

आयकर अपीलीय अधिकरण न्यायपीठ रायपुर में।  
IN THE INCOME TAX APPELLATE TRIBUNAL,  
RAIPUR BENCH, RAIPUR

BEFORE SHRI RAVISH SOOD, JUDICIAL MEMBER  
AND  
SHRI ARUN KHODPIA, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No. 112/RPR/2018

निर्धारण वर्ष / Assessment Year : 2013-14

M/s. Sun Developers & Builders Pvt. Ltd.  
Near Bansal Agency, Darri Road,  
Korba (C.G.)-495678  
PAN : AAOCS0895A

.....अपीलार्थी/Appellant

**बनाम / V/s.**

The Pr. Commissioner of Income Tax,  
Bilaspur (C.G.)

.....प्रत्यर्थी / Respondent

Assessee by : Shri Veekaas S. Sharma, CA  
Revenue by : Shri Debashis Lahiri, CIT-DR

सुनवाई की तारीख / Date of Hearing : 05.08.2022

घोषणा की तारीख / Date of Pronouncement : 17.10.2022

**आदेश / ORDER****PER RAVISH SOOD, JM:**

The present appeal filed by the assessee company is directed against the order passed by the Pr. Commissioner of Income-Tax, Bilaspur (for short 'Pr. CIT') u/s. 263 of the Income-tax Act, 1961 (in short 'the Act') dated 30.03.2018, which in turn arises from the order passed by the A.O under Sec 143(3) of the Act dated 31.03.2016 for assessment year 2013-14. The assessee has assailed the impugned order on the following grounds of appeal before us:

- “1. That on facts and circumstances of the case of the learner principal CIT has erred in law as well as on facts in issuing of show cause notice U/s 263 and assuming jurisdiction there under.
2. That the learned principal CIT has erred in holding the assessment order passed u/s.143(3) on Dt. 31.03.2016 to be erroneous in so far it is prejudicial to the interest of the revenue and therefore the impugned order passed is bad in law besides being wrong on facts.
3. That the learned principal CIT in the facts and circumstances of the case has erred in adjudicating the assessment order to the erroneous due to alleged lack of enquiry by the learned assessing officer, more so when the overriding document filed in support of the transactions by the appellant along with the reply received from the investor company in response to notice issued u/s.133(6) and subsequent documents submitted personally by the Director of the investor company proved the genuineness of the transactions beyond doubt and hence rightly accepted by the Assessing officer.
4. That having regard to the fact and circumstances of the case no addition was possible and permissible under section 68 or any other section of the I.T.ACT 1961 on the given matter and hence the order cannot be termed as prejudicial to the interest of the revenue.

The appellants craves leave, to add, amend, alter any or all ground of the appeal.”

2. Succinctly stated, the assessee company which is engaged in the business of a builder and developer had e-filed its return of income for the assessment year 2013-14, declaring an income of Rs. Nil. The return of income filed by the assessee company was initially processed as such u/s. 143(1) of the Act. Subsequently the case of the assessee was selected for scrutiny assessment u/s. 143(2) of the Act. Original assessment was thereafter framed by the A.O vide his order passed u/s. 143(3) of the Act, dated 31.03.2016 accepting the returned income of the assessee company as such.

3. The Pr. CIT after culmination of the assessment proceeding called for the records of the assessee company. The Pr. CIT perused the records and was of the view that as the A.O while framing the assessment had failed to enquire into and verify the authenticity of the assessee's claim of having received share application money of Rs. 1.65 crore during the year under consideration and had summarily accepted the same, therefore, the order passed by him u/s.143(3), dated 31.03.2016 was rendered as erroneous in so far as it was prejudicial to the interest of the revenue. Accordingly, the Pr. CIT vide his “Show cause” notice (“SCN”) dated 24.03.2018 called upon the assessee company to put forth an explanation as to why the order passed

by the A.O u/s.143(3), dated 31.03.2016 may not be revised u/s. 263 of the Act.

