/s 32(1)(iia) was that it should be engaged in the business of manufacture or production of any article or thing, had concluded that the assessee could not be denied additional depreciation on the ground that electricity is not an article or thing. We further find that a coordinate bench of the **ITAT, Mumbai** vide its order dated 09.10.2015 in the case of **ACIT Vs. Delta Enterprises (ITA No. 944/Mum/2012 for A.Y. 2007-08** had dismissed the appeal of the revenue by finding itself as being in agreement with the view taken by the CIT(A) that production of electricity by harnessing wind energy did tantamount to manufacturing or production of an article or thing. The Tribunal while adjudicating the aforesaid issue though observed that the business of generation or generation and distribution of power was added in Sec. 32(1)(iia) only w.e.f. 01.04.2013, however, the same would not have any material bearing on the entitlement of the assessee towards claim of additional depreciation prior to 01.04.2013. The Tribunal while so concluding had relied on the order passed by the coordinate bench of the Tribunal in the case of **ACIT Vs. M. Satish kumar (2012) 33 CCH 0394 (Chennai)**, wherein too the Tribunal after considering the amendment made by the Finance Act, 2012, had concluded that the assessee was entitled towards claim of additional depreciation, by observing as under:

> *"9. We have heard the submissions made by the respective parties and have also examined the judgements orders relied on by the A.R. of the assessee. A perusal of the judgements clearly show that generation of electricity is akin to manufacturing of a new product. In the instant case, electricity which may not be seen with the eyes, however, its effect can be seen and felt. The electricity can be transmitted, transferred, delivered, stored, possessed etc. The Hon'ble Supreme*

Court in the case of the CST Vs. Madhya Pradesh Electricity Board (supra) has held that electricity falls within the definition of goods under the provisions of Sale of Goods Act, 1930. The Delhi Bench of the Tribunal in the case of NTPC Ltd. (supra) after a detailed examination of several judgements, Acts, Constitution of India, has concluded that the process of generation of electricity is akin to manufacture of an article or thing.

10. In view of the above, we are of the considered opinion that generation of electricity is a manufacturing activity. The assessee is involved in the manufacturing activity and fulfills the conditions as laid down under section 32(1)(iia). The Government vide Finance Act, 2012 has amended the provisions of section 32(1)(iia) to include the business of generation or generation and distribution of power, eligible for benefit under section 32(1)(iia). Although the said amendment is with effect from 1.4.2013 but it gives impetus to the view that generation of electricity is a manufacturing process and qualifies for the benefits under section 32(1)(iia). In view of the above, the order of the CIT(A) is upheld and the appeal of the Revenue is dismissed being devoid of merit".

We further find that the coordinate bench of the Tribunal in the case of Delta Enterprises (supra) had observed as under :

"8.3. Further, it is observed by us that this issue has been decided in favour of assessee in many judgments passed by the Tribunal also, as were relied upon by the ld. Counsel, during course of hearing. We can take support from the judgments of ACIT vs. M. Satishkumar (supra), wherein similar claim has been allowed by the Bench after considering the amendment made by Finance Act, 2012, which has been referred to in grounds of appeal filed by the Revenue. Similar view has been taken in another case by Hon'ble ITAT, Chennai Bench in case of ACIT vs. M/s Mallow International in ITA No. 152/MDS/2014 dated 19.12.2014 for A.Y. 2006-07. The relevant portion of the judgment is reproduced below :

> *"6. The Hon'ble Madras High Court in the case of CIT vs. Hi Tech Arai Ltd. (Supra) has held that where the assessee has set up windmill in addition to some other existing business, and is engaged in the generation of electricity, the assessee is entitled to claim additional depreciation on the same.*
>
> *7. We find that the issue in appeal is squarely covered in favour of the assessee by the aforesaid decisions of*

> *the Hon'ble Madras High Court and the co-ordinate Bench of the Tribunal. We do not find any infirmity in the impugned order."*
>
> *8.4. Therefore, keeping in view the aforesaid facts and circumstances of the case and clear position of law, we find that the claim made by the assessee on account of additional depreciation is allowable, no interference is called for in the order of CIT(A), and therefore same is upheld. The AO is directed to allow additional depreciation u/s 32(1)(iia) of the Act. All the grounds raised by Revenue are dismissed."*

