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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgement reserved on: **08.04.2021**
Judgement pronounced on: **05.07.2021**

\+ **ITA 116/2021**

\+ **ITA 118/2021**

PRINCIPAL COMMISIONER OF INCOME TAX-01, NEW DELHI
....Appellant
Through: Ms. Vibhooti Malhotra, Senior Standing Counsel for the appellant/revenue.

versus

M/S BRAHMA CENTRE DEVELOPMENT PVT. LTD. ….Respondent
Through: Ms. Kavita Jha with Mr. Anant Man, Advocates for the respondent/assessee.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE TALWANT SINGH

RAJIV SHAKDHER, J:

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Prefatory facts: -

1. The above-captioned appeals are directed against the common order dated 18.12.2019, passed by the Income Tax Appellate Tribunal [in short "Tribunal"] in ITA Nos. 4341/Del/2019 and 4342/Del/2019, concerning assessment years [in short AYs] 2012-2013 and 2013-2014, respectively.

1.1. The Tribunal, via the impugned order, has in turn set aside two separate but similar orders dated 28.03.2019, passed by the Principal Commissioner of Income Tax [in short "PCIT"] in the exercise of his powers under Section 263 of the Income Tax Act, 1961 [in short "Act"]

1.2. The PCIT has, via his orders dated 28.03.2019, interfered with the assessment orders dated 31.01.2017 and 27.09.2017 passed by the assessing officer [in short "AO"] concerning the respondent/assessee [hereafter referred to as "assessee"] pertaining to AYs 2012-2013 and 2013-2014 respectively. The assessment orders were passed under Section 143(3) read with Section 144C of the Act, although, in the opening sheet of the assessment order concerning AY 2013-2014, there is only a reference to Section 143(3) of the Act. The record also shows that, after the PCIT had passed the order dated 28.03.2019, insofar as AY 2013-2014 is concerned, the AO as directed, passed a fresh order dated 12.11.2019 under Section 143(3) of the Act by conducting "proper enquiries".

2. The reason why the PCIT had interfered with the original assessment orders was on account of a view held by him that interest earned by the assessee against fixed deposits was adjusted, i.e., deducted from the value of the inventory and not credited to the Profit and Loss Account [in short "P&L account"]. The PCIT noted that the tax auditor, in the report filed in Form 3CD, had observed that interest earned on fixed deposits pertained to "other income" and had not been credited to the P&L account. The interest earned on fixed

deposits in AY 2012-2013 was Rs.9,47,04,585/- whereas in AY 2013-2014, the interest earned on fixed deposits was Rs.4,32,91,517/-

2.1. Consequently, after the PCIT had issued two separate show cause notices to the assessee concerning the aforementioned AYs dated 20.02.2019 and had received replies against the same, he proceeded to pass two separate orders of even date, i.e., 28.03.2019 concerning AYs 2012-2013 and 2013-2014.

2.2. The PCIT interfered with the orders of assessment on the ground that they had been passed without making any enquiries as to whether the interest earned by the assessee had any nexus with the real estate project, the construction of which was undertaken by the assessee. Thus, according to the PCIT, the assessment orders were "erroneous" insofar as they were prejudicial to the interests of the revenue.

2.3. In the appeals preferred before the Tribunal by the assessee, the view held by the PCIT was reversed. It is in these circumstances that the appellant, i.e., the revenue has approached this Court by way of the instant appeals.

2.4. In support of the appeals, arguments on behalf of the appellant/revenue were advanced by Ms. Vibhooti Malhotra, while submissions on behalf of the assessee were advanced by Ms. Kavita Jha.

2.5. Before we proceed further, we may also note that Ms. Jha had placed before us, the record of the aforementioned cases, as was filed before the Tribunal; a copy of which was served on Ms. Malhotra as well. The arguments were, thus, advanced by counsel for the parties, keeping in perspective the record concerning the above-referred cases, which was made available to the Tribunal.