4. In reply, it was submitted by the assessee that its case was selected for limited scrutiny for the solitary purpose of examining "Large share application money received against unallotted shares". It was submitted by the assessee that as the A.O in the course of the assessment proceeding had carried out requisite verifications and examined the aforesaid solitary issue which had formed the very basis for selection of its case for limited scrutiny assessment and had only after finding the same in order accepted it, therefore, the order passed by him could not be revised u/s.263 of the Act. It was the claim of the assessee that as the complete details of the investor company, viz. M/s Sakshi Real Estate (P) Ltd., Kolkata from whom the assessee company during the year under consideration was in receipt of share application money of Rs. 1.65 crore were furnished with the A.O in the course of the assessment proceedings, viz. name and complete address, PAN details, copy of bank account (from where the amount was paid), copy of audited financial statements and copy of Income-tax return, therefore, the primary onus that was cast upon it to substantiate the nature and source of the cash credit appearing in its books of account was duly discharged. In sum and substance, it was the claim of the assessee that now when the A.O had after exhaustive deliberations on the aforesaid issue under

consideration, i.e the authenticity of the assessee's claim of having received genuine share application money from the aforesaid investor company, had after thoroughly vetting the same in the backdrop of substantial documentary evidence which were placed on his record, therein, found it in order, therefore, the Pr. CIT in the garb of his revisionary jurisdiction u/s.263 of the Act could not have sought for substitution of his view as against that of the A.O. However, the Pr. CIT was not persuaded to subscribe to the aforesaid claim of the assessee. It was observed by him that as the financial statements of the investor company revealed that it was a shell company, therefore, the A.O had grossly erred in accepting the assessee's claim of having received genuine share application money from the said investor company. The Pr. CIT was of the view that the financial statements of the investor company revealed that it had not carried out any trading activities during the year and was merely acting as a facilitator for transfer of money from one company to another company. Also, the Pr. CIT was of the view that if the investor company would have been a genuine company, then, it would have earned dividend income and also declared capital gain/loss on sale of its investments. Apart from that, it was observed by the Pr. CIT that the name of the investor company had figured in the list of the shell companies which was circulated by the Income-tax department. Rebutting the claim of the assessee that as the A.O in the course of the assessment proceedings had carried out requisite verification, therefore, the

order passed by him could not be held to be erroneous in so far as it was prejudicial to the interest of the revenue, it was observed by the Pr. CIT that the A.O in the course of his aforesaid examination had lost sight of the material fact that the investor company had neither during the year under consideration nor in the preceding year declared any income from operations. Also the Pr. CIT was of the view that the A.O while framing the assessment had remained oblivious of certain peculiar facts that were emanating from the financial statements of the assessee company, viz. that the capital of the investor company was a miniscule amount of Rs.15 lac; and it had substantial borrowings and investments running in crores of rupees, both of which were typical features of a shell company. The Pr. CIT was also not inclined to accept the claim of the assessee that as the investor company had been assessed u/s.143(3) of the Act, dated 22.03.2016 by the ITO, Ward-5(1), Kolkata for the assessment year 2013-14, therefore, it could not be held to be a shell company. The Pr. CIT was of the view that as the A.O had failed to carry out sufficient verifications as regards the share application money which was claimed by the assessee company to have been received from the aforesaid investor, viz. M/s Sakshi Real Estate Private Limited, therefore, the order passed by him u/s.143(3), dated 31.03.2016 was rendered as erroneous in so far as it was prejudicial to the interest of the revenue. Accordingly, the Pr. CIT set-aside the order passed by the A.O u/s 143(3), dated 31.03.2016 to his file with a direction to re-adjudicate the

issue afresh after carrying out necessary verification and affording a reasonable opportunity of being heard to the assessee.

5. The assessee being aggrieved with the order passed by the Pr. CIT u/s.263 of the Act, dated 30.03.2018 has carried the matter in appeal before us.

6. We have heard the ld. authorized representatives of both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions.

7. Admittedly, it is a matter of fact borne from record that the case of the assessee company for the year under consideration was selected for limited scrutiny for the purpose of verifying and examining a solitary issue, i.e., large share application money that was received against unallotted shares. On a perusal of the assessment order it transpires that the A.O in the course of the assessment proceedings had specifically called upon the assessee to furnish details both as regards the issuance of shares and receipt of share application money during the year under consideration. The relevant observation of the A.O on the issue under consideration is culled out as under (as extracted from the assessment order) :