20. We have given a thoughtful consideration to the issue before us and are of the considered view that production of electricity by harnessing wind energy by the assessee can safely be held to be manufacturing or production of an article or thing. We though are not oblivious of the fact that the business of generation or generation and distribution of power had specifically been brought within the sweep of Sec. 32(1)(iia) w.e.f. 01.04.2013, vide the Finance Act, 2012, but then the entitlement of the assessee at the relevant point of time, viz. A.Y. 2011-12, has to be adjudicated by strictly confining ourselves to the conditions contemplated under the aforesaid statutory provisions, viz. Sec. 32(1)(iia), which as observed by us at length hereinabove, had duly been satisfied by the assessee. We are of the considered view that now when the generation of electricity by harnessing wind energy by the assessee can safely and rather inescapably be characterized as manufacturing or production of any article or thing, therefore, there is no reason for us to hold that the assessee despite having satisfied all the requisite conditions contemplated in Sec. 32(1)(iia), would however still stand disentitled and deprived of its claim of additional depreciation. We have deliberated at length on the aforesaid judgments of the Hon'ble Supreme Court, Hon'ble High Court and the coordinate benches of the Tribunal, and finding no reason to take a different view,

thus respectfully follow the same and conclude that the assessee was duly entitled towards claim of additional depreciation u/s 32(1)(iia). We thus being of the considered view that the allowing of additional depreciation u/s 32(1)(iia) by the A.O to the assessee company was in conformity with the judgment of the Hon'ble High Court of Madras and the coordinate benches of the Tribunal, therefore, the same cannot be held to be erroneous and prejudicial to the interest of the revenue. We thus being of the considered view that the assessee was duly entitled towards claim of additional depreciation, thus, set aside the order passed by the Principal CIT under section 263 of the 'Act' and restore the order passed by the A.O under Sec. 153A r.w.s 143(3). The **Grounds of Appeal No. 1 & 2** raised by the assessee before us are allowed in terms of our aforesaid observations.

27. The assessee had further assailed before us the order passed by the Principal CIT on the ground that though the assessee was never put to notice as regards any doubts on the part of the Principal CIT in respect of the veracity of the claim of depreciation on the fixed assets of Rs. 13,09,26,042/- and 4,36,42,014/- as were claimed by the assessee to have been put to use on 26.03.2011 and 30.03.2011, respectively, however, the Principal CIT had in his order passed u/s 263 traversed beyond the 'Show cause' notice and had also directed the A.O to call for and examine the claim raised by the assessee as regards the initial depreciation in respect of the aforesaid addition made by the assessee to the "fixed assets". It was averred by the Ld. A.R. that the Principal CIT without putting the assessee to notice in respect of the aforesaid issue, had thus exceeded his jurisdiction and directed the A.O to verify the claim of the assessee in respect of the initial depreciation on the additions to the abovementioned fixed

assets. Per contra, the Ld. D.R. relied on the order passed by the Principal CIT and submitted that the latter had rightly revised the order passed by the A.O under Sec. 153A r.w.s. 143(3) of the 'Act'.

28. We have given a thoughtful consideration to the facts of the case and after perusing the show cause notice dated 02.03.2017 issued by the Principal CIT (Page 1–2 of 'APB'), therein find ourselves to be in agreement with the contention of the Ld. A.R. that the Principal CIT had at no stage sought to revise the order passed by the A.O u/s 153A r.w.s. 143(3), for the reason that the latter had failed to verify the claim raised by the assessee in respect of initial depreciation on the fixed assets of Rs. 13,09,26,042/- and 4,36,42,014/-, which were claimed by the assessee to have been put to use on 26.03.2011 and 30.03.2011, respectively. We are of the considered view that now when the assessee had never been put to notice in respect of the revision of the order on the aforesaid ground, therefore, the latter had no occasion to put forth an explanation before the Principal CIT in context of the issue under consideration. We thus being of the considered view that a revision of an order passed by an A.O cannot be carried out in respect of an issue without putting the assessee to notice as regards the seeking of revision and affording an opportunity of being heard to him, as regards the same, therefore, the order passed by the Principal CIT u/s 263, to the extent he had directed the A.O to further examine the claim of the assessee in respect of initial depreciation on the addition of the fixed assets of Rs. 13,09,26,042/- and 4,36,42,014/- which were claimed by the assessee to have been put to use on 26.03.2011 and 30.03.2011, respectively, without affording any opportunity to the assessee to put forth an explanation as regards the same, cannot be sustained. We thus set aside the order of the

Principal CIT passed u/s 263 in context of the issue under consideration. The **Ground of Appeal No. 3** raised by the assessee before us is allowed.