Submissions on behalf of the appellant/revenue:

3. The submissions advanced by Ms. Malhotra can be, broadly, paraphrased as follows.

i. The impugned order of the Tribunal was perverse insofar as it did not take into account the fact that there was no enquiry or verification carried out by the AO as to whether or not the interest earned by the assessee from fixed deposits was taxable.

ii. The Tribunal had erred in holding that the PCIT had wrongly invoked powers under Section 263[1] of the Act. Explanation 2 appended to Section

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[1] "**Section 263 Revision of orders prejudicial to revenue. (Income-tax Act, 1961-2015)**
(1) The [Principal Commissioner or] Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.
[*Explanation 1***.]**—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—
(*a*) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include—
(*i*) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;
(*ii*) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the [56][Principal Chief Commissioner or] Chief Commissioner or [Principal Director General or] Director General or [Principal Commissioner or] Commissioner authorised by the Board in this behalf under section 120;
(*b*) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the [Principal Commissioner or] Commissioner;
(*c*) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the [57][Principal Commissioner or] Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.
[Explanation 2.—*For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—*

263 of the Act, which was inserted via Finance Act, 2015 w.e.f. 01.06.2015, was declaratory, and therefore, contrary to what the Tribunal as held, would be applicable retrospectively even for the AYs in issue, i.e., AY 2012-13 and 2013-14. In other words, the argument was that Clause (a) and (b) of Explanation 2 appended to Section 263 of the Act, would apply to the aforementioned AYs, although the provision came into effect from 01.06.2015. [See: Judgement dated 01.02.2016, passed by the Income Tax Appellate Tribunal, Mumbai in I.T.A. No. 1994/Mum /2013 titled Crompton Greaves Limited vs. CIT-6, Mumbai]

iii. The Tribunal failed to appreciate the judgements [referred to hereafter] in which Courts have held that, interest earned from fixed deposits, inter alia, kept as margin money or security for a bank guarantee to avail credit facility for export business, had to be treated as income from other sources and not business income since it did not have any nexus with business.

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*(*a*) the order is passed without making inquiries or verification which should have been made;*

*(*b*) the order is passed allowing any relief without inquiring into the claim;*

*(*c*) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or*

*(*d*) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.***]**

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, [National Tax Tribunal,] the High Court or the Supreme Court.

Explanation.—In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded."

a) ***Conventional Fasteners vs. CIT***, *[2017] 88 taxmann.com 163 (Uttarakhand)*[2]; the SLP(C.) Nos. 16338/2018 and 12610/2018, filed vis-à-vis this judgement, were dismissed by the Supreme Court, via orders dated 13.07.2018 and 16.05.2018;

b) ***CIT vs. Jyoti Apparels***[3], (2008) 166 Taxman 343 (Delhi); and

c) ***CIT vs. Mereena Creations***[4], (2010) 189 Taxman 71 (Delhi).

Submissions advanced on behalf of the respondent/assessee:

4. On the other hand, Ms. Jha contended that, firstly, Clause (a) and (b) of Explanation 2 appended to Section 263 of the Act could not have been invoked by the PCIT to interfere with the assessment orders, as said provisions did not have retrospective effect.

4.1. Secondly, even if one were to assume for a moment that Clause (a) and (b) of Explanation 2 appended to Section 263 of the Act could be applied to the assessee's case concerning AYs 2012-2013 and 2013-14, a close perusal of the assessment orders and the record, which was examined by the Tribunal, would show that the AO had made enquiries with regard to interest earned on fixed deposits by the assessee, and it was only after he was satisfied, that it had nexus with the real estate business undertaken by the assessee, that the adjustment/ deduction made by the assessee [qua the interest earned on fixed deposits against the inventory maintained] was left undisturbed.

4.2. Thirdly, since a finding of fact has been returned in this regard, by the Tribunal, no substantial question of law arises for consideration by this Court, and therefore, the appeals should be dismissed at the very threshold.

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[2] In short "***Conventional Fasteners*** Case"

[3] In short "***Jyoti Apparels*** Case"

[4] In short "***Mereena Creations*** Case"

Analysis and reasons:

5. Having heard counsel for the parties, and perused the record, it is important to bear in mind that the result of the appeal veers around the issue: as to whether the interest earned by the assessee against fixed deposits had any nexus with the real estate project undertaken by it?

