



ITA No.11 of 2025

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2025:KER:22638

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR. JUSTICE EASWARAN S.

MONDAY, THE 17<sup>TH</sup> DAY OF MARCH 2025 / 26TH PHALGUNA, 1946

ITA NO. 11 OF 2025

APPELLANT(S)/APPELLANT/APPELLANT :

MALABAR INSTITUTE OF MEDICAL SCIENCES LTD.  
1, MINI BYPASS ROAD, GOVINDAPURAM P.O,  
KOZHIKODE. PAN AACCM3480H, PIN - 673016

BY ADVS.  
ALEXANDER JOSEPH MARKOS  
ISAAC THOMAS  
JOHN VITHAYATHIL

RESPONDENT(S)/RESPONDENT/RESPONDENT :

THE DEPUTY COMMISSIONER OF INCOME TAX  
AAYAKAR BHAVAN, MANACHIRA,  
KOZHIKODE, PIN - 673001

BY ADVS.  
ADV. P.G. JAYASHANKAR  
KEERTHIVAS GIRI

SRI. JOSE JOSEPH -SC

THIS INCOME TAX APPEAL HAVING COME UP FOR ADMISSION ON  
17.03.2025, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:



## JUDGMENT

### EASWARAN S., J.

This I.T. Appeal is preferred by the assessee aggrieved by the order dated 26.9.2024 of the Income Tax Appellate Tribunal, Cochin Bench in I.T.A. No.312/Coch/2023.

2. The brief facts necessary for the disposal of this appeal are as follows:

For the assessment year 2006-2007, the assessment was completed under Section 143(3) read with Section 147 of the Income Tax Act, 1961 (for short, IT Act ) on 24.11.2011. While so, the Commissioner of Income Tax invoked the *suo moto* revisional power under Section 263 of the IT Act on the issue that the assessing officer has not conducted proper enquiries with respect to the assessee's claim for set off, of carry forward depreciation while computing book profit under Section 115JB of the IT Act. Though the appellant preferred an objection to the proposal, the commissioner rejected the objection by order dated 3.3.2014 and held that the assessing officer had not conducted proper enquiry to examine the genuineness of the claim and accordingly held that the assessment order was erroneous and prejudicial to the interest of the revenue. Hence, the Commissioner of Income Tax, by Annexure B order set aside the order of assessment and remanded the matter back to the assessing officer to make fresh assessment as per law on the point



discussed.

3. On remand, the assessing officer passed a revised order of assessment on 24.10.2014. The assessee, aggrieved by the order of assessment, preferred an appeal before the Commissioner of Income Tax (Appeals) who, by order dated 4.3.2023, dismissed the appeal. Against the order of the Commissioner of Income Tax (Appeals), the appellant preferred an appeal before the Income Tax Appellate Tribunal ('the tribunal', for short). The tribunal, while considering the appeal held that the order of the Commissioner of Income Tax under Section 263 having reached its finality, proceedings consequent to the order of Commissioner of Income Tax under Section 263 cannot be challenged until and unless the proceedings under Section 263 are agitated by the assessee. Therefore, the tribunal was of the view that the assessee should have preferred an appeal against the findings of the Commissioner of Income Tax under Section 263 of the Income Tax Act and thus, the order having not been assailed, no independent challenge to the consequent proceedings would lie before the tribunal. Accordingly, the appeal was dismissed as not maintainable. Aggrieved by the dismissal of the appeal, the assessee has preferred this appeal raising the following questions of law.

- 1) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in dismissing the Appeal as not maintainable on the ground that the Appellant has not challenged the order of the Commissioner under Section 263 of the Act?



2) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in holding that the observations in the order of the Commissioner of Income Tax under Section 263 on the merits of the issue, with respect to calculating income under Section 115JB, is binding on the Assessing Officer?

3) Whether on the facts and in the circumstances of the case, the Ld. CIT (A) is correct in confirming the order of assessing officer with regard to the computation of the book profit u/s 115JB of the Income Tax Act, of Rs.3,38,00,396/-.