29. The assessee had further assailed before us vide ground of appeal no. 4 the validity of the order passed by the Principal CIT u/s 263, on the ground that as no assessment or reassessment for the year under consideration, viz. A.Y. 2011-12 of the assessee was pending on the date on which search and seizure proceedings were initiated u/s 132(1), i.e. 14.03.2013, therefore, no addition /disallowance was permissible in respect of such unabated assessment year in the absence of any incriminating material found during the course of search and seizure proceedings. We though find that the ld. D.R vide her consolidate 'Written Submissions', dated. 28.07.2017, placed on our record, had stated as under:

> *"Therefore, it is fact that in none of the cases order u/s 143(3) was passed on or before 14.03.2013 (dt. of search) for the assessment years involved . Apart from M/s J N Investment, in none of the cases notice u/s 143(2) was issued, therefore, in none of the 3 cases at S.No. 1, 2 & 3 of the chart above, assessment proceedings were pending on the date of search. Only in the J N Investments the assessment got abated for A.Y. 2012-13 on the date of search for which Notice u/s 143(2) was issued."*

,however, the fact as it so remains is that the assessee had for the very first time in the 'Ground of appeal no. 4' raised the contention that no assessment or reassessment in its case for the year under consideration, viz. A.Y. 2011-12 was pending on the date on which

search and seizure proceedings were initiated u/s 132(1), i.e. 14.03.2013, therefore, no addition/disallowance was permissible in respect of such unabated assessment year in the absence of any incriminating material found during the course of search and seizure proceedings. We are of the considered view that though the fact that no assessment or reassessment proceedings were pending in the case of the assessee at the time when Search & seizure proceedings were conducted against the assessee, had been conceded by the ld. D.R before us, but then, the fact as to whether or not any incriminating material for the year under consideration, viz. A.Y. 2011-12 was found during the course of the Search & seizure proceedings, is not borne from the records. We thus in the backdrop of the aforesaid facts, are unable to persuade ourselves to accept the aforesaid contention of the assessee on the very face of it. We are of the considered view that as the order passed by the Principal CIT under section 263 of the 'Act' had already been set aside and the order passed by the A.O under Sec. 153A r.w.s 143(3) had been restored by us on merits while disposing of the Grounds of Appeal No. 1 & 2 raised by the assessee before us, therefore, in the absence of complete set of facts required for adjudicating the **Ground of Appeal No. 4** raised by the assessee before us, which we are of the considered view is rendered as academic, therefore, refrain from adjudicating the same.

30. The **Ground of Appeal No. 5** being general in nature, is thus dismissed.

31. We thus in terms of our aforesaid observations set aside the order passed by the Principal CIT under Sec. 263 of the 'Act', and thus restore the order passed by the A.O under Sec. 153A r.w.s. 143(3).

32. The appeal of the assessee is thus partly allowed in terms of our observations.

ITA No. 2372/Mum/2017

AY: 2012-13

33. We shall now take up the appeal of the assessee for A.Y. 2012-13. The assessee assailing the order passed by the Principal CIT(Central-2), Mumbai dated 23.03.2017 under Section 263 of the 'Act', had raised before us, the following grounds of appeal :

The following grounds of appeal are without prejudice to one another:-

1. *On the facts and in the circumstances of the appellant's case and in law the Ld. Principal CIT erred in passing the impugned order by invoking the provisions of section 263 of the Act, which is illegal, bad-in-law or otherwise void for want of jurisdiction.*

2. *on the facts and in the circumstances of the appellant's case and in law the Ld. Principal CIT erred to hold that the assessment order passed by the A.O u/s. 143(3) r.w.s 153A is erroneous and prejudicial to the interest of the revenue.*

3. *The appellant craves leave to add to, alter, amend and /or delete all or any of the foregoing grounds of appeal.*

The appellant prays this Hon'ble Tribunal to quash the impugned order passed by the Ld. Principal CIT by invoking the provisions of section 263 of the Income Tax Act, 1961.

34. Briefly stated, the facts of the case are that the assessee company in compliance to notice u/s 153A had filed its 'return of income' on 24.03.2015, declaring the income of Rs. Nil under the normal provisions and 'Book profit' of Rs. 17,81,67,919/- u/s 115JB as per the MAT provisions. The assessment in the case of the assessee was framed by the A.O vide order dated 30.03.2015 passed u/s 153A r.w.s. 143(3) of the 'Act', assessing the total income as declared in the return of income filed by the assessee.