5.1. To answer this issue, one would have to bear in mind, the following aspects.

i. Was there an enquiry carried out by the AO [and for this purpose, for the moment, we are assuming that Clause (a) and (b) of Explanation 2 appended to Section 263 of the Act would apply to the AYs in issue]?

ii. To what standard should the enquiry carried out by the AO, measure up?

iii. Whether the officer concerned [in this case, PCIT], while exercising powers under Section 263 of the Act, can supplant his views with those of the AO?

iv. Was the view taken by the AO, in the given facts, a possible view?

Issue no. (i):

6. It is not in dispute that the assessee was engaged, inter alia, in the business of promotion, construction and development of commercial projects. It is also not in dispute that the assessee had undertaken construction/development of a project allotted to it by the Haryana State Industrial and Infrastructure Development Corporation [in short "HSIIDC"].

7. To satisfy ourselves, we perused the record and *inter alia* discovered the following.

7.1. On 11.08.2016, chartered accountants of the assessee, i.e., BSR and Co. LLP filed their response to certain queries raised by the AO at a hearing held

before him on 09.08.2016 concerning AY 2013-2014. One of the queries raised concerned the exclusion of interest received on fixed deposits from the category/head "income from other sources". The relevant extract from the said communication is set forth hereafter.

> "We refer to the captioned subject. In this regard, further to our earlier submission filed and discussion with your office on 09th August 2016, the Company submits the following information/details: -
>
> **xxx** **xxx** **xxx**
>
> 3. Why interest on FDR is not included in Income from other sources;
>
> During the subject year, the Company was engaged in the business of promotion, construction and development of commercial project on the project land allotted by the Haryana State Industrial and Infrastructure Development Limited (HSIIDC). Consequent to the arrangement with HSIIDC, the Company was required to make payment in instalments to HSIIDC towards acquisition of land. In this regard, the Company raised funds from outside India through Compulsory Convertible Debentures (CCDs) to fulfil its payment obligation towards HSSIIDC. Such amount was kept as fixed deposit in bank account of the Company.
>
> It is further submitted that since the interest earned by the Company on fixed deposits has intrinsic and inseggregable nexus with the project being undertaken therefore, the interest earned by the Company has been adjusted against the project expenditure.
>
> Without prejudice to the above, in case your office intends to assess the interest on fixed deposit as income from other sources, a corresponding deduction towards interest on CCDs may be allowed.
>
> Sd/-"

7.2. Likewise, in response to a notice dated 14.09.2017, issued by the AO, under Section 154 and 155 of the Act, in respect of AY 2012-2013, a reply was submitted by the assessee on 12.10.2017. In the notice dated 14.09.2017, inter alia, it was brought to the attention of the assessee that audit scrutiny had, amongst others, raised objections regarding the interest earned on fixed deposits, in AY 2012-2013, which was not credited to the P&L Account and had been deducted from the value of inventory.

7.3. The relevant part of the notice dated 14.09.2017 is extracted hereafter.

> "1. The assessment of M/s Brahma Centre Development Pvt. Ltd. for the assessment year 2012-2013 completed after scrutiny u/s 143(3)/144 in January 2017

determining at an income of Rs. 9,47,04,585/-. Audit scrutiny revealed some Audit objection[s] in the assessment discussed as below: -

a) Audit Scrutiny revealed that during the year the assessee has earned the interest of Rs. 9,47,04,585/- on FDRs'; however instead of crediting the same to the Profit & Loss Account, this interest has been deducted by the assessee from the value of inventories (Schedule 15) as shown in the balance sheet. Audit scrutiny further revealed that as per point 13(d) of the 3CD Report the tax auditor as has also certified that an amount of Rs. 9,47,04,585/- pertaining to other income has not been credited to the profit & Loss Account. Being the nature of other income, it should have been credited to P&L A/c. the department had not taxed the amount of Rs. 9,47,04,585/- as interest income of FDRs'. The mistake resulted in under assessment of income of Rs. 9,47,04,585/- involving short levy of tax effect of Rs. 4,85,48,507/- including interest.

xxx xxx xxx

2. In view of the above, a rectification order is required to be passed to rectify the above mentioned mistake. Hence in this respect if you wish to be heard, you are requested to appear in person or through an authorised representative in my office on 25.09.2017 at 11:30 PM alternatively you may send a written reply so as to reach me on or before the date mentioned above. Failing, it will be presumed that you have nothing to say and action will be taken as per IT Act.

