

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: "A" NEW DELHI**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER  
&  
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No. 4341 & 4342/Del/2019  
Assessment Year: 2012-13 & 2013-14**

Brahma Center Development Pvt. Vs Principal CIT -02,  
Ltd., Cyber Terraces, 5A, 10<sup>th</sup> Floor, New Delhi  
DLF Cyber City, Phase-II, Gurgaon.

PAN :AAECB1294N  
Appellant

Respondent

**Assessee by Sh. Salil Kapoor, Adv.  
Ms. Ananya Kapoor, Adv.  
Revenue by Sh. S.S. Rana, CIT/DR**

**Date of Hearing 12/12/2019  
Date of Pronouncement 18/12/2019**

**ORDER**

**PER K. NARASIMHA CHARY, JM**

Aggrieved by the orders dated 28.03.2019 passed u/s. 263 of the Income Tax Act, 1961 ("the Act") passed by learned Principal Commissioner of Income-tax-2, New Delhi ("Id. PCIT) in respect of assessment years 2012-13 and 2013-14, M/s. Brahma Center Development Pvt. Ltd. ("the assessee" filed these two appeals.

2. Since the facts and issues involved in these two appeals are substantially same, we deem it convenient to dispose of these two appeals by way of common order with reference to the facts involved in assessment year 2012-13.

3. Brief facts of the case are that the assessment u/s. 143(3) read with section 144C of the Act for the assessment year 2012-13 was passed by the AO on 31.01.2017 at an income of Rs.14,96,63,312/-. Subsequently, the Id. PCIT examined the record of assessment and found that the assessee earned an interest of Rs.9,47,04,585/- on FDRs, but instead of crediting the same to the Profit & Loss account, the assessee deducted the same from the value of inventory as shown in the balance sheet; and that in 3CD report, the tax auditor certified the amount of Rs.9,47,04,585/- pertains to other income and has not been credited to the profit and loss account. The Id. PCIT held that prima facie non-consideration of this constitutes the assessment order erroneous in so far as it is prejudicial to the interest of Revenue.

4. He issued a notice dated 20.02.2019 and obtained the written submissions of the assessee. While referring to the provisions of section 263 of the Act, Id. PCIT was of the opinion that the order u/s. 143(3) of the Act was passed by the Ld. Assessing Officer without making enquiries into the claim of the assessee and in view of the decision in the case of M/s. Tuticorin Alkali Chemicals and Fertilizers Ltd. 227 ITR 172, the taxability of such interest needs to be examined and for non-examination of the same, the order renders itself erroneous in so far as it is prejudicial to the interest of the Revenue. According to the Id. PCIT, during the course of scrutiny proceedings, assessee merely provided a chart showing bifurcation of inventory and the ITR reconciliation without filing any details to justify that the FDRs have intrinsic and direct nexus with the real estate projects.

5. Aggrieved by such an order passed u/s. 263 of the Act, the assessee preferred this appeal contending that the Id. CCIT failed to consider the prescribed conditions to hold the order erroneous insofar as it is prejudicial to the interest of Revenue. The assessee further contended that the Id. Ld. Assessing Officer made necessary enquiries and verification with respect to the taxability of interest income of Rs.9,47,04,585/- and on this

aspect disregarded the submissions of the assessee. According to the assessee Id. PCIT failed to notice that the assessee had placed all the necessary in the case before him to satisfy that incomes earned had intrinsically real estate project and were accordingly reduced from the cost of the project.