35. The Principal Commissioner of Income tax, Central-2, Mumbai deliberated on the assessment records of the assessee for the year under consideration, viz. A.Y. 2012-13, and observed that the A.O had allowed total depreciation of Rs. 48,76,67,650/- (including additional depreciation of Rs. 8,35,66,916/- on Wind Energy Converters), as claimed by the assessee. It was observed by the Principal CIT that the assessee had made addition of "Wind Energy Converters" of a value aggregating to Rs. 48,65,32,759/- (Rs. 34,91,36,408/- + Rs. 13,73,96,351/-) which was put to use by the assessee on 03.10.2011 and 31.03.2011, respectively. That it was observed by the Principal CIT that as the additions of the respective assets was made in the second half and put to use subsequently, therefore, the assessee had failed to examine the admissibility of the claim of the assessee in respect of 100% depreciation on the said fixed assets. The Principal CIT further observed that as per the provisions of Sec. 32(1)(iia), additional deprecation @20% of actual cost of plant and machinery acquired and installed after 31.03.2005, was only allowable to an assessee who was engaged in the business of manufacture or production of any article or thing. That in the backdrop of the aforesaid observations the Principal CIT held a conviction that as per Sec. 32(1)(iia) the additional depreciation was though allowed in respect of those plant and machinery which were used for manufacturing or production of an article or a thing, but however such plant and machinery which were not used for the said purpose, did not qualify for additional depreciation. It was further observed by the Principal CIT that Sec. 36(1)(iia) was amended by the Finance Act, 2012 to allow the additional depreciation to the assesses who were engaged in the business of generation or generation and distribution of

power w.e.f. April,2013, i.e. from A.Y. 2013-14. The Principal CIT on the basis of his aforesaid conviction therein observed that the additional depreciation was not allowable to the assesses who were engaged in the business of generation or generation and distribution of power prior to A.Y. 2013-14. The Principal CIT on the basis of his aforesaid observations concluded that the assessee was not eligible for additional depreciation on "Wind Energy Converters" during the year under consideration, viz. A.Y. 2011-12.

36. The Principal CIT thus being of the view that the A.O while framing the assessment u/s 143(3) r.w.s. 153A, dated 30.03.2015, loosing sight of the fact that the assessee had made addition of "Wind Energy Converters" of Rs. 35,91,36,408/- and Rs. 13,73,96,351/- which were claimed to have been put to use on 03.10.2011 and 31.03.2011, respectively, therefore, the A.O had failed to make necessary enquiries and verification in respect of the claim of depreciation of the assessee. The Principal CIT holding a conviction that the A.O had wrongly allowed additional depreciation of Rs. 8,35,66,916/- on the "Wind Energy Converters" while framing the assessment u/s 143(3) r.w.s. 153A, the same had thus rendered the order passed by him as erroneous and prejudicial to the interest of the revenue, therefore, invoked his revision jurisdiction u/s 263 of the 'Act'.

37. The Principal CIT vide his notice u/s 263 of the 'Act' called upon the assessee to show cause as to why the assessment framed u/s 153A r.w.s. 143(3) may not be revised in order to withdraw the additional depreciation of Rs. 8,35,66,916/-, which as per him was wrongly allowed by the A.O while framing the aforesaid assessment, as

well as explain as to how to admissibility of 100% depreciation in respect of addition made to the fixed assets in the second half and put to use subsequently may not be held to be incorrect. The assessee in his reply, taking support of various judicial pronouncements, submitted before the Principal CIT that as electric energy has all trappings of an article or thing, therefore, the process of its generation was also akin to manufacture or production of articles or things. The assessee thus tried to impress upon the Principal CIT that as per the settled position of law the wind energy convertors were used for generation of electricity which is akin to manufacturing of a product, as the electricity is intangible and its effect can be seen and felt, transferred, delivered, stored, processed etc., therefore, the assessee was entitled towards the claim of additional depreciation in respect of the new plant and machinery purchased and installed by it for generation of electricity. It was averred by the assessee that though the amendment to include the business of generation or generation and distribution of power was applicable w.e.f. 01.04.2013, the basic concept for claim of additional depreciation remained the same, and thus now when the assessee duly satisfied all the requisite conditions entitling it to claim additional depreciation, therefore, the order passed by the A.O u/s 153A r.w.s. 143(3), allowing the additional depreciation could not be held to be erroneous. The assessee in order to drive home his contention that electricity was an article or thing, therein submitted that it had generated electricity by harnessing wind energy and earned income from sale of electricity generated which was measured and traded in units known as 'Killowatts'. The assessee in order to drive home its aforesaid contention that it stood duly entitled for claim of additional depreciation on the new plant and machinery