Yours faithfully

Sd/-
(Girish Parihar)
Astt. Commissioner of Income Tax
Circle 5(1), New Delhi"

7.4. The relevant part of the response dated 12.10.2017 is extracted hereafter.

"This is in connection with the subject matter. Further to the submission already placed on record by the Company, we submit the following.

1. **Audit Scrutiny revealed that during the year the assessee has earned the interest of Rs. 9,47,04,585/- on FDRs'; however instead of crediting the same to the Profit & Loss Account, this interest has been deducted by the assessee from the value of inventories (Schedule 15) as shown in the balance sheet. Audit scrutiny further revealed that as per point 13(d) of the 3CD Report the tax auditor as has also certified that an amount of Rs. 9,47,04,585/- pertaining to other income has not been credited to the profit & Loss Account. Being the nature of other income, it should have been credited to P&L A/c. the department had not taxed the amount of Rs. 9,47,04,585/- as interest income of FDRs'. The mistake resulted in under assessment of income of Rs. 9,47,04,585/- involving short levy of tax effect of Rs. 4,85,48,507/- including interest.**

At the outset, we would like to state that the above cannot be said to be mistake apparent from record within the Act. In this regard the Company places reliance on the decision of Supreme court in the case of **CIT v. Hero Cycles Private Limited 94**

Taxmann 271 wherein it was held that rectification under section 154 can only be made when glaring mistake of fact or law has been committed by the officer passing the order and it becomes apparent from the record. Rectification is not possible if the question is debatable. Moreover, the point which is not examined on fact or in law cannot be dealt with as mistake apparent on the record.

xxx **xxx** **xxx**

The Company would further like to submit that the Company was engaged in the business of promotion, construction and development of commercial project land allotted by the Haryana State Industrial and Infrastructure Development Limited (HSIIDC). Consequent to the arrangement wit HSIIDC, the Company was required to make payment in instalments to HSIIDC towards acquisition of land. In this regard, the Company raised funds from non-resident shareholders/investors outside India through Compulsory Convertible Debentures (CCDs) to fulfil its payment obligation towards HSIIDC.

It is further submitted that since the interest earned by the Company on fixed deposits has intrinsic and inseggregable nexus with the real estate project being undertaken, the interest earned by the Company was been adjusted against the project expenditure. This treatment is in accordance with applicable accounting policies and standards and numerous favourable judicial precedents on this issue.

Yours faithfully,
For Brahma Center Development Pvt. Ltd.
Sd/-
Authorised Signatory"

Notice dated 15.11.2014 issued to the assessee under Section 143(2) of the Act concerning AY 2012-2013:

8. Via this notice, the assessee was inter alia asked to reconcile the information given in its Annual Income Return [in short "AIR"]. The response to this notice was given on 25.11.2014. The relevant parts of the notice and the response are extracted hereafter.

Extract from notice dated 15.11.2014:

"In continuation of the pending assessment proceedings in your case, you are hereby accorded Last and Final Opportunity to file the following information/detail which are given as under.

Sl. No.	Details required	Remarks
xxx	**xxx**	**xxx**
xxx	**xxx**	**xxx**

3.	Reconciliation of AIR information	Enclosed herewith*
xxx	**xxx**	**xxx**

*Bifurcation of inventory

Particulars	**March 31, 2011**	**March 31, 2012**
Opening Inventory	-	6,221,079,207
Cost of project Land for development	5,875,559,600	-
Artichet & Consultancy Fees	3,936,356	-
Other site expenses	321,245	-
Manpower Cost	5,987,419	4,693,226
Selling, Administration & Other Expenses	6,251,200	-
Interest & Finance Charges	328,910,553	683,565,792
Depreciation	112,834	-
Project Management Expenses	-	432,963
Less: Interest Income on fixed deposit	-	-94,704,585
Total	6,221,079,207	6,815,066,603"