4) Whether, in the absence of any specific guidelines in Section 115JB of the Income Tax Act, the AO and CIT(A) are correct in disregarding the method adopted by the Appellant for reckoning lower of loss or depreciation.”

4. Heard Sri. Joseph Markose, the learned Senior counsel assisted by Sri. Alexander Joseph Markose appearing for the appellant and Sri. PG Jayasankar, the learned counsel appearing for the revenue.

5. The learned Senior counsel primarily contended that the order passed by the Commissioner of Income Tax (Appeals) under Section 263 of the IT Act is not a closed remand but, an open remand, and therefore, the assessee felt that there is no requirement to challenge the order under Section 263 of the IT Act separately. Even otherwise, when the assessment order was passed pursuant to the remand, an appeal was preferred before the Commissioner of Income Tax (Appeals) who heard the appeal and dismissed the same on merits and aggrieved by the order of the Commissioner of Income Tax (Appeals) when the assessee preferred the appeal before the tribunal, it was not open for the tribunal



to have taken a view that the assessee ought to have separately challenged the order of remand under Section 263 of the Income Tax Act.

6. On the other hand, the learned Standing Counsel appearing for the revenue supported the findings of the tribunal and submitted that in the absence of any challenge to the order passed by the Commissioner of Income Tax revising the order of assessment, the consequential order is not open for challenge.

7. We have considered the rival submissions raised across the Bar and perused the order of the tribunal.

8. We find from the records that the order passed by the Commissioner of Appeals under Section 263 of the IT Act cannot be under any circumstances construed as a closed remand. While exercising the *suo moto* power of revision under Section 263 of the IT Act, the Commissioner had found that the order of assessment is erroneous and prejudicial to the interest of the revenue and, therefore, set aside the order of assessment and remanded the matter back to the assessing authority for a fresh consideration on merits. That be so, it is beyond one's comprehension as to how the tribunal could hold that the order of remand under Section 263 of the IT Act passed by the Commissioner of Appeals is a closed remand. Thus, we are of the view that the assessee need not have questioned the order under Section 263 in a separate proceeding.



9. We further note that in as much as the Commissioner of Income Tax (Appeals) had decided the appeal preferred by the assessee against the revised assessment order on merits, it was incumbent upon the tribunal to have decided the appeal on merits rather than finding that the assessee ought to have questioned the order under Section 263 in a separate proceedings. Therefore, we are of the considered view that the tribunal erred egregiously in dismissing the appeal preferred by the assessee as 'not maintainable'. Therefore, we are of the view that the order of the tribunal requires to be interfered with. Accordingly, the order dated 26.9.2024 in ITA No.312/Coch/2023 on the files of the Income Tax Appellate Tribunal, Cochin Bench is set aside, and the appeal will stand restored to the files for fresh consideration. Thus, the IT Appeal is allowed by answering the questions of law raised in favour of the assessee and against the revenue. The tribunal shall consider the appeal on merits and dispose of the same in accordance with law.

Sd/-

**DR. A.K.JAYASANKARAN NAMBIAR**  
**JUDGE**

Sd/-

**EASWARAN S.**  
**JUDGE**

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APPENDIX OF ITA 11/2025

PETITIONER ANNEXURES

Annexure A	TRUE COPY OF THE SAID ASSESSMENT ORDER
Annexure B	TRUE COPY OF THE ORDER OF THE COMMISSIONER UNDER SECTION 263 DATED 03.03.2014
Annexure C	TRUE COPY OF THE ASSESSMENT ORDER DATED 24.10.2014 OF THE ASSESSING OFFICER DISALLOWING THE CLAIM MADE BY THE APPELLANT
Annexure D	TRUE COPY OF THE ATRUE COPY OF THE ORDER DATED 04.03.2023 PASSED BY THE COMMISSIONER OF INCOME TAX (APPEALS)
Annexure E	TRUE COPY OF THE APPEAL MEMORANDUM DATED 02.05.2023 FILED BY THE APPELLANT BEFORE THE INCOME TAX APPELLATE TRIBUNAL
Annexure F	TRUE COPY OF THE ORDER DATED 26.09.2024 OF THE INCOME TAX APPELLATE TRIBUNAL