“Assessee was specifically asked to furnish details regarding issuance of share and receipt of share application money during the financial year 2012-13 with complete details. In response, counsel appeared

and stated that the Sakshi Real Estate Pvt. Ltd. a Kolkata based company had applied for allotment for Equity Shares of Rs. 8 each share and paid Rs. 65,00,000/- as application money for 8,12,500 equity shares. Later, the assessee-company decided to allot the shares at Rs. 10/- per share due to which a dispute was generated between the assessee-company and Sakshi Real Estate Pvt. Ltd regarding the price at which the shares are to be allotted. The assessee-company later informed the Sakshi Real Estate Pvt. Ltd., Kolkata that shares can be subscribed only at Rs. 10/- per share and not at the discounted rate of Rs. 8/- and was ready to refund the amount received as share application money. However, Sachin Verma, Director of Sakshi Real Estate Pvt. Ltd., Kolkata requested the assessee to withhold the fund till the matter was discussed in the board meeting and it is due to this dispute the share could not be allotted during the relevant financial year even after receiving the share application money. In this regard, the counsel had submitted, relevant documents as a proof of his claim which were duly examined and placed on record. He further explained that the share premium fixation is the sole discretion of the directors of the company which is based on various aspects and there is no bar by any law in such fixation.

Meanwhile, letter u/s 133(6) of the Income Tax Act, 1961 dated 01/03/2016 was issued to M/s. Sakshi Estate Pvt. Ltd., Kolkata seeking certain information regarding share application money and issuance of share. In response, Shri Sachin Verma, Director of M/s. Sakshi Real Estate Pvt. Ltd. appeared and submitted the requisite documents and stated that due to issues regarding the allotment price of shares between both the companies the allotment had not been made during the FY 2012-13. He further stated that the case of the M/s. Sakshi Estate Pvt. Ltd. is under scrutiny for AY 2013-14 in ward-5(1), Kolkata. He was asked to submit the copy of assessment order if the assessment is completed before 31.03.2016. Later on, on 30/03/2016, Shri Sachin Verma, Director of M/s. Sakshi Real Estate Pvt. Ltd. appeared and submitted the copy of assessment order of M/s. Sakshi Estate Pvt. Ltd.

The contention of the counsel of the assessee is examined vis-à-vis books of account produced, documents submitted by Shri Sachin Verma and assessment order of M/s. Sakshi Real Estate Pvt. Ltd. of AY 2013-14 and no untoward inference is drawn.”

8. On a perusal of the aforesaid observation of the A.O, it transpires that he had in the course of the assessment proceeding specifically called upon the assessee to furnish requisite details as regards the share application

money which was received by him from the investor company, viz. M/s. Sakshi Real Estate Pvt. Ltd. As per the records the A.O had vide his notice issued u/s.142(1) of the Act, dated 18.01.2016 at Query No.5 directed the assessee to furnish complete name and address, PAN of the parties from whom share application money was received during the year under consideration. Further the A.O in order to verify the authenticity of the transaction of receipt of share application money by the assessee company had issued notice u/s.133(6) of the Act, dated 29.01.2016 to the investor company, viz. M/s. Sakshi Real Estate Private Limited, wherein referring to the investments which it had made in the assessee company during F.Y. 2011-12 and F.Y.2012-13 it was called upon to furnish the following details:

1. Copy of your Income Tax Return, Capital Account and Balance sheet in respect of A.Y.2013-14.
2. Name and complete address of the directors along with their proof of identity and there contract numbers (landline and mobile)
3. Mode of payment please make specific mention of demand draft no./ Cheque no./ bank and branch name and date of investment etc.
4. Copy of bank statement showing the above transaction.
5. Copy of share application and copy of share certificates if it had been given.
6. Explain how did you come to contact with this company? Whether it was through advertisement or through any mode? Please substantiate your reply with evidences.
7. What prospects have you seen in the assessee company which prompted you to purchase share of face value of Rs.10/- at high premium.

8. Do the Directors of your company have any relation with the above company or with the directors of the company or with the any associate company of the assessee company. If so, please furnish the details.”