purchased and installed for generation of electricity, relied on a host of judicial pronouncements. The Principal CIT after deliberating on the contention of the assessee, however, did not find favour with the same and holding a conviction that now when the allowability of additional depreciation to the assesses engaged in the business of generation or generation and distribution of power had been brought within the sweep of Sec. 32(1)(iia), vide the Finance Act, 2012, w.e.f. 1st April, 2013, i.e. from A.Y. 2013-14, therefore, the assessee could not be held as eligible for claiming additional depreciation on the "Wind Energy Converters" during the year under consideration. The Principal CIT thus being of the view the A.O had failed to look into the claim of depreciation and additional depreciation properly while framing the assessment, specifically in the backdrop of the impact of amendment of Sec. 32(1)(iia) which was vide the Finance Act, 2012, w.e.f. 01.04.2013, i.e. A.Y. 2013-14, nor had called for any explanation of the assessee on the issue of allowability of initial depreciation, therefore, held that the assessment order passed u/s 143(3) r.w.s. 153A was rendered as erroneous and prejudicial to the interest of the revenue. The Principal CIT while concluding as hereinabove, therein also took support of the *Explanation 2* of Sec. 263 of the 'Act'. The Principal CIT on the basis of his aforesaid observations set aside the assessment order to the file of the A.O, with the direction to examine the claim of the assessee towards additional depreciation and initial depreciation afresh and complete the assessment as per law.

38. The assessee being aggrieved with the order passed by the Principal CIT under Section 263, had carried the matter in appeal before us. We find that the sole issue involved in the present appeal boils down to the entitlement of the assessee which is engaged in the

business of generating electricity by harnessing wind energy, in respect of additional depreciation contemplated u/s 32(1)(iia) of the 'Act'. We are of the considered view that as the said issue had already been adjudicated by us while disposing of the appeal filed by the assessee for A.Y. 2011-12, marked as ITA No. 2371/Mum/2017, wherein we had after deliberating at length on the issue under consideration in the backdrop of the judicial pronouncements of different Hon'ble Courts and coordinate benches of the Tribunal, had concluded that as the assessee who was engaged in the business of generating electricity by harnessing wind energy, duly satisfied the requisite conditions contemplated u/s 32(1)(iia) (as was then so available on the statute), was thus entitled for claim of additional depreciation under the said statutory provision. That as facts and the issue involved in the present appeal are the same as were there before us in the appeal of the assessee for A.Y. 2011-12, in ITA No. 2371/Mum/2017, therefore, our order passed in respect of the issue under consideration would apply *mutatis mutandis* for adjudicating the issue under consideration in the present appeal of the assessee for A.Y. 2012-13, marked as ITA No. 2372/Mum/2017. The **Grounds of Appeal No. 1 & 2** raised by the assessee before us are allowed. The **Ground of Appeal No. 3** being general is dismissed as not pressed. The appeal of the assessee is thus allowed in terms of our observations and reasoning's recorded in context of the issue under consideration, while disposing of the appeal of the assessee for A.Y. 2011-12, marked as ITA No. 2371/Mum/2017. We thus set aside the order passed by the Principal CIT under Sec. 263 of the 'Act', and restore the order passed by the A.O under Sec. 153A r.w.s. 143(3).

39. The appeal of the assessee is allowed in terms of our aforesaid observations.

ITA No.2373/Mum/2017
AY: 2011-12

(J.N. Investment & Trading Co. Pvt. Ltd.)

40. We now take up the appeal of the assessee, viz. J.N. Investment & Trading Co. Pvt. Ltd. for A.Y. 2011-12. The assessee assailing the order passed by the Principal CIT(Central-2), Mumbai dated 24.03.2017 under Section 263 of the 'Act', had raised before us, the following grounds of appeal :

The following grounds of appeal are without prejudice to one another:-

1. *On the facts and in the circumstances of the appellant's case and in law the Ld. Principal CIT erred in passing the impugned order by invoking the provisions of section 263 of the Act, which is illegal, bad-in-law or otherwise void for want of jurisdiction.*
2. *on the facts and in the circumstances of the appellant's case and in law the Ld. Principal CIT erred to hold that the assessment order passed by the A.O u/s. 143(3) r.w.s 153A is erroneous and prejudicial to the interest of the revenue.*
3. *on the facts and in the circumstances of the appellant's case and in law the Ld. Principal CIT erred to hold that the addition to fixed assets call for further examination despite the fact that this issue was not raised in the show cause notice.*
4. *The Ld. Principal CIT failed to appreciate that as on the date of search, the assessment or reassessment for the assessment year under consideration was not pending and no addition/disallowance is permissible in respect of such unabated assessment year in the absence of any incriminating material found during the course of search.*
5. *The appellant craves leave to add to, alter, amend and/or delete all or any of the foregoing grounds of appeal.*

The appellant prays this Hon'ble Tribunal to quash the impugned order passed by the Ld. Principal CIT by invoking the provisions of section 263 of the Income Tax Act, 1961.