Extract from notice dated 25.11.2014:

"Sub: Assessment proceedings under section 143(2) of the Income-tax Act, 1961 ('the Act') File ID: 112

We refer to notice dated 15th November 2014 issued by your office under Section 143(2) of the Act (copy of notice enclosed as Annexure 1). In this regard, we understand that the jurisdiction of the Company has changed from Circle 3(1) to Circle 5(1) on account of cadre restricting at the Income Tax Department, Delhi Region. The same is duly acknowledged by us.

In this regard, the Company submits the following information/documents;

xxx **xxx** **xxx**

3. Reconciliation of AIR Information

With regard to difference in the amount as per Form 26AS and ITR, it is submitted that the interest received from banks has been duly accounted and considered in the financial statements of the Company for the financial year ending on March 31, 2012 and income-tax return for AY. Given that the real-estate project being undertaken by the Company is under construction, the interest received during construction period has been adjusted/reduced against cost of the project."

9. Having regard to the aforesaid documents, it cannot be said that the enquiry or verification was not carried out by the AO. A perusal of paragraphs 10 to 12 of the impugned orders passed by the Tribunal would show that findings of fact concerning the enquiry made by the AO have been recorded. For the sake of convenience, the same are extracted hereafter.

"10. We have gone through the record in the light of submissions made on either side. Vide letter dated 15.11.2004 to be found at page 63 of the paper book, the ld. Ld. Assessing Officer sought information/details in respect of high ratio of refund to TDS, large share premium received and reconciliation of AIR information. Vide reply dated 25.11.2014 (page 66 of the paper book), at point No. 3 (at page 67), the assessee explained that the difference in the amount as per Form 26AS and ITR was due to the difference in the interest received from the banks duly accounted and considered in the financial statements of the company and the ITR and given that the Real Estate projects being undertaken by the company is under consideration, the interest received during construction period has been adjusted/reduced against the cost of the project. Vide page No. 118 of the paper book, the assessee submitted the bifurcation of the inventory showing that the assessee paid interest and finance charges to the tune of Rs.68,35,65,792/-, whereas the assessee received interest income on fixed deposits to the tune of Rs.9,47,04,585/-. It is submitted that both these items are taken to the inventory.

11. Further, it could be seen from the record that vide letter dated 14.09.2017, the ld. Ld. Assessing Officer issued notice to the assessee proposing rectification in respect of certain items including the one relating to interest of Rs.9,47,04,585/- to which the assessee has issued reply dated 12.10.2017 where under it was explained that the company was engaged in the business of promotion, construction and development of commercial projects on the project land allotted by Haryana State Industrial and Infrastructure Development Limited (HSIIDC). Consequent to the arrangement with HSIIDC, the assessee was required to make payment in instalments to HSIIDC

> towards acquisition of land. In this regard the company raised funds from non-resident shareholders outside India through Compulsory Convertible Debentures (CCDs) to fulfil its payment obligations towards HSIIDC and in that connection they temporarily parked the funds in FDRs, which earned interest. The assessee, therefore, submitted that in this way, such an interest has intrinsic nexus with the Real Estate Projects undertaken and therefore, they have adjusted the same against the project expenditure. The ld. AR submitted that the proceedings u/s. 148 were dropped.
> 12. In view of the above, we find it difficult to agree with the ld. DR that there was no enquiry conducted by the Ld. Assessing Officer by putting any specific question to the assessee as to the treatment given to the interest. As a matter of fact, the reason for the difference in the amount as per Form 26AS and ITR was due to the interest received from the banks that was duly accounted and considered in the financial statements of the company and was adjusted against the project expenditure. The very fact that pursuant to the scrutiny when the Ld. Assessing Officer proposed charging the interest amount received to tax, the very same explanation was offered by the assessee and was accepted by the Assessing Officer. We are, therefore, of the considered opinion that it is not a case of no enquiry and as a matter of fact, it was specifically brought to the notice of the Ld. 7 Assessing Officer that the interest earned was adjusted against the project expenditure."