In reply, the investor company had vide its letter dated 22.02.2016 filed with the A.O documents as were called for by him u/s 133(6) of the Act, viz. copy of its income-tax return along with audited balance sheet for the year under consideration, copy of Form-20B (annual return filed with registrar of companies), company master data, names and complete address of its directors, mode of payment of the share application money (through banking channel) a/w copy of the bank account from where payments were made, confirmation of having paid share application money to the assessee company which was supported with an affidavit. Also the investor company had in its reply stated that the source of payment towards share application money was out of, viz. (i). bank balance as on 01.04.2012: Rs. 25,03,571/-; and (ii). loan received from M/s Natural View Software (P) Ltd.: Rs. 40 lac. In order to fortify its aforesaid claim the investor company had alongwith its reply appended the audited balance sheet of M/s Natural View Software (P) Ltd. Also, it was stated before the A.O that as certain disputes had cropped up between the investor company and the assessee company, therefore, for the said reason shares could not be allotted even after receipt of share application money. On being queried by the A.O as to how it had come in touch with the assessee company, it was submitted by the director of the investor company that they were well acquainted with the directors of the

assessee company. Also the director of the investor company, viz. Shri. Sachin Verma in the course of the assessment proceedings had appeared in person before the A.O and confirmed the transaction in question. As is discernible from the record Shri. Sachin Verma (supra) had appeared before the A.O and furnished the requisite documentary evidences a/w. copy of the assessment order which was passed in the case of the investor company u/s.143(3) of the Act, dated 22.03.2016 for A.Y.2013-14 by the ITO, Ward-5(1), Kolkata. Apart from that it was brought to the notice of the A.O that the credit appearing in the bank account of the investor company, viz. M/s Sakshi Real Estate Pvt. Ltd. out of which investment was made in the assessee company were the amounts which was received on liquidation of certain investments in favor of M/s. Natural View Software (P) Ltd.

9. We have given a thoughtful consideration to the issue before us, and find substance in the claim of the ld. A.R that the primary onus that was cast upon the assessee company to substantiate the nature and source of the credits in its books of accounts, i.e, the share application money received from M/s Sakshi Real Estate Pvt. Ltd. was duly discharged on the basis of documentary evidences that were filed by the assessee in the course of three assessment proceedings, as well as those that were collated by the A.O from the investor company u/s 133(6) of the Act. In fact, we find that Shri. Sachin Verma, director of the investor company had personally appeared before the

A.O and confirmed the transaction in question. Also as observed by us hereinabove the assessee company had in order to dispel all doubts as regards the identity and creditworthiness of the investor company, and the genuineness of the transaction under consideration had filed with the A.O a copy of the order that was passed by the ITO, Ward-5(1), Kolkata u/s.143(3) of the Act, dated 22.03.2016 in the case of the investor company for A.Y 2013-14. Also, the investor company had explained to the AO that the delay in allotment of the shares despite having received the share application money was on account of a dispute that had cropped up between it and the appellant company as regards the price on which the shares were to be subscribed.

10. We have given a thoughtful consideration to the facts elucidated hereinabove, and are unable to concur with the Pr. CIT, who vide his order passed u/s 263 of the Act, dated 30.03.2018 after holding the investor company, viz. M/s. Sakshi Real Estate Pvt. Ltd. as an ingenuine investor company, had observed, that as the A.O had failed to properly analyze the financial statements of the investor company and such other details which otherwise would have resulted to a contrary view, therefore, the order passed by him u/s. 143(3), dated 31.03.2016 was rendered as erroneous in so far as it was prejudicial to the interest of the revenue. We, say so, for the reason that as observed by us hereinabove the A.O in the course of original

assessment proceeding had exhaustively examined and verified at length the solitary issue which had formed the very basis for selection of the assessee's case for limited scrutiny, viz. "large share application money received against unallotted share". Not only the A.O had called for the requisite details from the assessee company to substantiate the authenticity of the transaction of receipt of share application money, but had also while vetting the said claim of the assessee had independently called for substantial details from the investor company u/s 133(6) of the Act. In compliance to the notice issued u/s.133(6), dated 01.03.2016 the director of the investor company, viz. Shri. Sachin Verma had appeared before the A.O and confirmed the transaction by placing on record supporting documentary evidences. Also, we cannot remain oblivion of the fact that the assessment framed by the Income-tax department u/s. 143(3), dated 22.03.2016 by the ITO, Ward-5(1), Kolkata in the case of aforesaid investor company, viz. M/s. Sakshi Real Estate Pvt. Ltd. (as was filed by the investor company in the course of the assessment proceeding) carries sanctity not only as regards the latter's existence but also the genuineness of its business transactions.