41. Briefly stated, the facts of the case are that the assessee company in compliance to notice u/s 153A had filed its 'return of

income' on 27.02.2014, declaring a total loss of Rs. (-) 2,82,47,480/- under the normal provisions and 'Book profit' of Rs. 18,62,53,115/- u/s 115JB as per the MAT provisions. The assessment in the case of the assessee was framed by the A.O vide order dated 24.03.2015, passed u/s 153A r.w.s. 143(3) of the 'Act', assessing the total income as declared in the return of income filed by the assessee.

42. The Principal Commissioner of Income tax, Central-2, Mumbai deliberated on the assessment records of the assessee for the year under consideration, viz. A.Y. 2011-12, and observed that the A.O had allowed total depreciation of Rs. 17,60,29,601/- on Wind Turbine Generator (including additional depreciation of Rs. 3,52,00,000/-), as claimed by the assessee. It was observed by the Principal CIT that the assessee had made addition of asset of "Wind Turbine Generator" aggregating to Rs. 17,60,00,000/- during the year, which were claimed by the assessee to have been put to use on or before 30.09.2011, and as such for a period of than 180 days during the year. That it was observed by the Principal CIT that depreciation of Rs. 14,08,29,601/- @ 80% on the aforesaid assets was allowable, however, the depreciation had been allowed at Rs. 17,60,29,601/- (which included additional depreciation of Rs. 3,52,00,000/). The Principal CIT further observed that as per the provisions of Sec. 32(1)(iia), additional deprecation @20% of actual cost of plant and machinery acquired and installed after 31.03.2005 was though allowable to an assessee who was engaged in the business of manufacture or production of any article or thing, but however, where such plant and machinery was not used in manufacturing or production of any article or thing, the same did not qualify for additional depreciation. It was further observed by the Principal CIT that Sec. 32(1)(iia) was amended by the Finance Act,

2012, to allow the additional depreciation to the assesses who were engaged in the business of generation or generation and distribution of power w.e.f. April, 2013, i.e. from A.Y. 2013-14. The Principal CIT on the basis of his aforesaid conviction therein observed that the additional depreciation was not allowable to the assesses who were engaged in the business of generation or generation and distribution of power prior to A.Y. 2013-14. The Principal CIT on the basis of his aforesaid observations thus concluded that the assessee was not eligible for additional depreciation on "Wind Turbine Generator" during the year under consideration, viz. A.Y. 2011-12.

43. The Principal CIT thus being of the view that the A.O while framing the assessment u/s 143(3) r.w.s. 153A, dated 24.03.2015, loosing sight of the fact that the assessee had made addition of "Wind Energy Converters" of Rs. 17,60,29,601/- which were claimed to have been put to use on or before 30.09.2011, which was more than 180 days during the year, therefore, the A.O had failed to make necessary enquiries and verification in respect of the claim of depreciation of the assessee. The Principal CIT further holding a conviction that the A.O had wrongly allowed additional depreciation of Rs. 3,52,00,000/- on the "Wind Turbine Generator" while framing the assessment u/s 143(3) r.w.s. 153A. The Principal CIT thus being of the view that for the aforesaid reasons the order passed by the A.O was rendered as erroneous and prejudicial to the interest of the revenue, therefore, invoked his revisional jurisdictional u/s 263 of the 'Act'.

44. The Principal CIT vide his notice u/s 263 of the 'Act' called upon the assessee to show cause as to why the assessment framed u/s 153A r.w.s. 143(3) may not be revised in order to withdraw the

additional depreciation of Rs. 3,52,00,000/- which was wrongly allowed by the A.O while framing the aforesaid assessment. The assessee in his reply, taking support of various judicial pronouncements, submitted before the Principal CIT that as electric energy had all trappings of an article or thing, therefore, the process of its generation was also akin to manufacture or production of articles or things. The assessee thus tried to impress upon the Principal CIT that as per the settled position of law, the wind turbine generator were used for generation of electricity, which is akin to manufacturing of a product, as the electricity is intangible and its effect can be seen and felt, transferred, delivered, stored, processed etc., therefore, the assessee was entitled towards the claim of additional depreciation in respect of the new plant and machinery purchased and installed by it for generation of electricity. It was averred by the assessee that though the amendment to include the business of generation or generation and distribution of power is applicable w.e.f. 01.04.2013, the basic concept for claim of additional deprecation remained the same and thus now when the assessee duly satisfied all the requisite conditions entitling it towards raising of the said claim, therefore, the order passed by the A.O u/s 153A r.w.s. 143(3), allowing the additional depreciation could not be held to be erroneous. The assessee in order to drive home his contention that electricity was an article or thing, therein submitted that it had generated electricity by harnessing wind energy which was measured and traded in units known as 'Kilowatts'. The assessee in order to drive home its aforesaid contention that it stood duly entitled for claim of additional depreciation on the new plant and machinery purchased and installed for generation of electricity, therein relied on a host of judicial pronouncements. The