Issue no. (ii):

10. The standard to be adopted while dealing with the issue as to whether or not an AO has carried out an enquiry or verification, all that the Court is required to ascertain is as to whether the AO applied his mind.

10.1. The fact that the AO has not given reasons in the assessment order is not indicative, always, of whether or not he has applied his mind. Therefore, scrutiny of the record, is necessary and while scrutinising the record the Court has to keep in mind the difference between lack of enquiry and perceived inadequacy in enquiry. Inadequacy in conduct of enquiry cannot be the reason based on which powers under Section 263 of the Act can be invoked to interdict an assessment order. The observations made in this behalf, by the Division Bench of this Court, in ***Commissioner of Income-tax vs. Sunbeam Auto Ltd.***, [2010] 189 Taxman 436 (Delhi)/[2011] 332 ITR 167 (Delhi) being apposite, are extracted hereafter.

> "12. We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of Income-tax under section 263 of the

Income-tax Act. As noted above, the submission of learned counsel for the revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate, that would not by itself, give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry", that such a course of action would be open. In Gabriel India Ltd.'s case (supra), law on this aspect was discussed in the following manner :

> ". . . From a reading of sub-section (1) of section, it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income-tax Officer is 'erroneous insofar as it is prejudicial to the interests of the revenue'. It is not an arbitrary or unchartered power. It can be exercised only on fulfilment of the requirements laid down in sub-section (1). The consideration of the Commissioner as to whether an order is erroneous insofar as it is prejudicial to the interests of the revenue must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. [See : *Parashuram Pottery Works Co. Ltd. v. ITO*[1977] 106 ITR 1 (SC) at page 10].
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> ******
>
> From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income

either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. . . . There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed.

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We may now examine the facts of the present case in the light of the powers of the Commissioner set out above. The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation on that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be "erroneous" simply because in his order he did not make an elaborate discussion in that regard . . ." (pp. 113-117)

xxx **xxx** **xxx**

15. Thus, even the Commissioner conceded the position that the Assessing Officer made the inquiries, elicited replies and thereafter passed the assessment order. The grievance of the Commissioner was that the Assessing Officer should have made further inquires rather than accepting the explanation. Therefore, it cannot be said that it is a case of 'lack of inquiry'."

10.2. This view was followed by another Division Bench of this Court in ***Commissioner of Income-tax vs. Anil Kumar Sharma***, (2010) 194 taxman 504 (Delhi).

Issue no. (iii):

11. The assessment order can be interdicted under Section 263 of the Act, if two conditions are met, i.e., that the order is erroneous and is prejudicial to the interests of the revenue. [See ***Malabar Industrial Co. Ltd. vs. Commissioner of Income-tax***, [2000] 109 Taxman 66 (SC)/[2000] 243 ITR 83 (SC) and ***CIT vs. Max India Ltd***., (2007) 295 ITR 282 (SC)]

11.1. Therefore, the error should be one that is not debatable or a plausible view. Section 263 of the Act invests a power of revision in a superior officer and therefore, by the very nature of the power, does not allow for supplanting or substituting the view of the AO. The appreciation of material placed before the AO is, exclusively within his domain which cannot be interdicted by a superior officer while exercising powers under Section 263 of the Act only on the ground that if he had appraised the said material, he would have come to a different conclusion. [See ***Parashuram Pottery Works Co. Ltd. v. ITO***, [1977] 106 ITR 1 (SC)]

Issue no. (iv):

12. According to us, the AO, having received a response to his query about the adjustment of interest, in the concerned AYs, against inventory, concluded that, there was a nexus between the receipt of funds from investors located abroad and the real estate project, which upon being invested generated interest. Thus, it cannot be said that the conclusion arrived by the AO, that such adjustment was permissible in law, was erroneous.