6. Arguments of the Id. AR on this aspect are three-fold. Firstly, he submitted that it is not a case of no enquiry inasmuch as the Id. Ld. Assessing Officer raised a query, obtained reply of the assessee and only after having been satisfied with the submissions of the assessee, the Ld. Assessing Officer had taken plausible view that the interest amount is not taxable in the hands of the assessee inasmuch as to that extent, the WIP was reduced. Second submission of the Id. AR is that if for any reason, the PCIT feels that the Ld. Assessing Officer should have made further inquiries and the assessment order is bad for not making such inquiries, it is incumbent on the Id. PCIT to make some inquiries before reaching a conclusion that the assessment order is erroneous in so far as it is prejudicial to the interest of Revenue. Last contention of the Id. AR is that the issue in this matter is a debatable one, inasmuch as subsequent to the decision in the case of M/s. Tuticorin Alkali Chemicals and Fertilizers Ltd. (supra), the Apex Court considered the issue in the case of CIT vs. Bokaro Steels Ltd., 236 ITR 316 (SC) and it is followed in a number of other cases by the Tribunal also. In view of this, it cannot be said that the view taken by the Ld. Assessing Officer is an improbable one. In support of his contentions, the Id. AR placed reliance on the decision in the case of ITO vs. DG Housing Projects Ltd., 343 ITR 329, PCIT vs. Modicare Ltd. in ITA No. 759/2016 and DIT vs. Jyoti Foundation, 357 ITR 388. He further submitted that Explanation 2 to section 263 of the Act has no retrospective application and it is held so by Mumbai Bench of Tribunal in Shri Narayan Taturane vs. ITO (ITA No. 2690/Mum/2016 and M/s. Amira Pure Foods Pvt. Ltd. Vs. PCIT in ITA No. 3205/Del/2017.

7. The Id. AR further submitted that the decision of Hon'ble Apex Court in the case of M/s. Tuticorin Alkali Chemicals and Fertilizers Ltd. (supra) has no application to the facts of the case inasmuch as in that case the business of the assessee was not commenced, whereas admittedly in the present case the business of the assessee had already been commenced which fact the PCIT failed to take into consideration, and therefore, the decision of Apex Court in M/s. Tuticorin Alkali Chemicals and Fertilizers Ltd.(supra) has no application to the facts of the case. Ld. PCIT was not justified in passing the order u/s. 263 of the Act holding it erroneous in so far as it is prejudicial to the interest of Revenue.

8. Per contra, it is the submission on behalf of the Revenue that in this matter, there was no enquiry made by the Ld. Assessing Officer specifically as to the issue of interest because the record does not show that the Id. AO put any specific question as to why the interest shall not be taxed as income from other sources. It is only an attempt of the assessee to reconcile the difference of income reported in form-26AS and the income offered to tax under the head 'income from other sources' basing the ITR. Next contention of the Id. DR is that there is no scope for further inquiry in this matter by the Id. PCIT because all the details were available on record and it is only non-consideration of binding principle laid down by Hon'ble Supreme Court in the case of M/s. Tuticorin Alkali Chemicals and Fertilizers Ltd.(supra) that renders the order of assessment to be erroneous in so far as it is prejudicial to the interest of Revenue. Further, he submitted that in view of this decision it cannot be said that the view taken by the Id. Assessing Officer, if we assume for a while that he has considered this aspect, is a probable one. He placed reliance on the decision of the Hon'ble Apex Court in the case of Deniel MerchantsPvt. Ltd. Vs. ITO in appeal No. 2396/2017 by order dated 29.11.2017 and Malabar Industrial Co. Ltd. CIT (2000) 243 ITR 83 (SC). Further reliance was placed on the decision of

Hon'ble Calcutta High Court in the case of Rajmandir Estates (P) Ltd. Vs. PCIT (2016) 386 ITR 162 (Calcutta), SLP against which was dismissed by the Hon'ble Apex Court and reported in (2017) 77 taxmann.com 285(SC).

9. The Id. DR placed reliance on the decision reported in Conventional Fastners vs. CIT, 2018-TIOL-202-SC-IT, CIT vs. Jyoti Apparels (2008) 166 Taxman 343 and CIT v. Mereena Creations (2010) 189 Taxman 71 (Delhi), wherein it was held that the interest earned from the fixed deposits kept as margin money or security for bank guarantee in order to avail credit facility for export business has to be treated as income from other sources and not as business income, inasmuch as it does not have any nexus with the business.

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 Id. 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 Id. 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 Id. AR submitted that the proceedings u/s. 148 were dropped.

12. In view of the above, we find it difficult to agree with the Id. 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.

Assessing Officer that the interest earned was adjusted against the project expenditure.