Principal CIT after deliberating on the contentions of the assessee, however, did not find favour with the same and holding a conviction that now when the allowability of additional depreciation to the assessee engaged in the business of generation or generation and distribution of power had been brought with the sweep of Sec. 32(1)(iia) vide the Finance Act, 2012, w.e.f. 1st April, 2013, i.e. from A.Y. 2013-14, therefore, the assessee could not be held to be eligible for claim additional depreciation on "Wind Turbine Generator" during the year under consideration. The Principal CIT thus being of the view the A.O had failed to look into the claim of depreciation and additional depreciation properly while framing the assessment, specifically in the backdrop of the impact of amendment of Sec. 32(1)(iia), which was made available on the statute w.e.f. 01.04.2003, i.e. from A.Y. 2013-14, nor had called for any explanation of the assessee on the issue of allowability of additional depreciation, therefore, held that the assessment order passed u/s 143(3) r.w.s. 153A was erroneous and prejudicial to the interest of the revenue. The Principal CIT while concluding as hereinabove, also took support of the *Explanation 2* of Sec. 263 of the 'Act'. The Principal CIT on the basis of his aforesaid observations therein set aside the assessment order to the file of the A.O with the direction to examine the claim of the assessee towards additional depreciation afresh and complete the assessment, as per law.

45. The assessee being aggrieved with the order passed by the Principal CIT under Section 263, had carried the matter in appeal before us. We find that the primary issue involved in the present appeal boils down to the entitlement of the assessee which is engaged in the business of generating electricity by harnessing wind energy in

respect of additional depreciation contemplated u/s 32(1)(iia) of the 'Act'. We are of the considered view that as the said issue had already been adjudicated by us while disposing of the appeal filed by the 'sister concern' of the assessee, viz. Wind World Infrastructure India Pvt. Ltd. for A.Y. 2011-12, marked as ITA No. 2371/Mum/2017, wherein we had after deliberating at length on the issue under consideration, in the backdrop of the judicial pronouncements of different Hon'ble Courts and coordinate benches of the Tribunal, had therein concluded that the assessee who was engaged in the business of generating electricity by harnessing wind energy, satisfied the requisite conditions contemplated u/s 32(1)(iia) (as was then so available on the statute), therefore, was duly entitled for claim of additional depreciation under the said statutory provision. That as the facts and the issue involved in the present appeal are the same as were there before us in the appeal of the 'sister concern' of the assessee, viz. Wind World Infrastructure India Pvt. Ltd. for A.Y. 2011-12, in ITA No. 2371/Mum/2017, therefore, our order passed in respect of the issue under consideration in the said appeal would apply *mutatis mutandis* for adjudicating the issue under consideration in the present appeal of the assessee for A.Y. 2012-13, marked as ITA No. 2372/Mum/2017. The aforesaid issue involved in the present appeal of the assessee is thus allowed, in terms of our observations and reasoning's recorded in context of the issue under consideration while disposing of the aforesaid appeal of the 'sister concern' of the assessee for A.Y. 2011-12, marked as ITA No. 2371/Mum/2017. The **Ground of Appeal No. 1 & 2** raised by the assessee before us are allowed.

46. The assessee had further assailed before us the order passed by the Principal CIT on the ground that though the assessee was never

put to notice as regards any doubts on the part of the Principal CIT as regards the veracity of the claim of depreciation on the fixed assets of Rs. 17,60,00,000/-, which were claimed by the assessee to have been put to use before 30.09.2011, however, the Principal CIT had in his order passed u/s 263 traversed beyond the 'Show cause' notice, and had also directed the A.O to call for and examine the claim of the assessee as regards the initial depreciation raised in respect of the aforesaid addition to the "fixed assets". It was averred by the Ld. A.R. that the Principal CIT without putting the assessee to notice in respect of the aforesaid issue, had thus exceeded his jurisdiction and directed the A.O to verify the claim of the assessee in respect of the initial depreciation on the additions to the abovementioned fixed assets. Per contra, the Ld. D.R. relied on the order passed by the Principal CIT and submitted that the latter had rightly revised the order passed by the A.O under Sec. 153A r.w.s. 143(3) of the 'Act'.