12.1. The reliance placed on behalf of the revenue on the judgement of Supreme Court in ***Tuticorin Alkali Chemicals & Fertilizers Limited v. CIT***[5], (1997) 227 ITR 172 (SC) was not apposite, given the finding of fact returned by the Tribunal that there was a nexus between the investment of funds received from investors located abroad and the real estate project. The Tribunal, in paragraph 15 of the impugned order, has distinguished (and, in our view, correctly) the judgement of the Supreme Court in ***Tuticorin Alkali Chemicals***

[5] In short "***Tuticorin Alkali Chemicals*** Case"

Case and applied the later judgement of the same Court in ***CIT v. Bokaro Steels Limited,*** (1999) 236 ITR 315 (SC)[6].

12.2. Furthermore, these judgements were also considered by a Division Bench of this Court in ***Indian Oil Panipat Power Consortium Ltd. vs. Income-tax Officer***[7], [2009] 181 Taxman 249 (Delhi)/[2009] 315 ITR 255 (Delhi) wherein after appreciating the ratio of the aforementioned judgements of the Supreme Court, the following was observed as follows.

> "5. In our opinion the Tribunal has misconstrued the ratio of the judgment of the Supreme Court in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd.'s case (supra) and that of Bokaro Steel Ltd. (supra). The test which permeates through the judgment of the Supreme Court in Tuticorin Alkali Chemicals & Fertilizers Ltd.'s case (supra) is that if funds have been borrowed for setting up of a plant and if the funds are 'surplus' and then by virtue of that circumstance they are invested in fixed deposits the income earned in the form of interest will be taxable under the head 'income from other sources'. On the other hand the ratio of the Supreme Court judgment in Bokaro Steel Ltd.'s case (supra) to our mind is that if income is earned, whether by way of interest or in any other manner on funds which are otherwise 'inextricably linked' to the setting up of the plant, such income is required to be capitalized to be set off against pre-operative expenses.
>
> **xxx** **xxx** **xxx**
>
> 5.2 It is clear upon a perusal of the facts as found by the authorities below that the funds in the form of share capital were infused for a specific purpose of acquiring land and the development of infrastructure. Therefore, the interest earned on funds primarily brought for infusion in the business could not have been classified as income from other sources. Since the income was earned in a period prior to commencement of business it was in the nature of capital receipt and hence was required to be set off against pre-operative expenses. In the case of Tuticorin Alkali Chemicals & Fertilisers Ltd. (supra) it was found by the authorities that the funds available with the assessee in that case were 'surplus' and, therefore, the Supreme Court held that the interest earned on surplus funds would have to be treated as 'income from other sources' . On the other hand in Bokaro Steel Ltd.'s case (supra) where the assessee had earned interest on advance paid to contractors during pre-commencement period was found to be 'inextricably linked' to the setting up of the plant of the assessee and hence was held to be a capital receipt which was permitted to be set off against pre-operative expenses."

[6] In short "***Bokaro Steels*** Case"

[7] In short "***Indian Oil Panipat Power*** Case"

12.3. ***Indian Oil Panipat Power*** Case has also been cited with approval in ***NTPC Sail Power Company (P.) Ltd. vs. Commissioner of Income-tax***[8], [2012] 25 taxmann.com 401 (Delhi); the relevant observations are extracted hereafter.

> "9. This Court, in *Indian Oil Panipat Power Consortium Ltd. v. ITO* [2009] 315 ITR 255/181 Taxman 249 (Delhi) held that where interest on money received as share capital is temporarily placed in fixed deposit awaiting acquisition of land, a claim that such interest is a capital receipt entitled to be set off against pre-operative expenses, is admissible, as the funds received by the assessee company by the joint venture partners are "inextricably linked" with the setting up of the plant and such interest earned cannot be treated as income from other sources. The reasoning in Indian Oil is in line with Bokaro Steel Ltd. Similarly, the Supreme Court in *CIT v. Karnataka Power Corpn.* [2001] 247 ITR 268/[2000] 112 Taxman 629 (SC) and *Bongaigaon v Refinery & Petrochemicals Co. Ltd. v. CIT* [2001] 251 ITR 329/119 Taxman 488 (SC) held that such receipts are not income.
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> 10. It is no doubt correct that the proviso to section 36(1)(iii) of the Income Tax Act enacts that any amount of the interest paid towards ("in respect of") capital borrowed for acquisition of an asset or for extension of existing business regardless of its capitalization in the books or otherwise, "for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use" would not qualify as deduction. However, in all these cases, when the interest was received by the assessee towards interest paid for fixed deposits when the borrowed funds could not be immediately put to use for the purpose for which they were taken, this Court, and indeed the Supreme Court held that if the receipt is "inextricably linked" to the setting up of the project, it would be capital receipt not liable to tax but ultimately be used to reduce the cost of the project. By the same logic, in this case too, the funds invested by the assessee company and the interest earned were inextricably linked with the setting up of the power plant. It may be added that the Tribunal has not found that the deposits made as margin monies were not limited to the construction activity connected to the expansion of the business by way of setting up of a new power generation plant."