11. Be that as it may, we are of the considered view that it is not a case where the A.O had failed to carry out any enquiry, but as observed by the Pr. CIT in the body of his order it could be a case of inadequate enquiry on the issue in hand. We are of the considered view that now when the A.O on

the basis of his exhaustive verifications, examination and deliberations on the solitary issue, i.e., large share application money received against unallotted shares which had formed the very basis for selection of the assessee's case for limited scrutiny, had arrived at a possible and plausible view and accepted the claim of the assessee of having received genuine share application money from the investor company, viz. M/s. Sakshi Real Estate Pvt. Ltd., therefore, the Pr. CIT in the garb of powers vested with him under Sec. 263 of the Act could not have sought for substitution of his view as against that arrived at by the A.O. On a careful perusal of the impugned order, we would not hesitate to observe that the Pr. CIT had in fact held the order passed by the A.O as erroneous, for the reason that as per him a different view ought to have been arrived by analyzing the issue under consideration by adopting a different stream or process of verification. As the A.O had carried out necessary inquiries and verifications on the solitary issue which had formed the very basis for selection of the assessee's case for limited scrutiny assessment, i.e. large share application money received against unallotted shares, and had only after exhaustive deliberations arrived at a possible and a plausible view, therefore, it is beyond any doubt not a case of lack of enquiry which would have otherwise justified triggering of the powers vested with the Pr. CIT u/s 263 of the Act. In sum and substance the Pr. CIT could not have with a purpose and an intent to substitute his view as against that of the A.O brought into play the

provisions of Sec. 263 of the Act. Our aforesaid view is supported by the landmark judgment of the Hon'ble Apex Court in the case of Malabar Industrial Co. Ltd. Vs. CIT (2000) 243 ITR 83 (SC). In the aforesaid judgment it was held by the Hon'ble Apex Court that where an Income-Tax Officer had adopted one of the courses permissible in law with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income Tax Officer is unsustainable in law. The aforesaid view was thereafter reiterated by the Hon'ble Supreme Court in the case of CIT Vs. Max India Ltd. (2007) 213 CTR 266 (SC). Once again it was observed that where two views are possible and the Income-Tax Officer has taken one of the view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue, unless the view taken by the Income Tax Officer is unsustainable in law. Also support is drawn from the order of the Tribunal in the case of Ashfaque Quamar Vs. Pr. CIT, Raipur-1(C.G.), ITA No.83/RPR/2021 dated 06.04.2022, wherein it was observed that as the A.O while framing the assessment vide his order passed u/s.147 r.w.s. 143(3), dated 05.12.2018 had carried out necessary verifications, therefore, even if the same were to be held as inadequate it would by no means justify the invoking of the revisional jurisdiction by the Pr. CIT u/s. 263 of the Act.

12. Coming to “Explanation 2” to Sec. 263 as had been made available on the statute vide the Finance Act, 2015 w.e.f 01.06.2015, the same in a way expands the scope of the term “erroneous” as provided in the statutory provision. Ostensibly, the rationale for inserting the “Explanation 2”, specifically clause (a), was to render the assessment orders which had been passed without making inquiries or verification, which should have been made, amenable for revision under the said statutory provision. Undeniably the A.O had in the course of the assessment proceedings examined and verified at length the solitary issue on the basis of which the case of the present assessee before us was selected for limited scrutiny, i.e., large share application money received against unallotted shares. Only after deliberating at length on the information collated both from the assessee and u/s 133(6) from the investor company, the A.O by accepting the assessee’s claim of having received genuine share application money under consideration had arrived at a possible and a plausible view. Albeit the “Explanation 2” in a way expands the scope of the term “erroneous” provided in Sec. 263 of the Act, but the same only being in nature of a tool to aid in construing of the said statutory provision, thus, can by no means be allowed to distort the set of pre-conditions which are necessarily required to be satisfied for triggering the exercise of jurisdiction therein vested. Now when, the A.O in the case before us had on the basis of his exhaustive examination, verification and deliberations on the issue in hand, i.e, authenticity of the