47. We have given a thoughtful consideration to the facts of the case and after perusing the show cause notice dated 02.03.2017 issued by the Principal CIT (Page 1–2 of 'APB'), therein find ourselves to be in agreement with the contention of the Ld. A.R. that the Principal CIT had at no stage sought to revise the order passed by the A.O u/s 153A r.w.s. 143(3), for the reason that the latter had failed to verify the claim raised by the assessee in respect of initial depreciation on fixed assets of Rs. 17,60,00,000/-, in the backdrop of the period for which the said assets were put to use by the assessee during the year. We are of the considered view that now when the assessee had never been put to notice in respect of the revision of the order on the aforesaid ground, therefore, the latter had no occasion to put forth an explanation before the Principal CIT in context of the issue under

consideration. We thus being of the considered view that a revision of an order passed by an A.O in respect of an issue cannot be carried out without putting the assessee to notice and affording an opportunity of being heard to him, as stands contemplated u/s 263(1) of the 'Act', in respect of the said issue, therefore, the order passed by the Principal CIT u/s 263 to the extent directing the A.O to further examine the claim of the assessee in respect of initial depreciation on the addition of fixed assets of Rs. 17,60,00,000/- made during the year, without affording any opportunity to the assessee to put forth an explanation as regards the same, cannot be sustained. We thus set aside the order of the Principal CIT in context of the issue under consideration. The **Ground of Appeal No. 3** raised by the assessee before us is allowed.

48. The assessee had further assailed before us vide ground of appeal no. 4 the validity of the order passed by the Principal CIT u/s 263, on the ground that as no assessment or reassessment for the year under consideration, viz. A.Y. 2011-12 of the assessee was pending on the date on which search and seizure proceedings were conducted u/s 132(1), i.e. 14.03.2013, therefore no addition/disallowance was permissible in respect of such unabated assessment year in the absence of any incriminating material found during the course of search and seizure proceedings.

49. We find that the ld. D.R vide her consolidate 'Written Submissions', dated. 28.07.2017, placed on our record, had stated as under:

> *"Therefore, it is fact that in none of the cases order u/s 143(3) was passed on or before 14.03.2013 (dt. of search) for the assessment*

years involved. Apart from M/s J N Investment, in none of the cases notice u/s 143(2) was issued, therefore, in none of the 3 cases at S.No. 1, 2 & 3 of the chart above, assessment proceedings were pending on the date of search. ***Only in the J N Investments the assessment got abated for A.Y. 2012-13 on the date of search for which Notice u/s 143(2) was issued****."*

The ld. A.R had not able to dislodge the contention of the revenue that on the date on which Search & seizure proceedings were conducted in the hands of the assessee a Notice under Sec. 143(2) stood issued and the proceedings emerging therefrom were pending adjudication before the A.O. We thus, in the backdrop of the proceedings u/s 143(2) which were pending in the case of the assessee on the date of Search & seizure proceedings, viz. A.Y. 2003-03, are of the considered view that the assessment proceedings in the case of the assessee for A.Y. 2002-03 stood abated. The **Ground of Appeal No. 4** raised by the assessee before us is dismissed.

49. The **Ground of Appeal No. 5** being general in nature is dismissed.

50. We thus in terms of our aforesaid observations set aside the order passed by the Principal CIT under Sec. 263 of the 'Act', and restore the order passed by the A.O under Sec. 153A r.w.s. 143(3).

51. The appeal of the assessee is partly allowed in terms of our aforesaid observations.

52. The appeal of the assessee, viz. Wind World India Infrastructure Pvt. Ltd for A.Y 2007-08, marked as ITA No. 2370/Mum/2017 and the

appeal of the assessee, viz. Wind World Wind Resources Development Pvt. Ltd. for A.Y 2012-13, marked as ITA No. 2372/Mum/2017 are allowed, while for the appeal of the assessee, viz. Wind World Wind Resources Development Pvt. Ltd. for A.Y. 2011-12, marked as ITA No. 2371/Mum/2017 is partly allowed, and the appeal of the assessee, viz. J.N. Investment and Trading Co. Pvt. Ltd. for A.Y. 2011-12, marked as ITA No. 2373/Mum/2017 are partly allowed, in terms of our aforesaid observations.

Order pronounced in open court on 27/09/2017

Sd/-	Sd/-
(G.S. Pannu)	(Ravish Sood)
Accountant Member	Judicial Member

मुंबई Mumbai;दिनांक 27.09.2017

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**