12.4. Also See ***Commissioner of Income Tax vs. Jaypee DSC Ventures Ltd.***[9], [2012] 17 taxmann.com 257 (Delhi) at paragraphs 19 to 21.

13. Having regard to the aforesaid, we are of the opinion that, since the Tribunal has returned a finding of fact that there was indeed an enquiry carried out by the AO as to the nexus between the funds invested in fixed deposits (on

[8] In short "***NTPC Sail Power*** Case"]

[9] In short "***Jaypee DSC Ventures*** Case"

which interest was earned) and the real estate project undertaken by the assessee, no interference is called for by the Court.

14. Insofar as the judgements that were cited before us by Ms. Malhotra are concerned, in our view, they are distinguishable on facts.

14.1. In ***Mereena Creations*** case, this Court was concerned with discerning the import of the expression "derived from" found in Section 80HHC of the Act. The Court concluded that, interest earned from fixed deposits maintained with the bank for obtaining bank guarantee was, "income from other sources" and not business income and hence no deduction could be claimed by the assessee under Section 80HHC of the Act. In this context, the Court brought into sharp relief the difference between the expression "derived from" and "attributable to"; the former being narrower, according to the Court, restricted the kind of income which was amenable to deduction under Section 80HHC of the Act.

14.2. In the ***Jyoti Apparels*** case, the Court repelled the assessee's claim for deduction under Section 80HHC of the Act, as the assessee itself had treated interest on fixed deposit as "income from other sources" under Section 56 of the Act and then, it also sought deduction qua the same under Section 80HHC of the Act. The Court, therefore, held that the interest earned on fixed deposit maintained with the bank for availing credit facility could not be treated as business income, and hence, not entitled to deduction.

14.3. The ***Conventional Fasteners*** case was no different except that the provision involved was Section 80IC of the Act. This provision also contained the expression "derived from", and therefore, vis-a-vis interest received, the same approach was adopted.

14.4. A careful perusal of these judgements would show that the conclusion reached had a context; first, the subsistence of the expression "derived from" in Sections 80HHC and 80IC of the Act, and second, there was no finding of fact

concerning nexus between the business and the funds received on which interest was earned by the assessee.

14.5. In the instant cases, it was not as if the funds were surplus and therefore invested in a fixed deposit. The funds were received for the real estate project and while awaiting their deployment, they were invested in a fixed deposit which generated interest. This fits in with the dicta of the Supreme Court in ***Bokaro Steels*** Case and of this Court in ***Indian Oil Panipat Power*** Case, ***NTPC Sail Power*** Case, and ***Jaypee DSC Ventures*** Case.

15. Furthermore, in our view, we need not detain ourselves and examine as to whether Clause (a) and (b) of Explanation 2 appended to Section 263 of the Act could have been applied to the AYs in issue, since on facts, it has been found by the Tribunal that an enquiry was, indeed, conducted by the AO.

Conclusion: -

16. Thus, for the foregoing reasons, the above-captioned appeals are dismissed as, according to us, no substantial question of law arises for our consideration.

17. There shall, however, be no order as to costs.

RAJIV SHAKDHER, J.

TALWANT SINGH, J.

JULY 05, 2021 *Click here to check the corrigendum, if any*