13. Further, it is an admitted fact that in this case, the business of the assessee was commenced in this case, unlike the facts in the case of M/s. Tuticorin Alkali Chemicals and Fertilizers Ltd.(supra). The Mumbai Bench of Tribunal while noticing the decision of jurisdictional High Court in the case of CIT vs. Sunbeam Auto Ltd, 332 ITR 167 and the case of Nagesh knitwear Pvt. Ltd., 355 ITR 135 observed that the Explanation-2 to section 263 inserted by Finance Act, 2015 w.e.f. 01.04.2015 would not impact the assessment earlier to 2014-15 and such a decision was followed by the Delhi Bench of Tribunal in the case of Arun Kumar Garg (HUF) vs. PCIT in ITA No. 3391/Del/2018 for the assessment year 2014-15 and by order dated 08.01.2019 held that Explanation 2 to section 263 of the Act is only prospective in nature.

14. In the case on hand, the Id. PCIT while reading the provisions of section 263 of the Act and the decision of Hon'ble Apex Court in the case of M/s. Tuticorin Alkali Chemicals and Fertilizers Ltd.(supra) reached a conclusion that inasmuch as there was no specific inquiry by the Assessing Officer, the assessment order was erroneous in so far as it is prejudicial to the interest of Revenue. He does not conduct any independent enquiry to reach the conclusion that the assessment order was erroneous in so far as it is prejudicial to the interest of Revenue. If we accept the submission of the Id. DR that since all the material was available on record, there was no need for the PCIT to conduct any further inquiry, it also inures to the benefit of the assessee because all these things are available on record and the assessee specifically submitted that the difference in the ITR and 26AS occurred because of the adjustment of the interest received against the project expenditure. Admittedly, this is the only project conducted by the assessee and there is no other project. In such an event, it is not the passive submission to be recorded to the AO, but also actively pleading

before him that the interest received was adjusted against the project expenditure.

15. Hon'ble jurisdictional High court considered the decision of the Hon'ble Apex Court in the case of M/s. Tuticorin Alkali Chemicals and Fertilizers Ltd.(supra) and Bokaro Steel Ltd. (supra) in Indian Oil Panipat Power Consortium Ltd. Vs. ITO (2009) 315 ITR 255(Del) and held that the interest earned on funds primarily brought for infusion in the business could not have been classified as income from other sources. Further, unlike in the case of M/s. Tuticorin Alkali Chemicals and Fertilizers Ltd.(supra), in the case on hand, the assessee had already commenced business.

16. Viewing from another angle, we are of the considered opinion that the Id. PCIT is not justified in invoking the jurisdiction u/s. 263 of the Act or to hold that the assessment order is erroneous or prejudicial to the interest of Revenue and we find it difficult to sustain the same. Hence, we allow the ground appeal.

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17. Facts in this case are identical to the ones for the assessment year 2012-13. The Id. DR, however, brought to our notice that in this case there was no proper enquiry but the assessee on their own, submitted to the AO about adjusting the interest earned against the project expenditure vide letter dated 11.08.2016 and therefore, it cannot be said that there is any enquiry on this aspect by the Assessing Officer.

18. On a perusal of this letter dated 11.08.2016 to be found at page No. 48 of the paper book, we find that this letter was the result of discussion with the Ld. Assessing Officer and seeking of information. We, therefore, do not find any strength in the argument of the Id. DR. In view of the identity of the facts in this case with those involved in assessment year 2012-13, while following the view taken by us, we hold that the impugned order cannot be



sustained. Grounds of appeal are accordingly allowed. Hence, the orders passed u/s. 263 of the Act for the assessment years 2012-13 and 2013-14 are hereby quashed.

19. In the result, both the appeals of the assessee are allowed.  
Order pronounced in the open court on 18<sup>th</sup> December, 2019.

Sd/-

Sd/-

**(R.K. PANDA)**

**(K. NARASIMHA CHARY)**

**ACCOUNTANT MEMBER**

**JUDICIAL MEMBER**

**Dated: 18<sup>th</sup> December, 2019**

**aks**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT NEW DELHI