assessee's claim of having received genuine share application money from the investor company, viz. M/s. Sakshi Real Estate Pvt. Ltd. had arrived at a possible and a plausible view, then, the same could not have been revised by the Pr. CIT under Sec. 263 of the Act, for the reason that the A.O had failed in not adopting a different line of verification and, therein, arriving at a view to the contrary on the issue under consideration. We, say so, for the reason that the A.O in the course of the assessment proceedings had not only raised queries on the issue in hand from the assessee, but had in fact in exercise of his powers u/s 133(6) of the Act called for and examined the substantial documentary evidence that was placed on his record by the investor company, viz. copy of its income-tax return along with audited balance sheet, copy of Form-20B (annual return filed with registrar of companies), company master data, names and complete address of its directors a/w. proof of identity, mode of payment of the share application money (through banking channel) a/w copy of the bank account from where payments were made, and confirmation of having paid share application money to the assessee company alongwith a supporting affidavit. Apart from that, the investor company had in its reply stated that the payment towards share application money was sourced out of, viz. (i). bank balance as on 01.04.2012 : Rs. 25,03,571/-; and (ii). loan received from M/s Natural View Software (P) Ltd. : Rs. 40 lac. Also in order to fortify its aforesaid claim the investor company had alongwith its reply appended the audited balance

sheet of M/s Natural View Software (P) Ltd. In sum and substance, the primary onus that was cast upon the assessee company as per the '1<sup>st</sup> proviso' to Sec. 68 i.e to prove the source of source of the credit appearing in its books of accounts stood duly discharged in the backdrop of the aforesaid documentary evidence. Also, the A.O on verifying as to why shares were not allotted against the share application money was specifically informed by the investor company that as it had certain dispute with the assessee company on the issue of the price at which the shares were to be subscribed, therefore, for the said reason those could not be allotted even after receipt of share application money. In fact, as observed by us hereinabove the director of the investor company, viz. Shri. Sachin Verma in the course of the assessment proceedings had appeared in person before the A.O and confirmed the transaction in question and had also placed on record supporting documentary evidence a/w a copy of the assessment order which was passed in the case of the investor company u/s.143(3) of the Act, dated 22.03.2016 for the year under consideration i.e A.Y.2013-14 by the ITO, Ward-5(1), Kolkata. Considering the aforesaid exhaustive deliberations of the A.O qua the supporting documentary evidence which were placed on his record during the course of the assessment proceedings, we have no hesitation in observing that the A.O had after necessary examination and verification on the issue in hand, i.e, authenticity of the assessee's claim of having received genuine share application money from

the investor company, viz. M/s. Sakshi Real Estate Pvt. Ltd. arrived at a possible and a plausible view which the Pr. CIT could not have sought to substitute in the garb of proceedings u/s 263 of the Act. In case the claim of the department that the ld. Pr. CIT remaining well within his jurisdiction had revised the assessment order u/s 263 r.w “Explanation 2” is accepted, then, we are afraid that the same would clearly militate with the mandate of Sec. 263 of the Act, and resultantly even render a reasoned assessment made after necessary examination and verification prone to revision.

13. Clause (a) of the “Explanation 2” of Sec. 263 reads as under (relevant extract as was available on the statute at the relevant point of time):

“Explanation 2 - For the purpose 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 interest of the revenue, if, in the opinion of the Principal Commissioner or Commissioner, -

(a). the order is passed without making inquiries or verifications which should have been made.

(b) to (d) .....

Ostensibly the “Explanation 2(a)” is only in the nature of a tool to aid in construing the scope and gamut of Sec. 263, and thus, cannot override the statutory provision. Inadequacy in conducting enquiry cannot be the reason based on which powers under Sec. 263 can be invoked to interdict an assessment order. Our said view is fortified by the judgment of the Hon’ble High Court of Delhi in the case of Pr. CIT-1, New Delhi Vs. M/s Brahma

Centre Development Pvt. Ltd., ITA No. 116 & 118/2021; dated 05.07.2021, which in turn relying on its earlier order in the case of the CIT Vs. Sunbeam Auto Ltd. (2011) 332 ITR 167 (Del) and that of the Hon'ble High Court of Bombay in the case of CIT Vs. Gabriel India Ltd. (1993) 203 ITR 108 (Bom), after pointing out the fine distinction between "lack of inquiry" and "Inadequate inquiry" had observed that if there was any inquiry, even inadequate, that would not by itself, give occasion to the CIT to pass order under Sec. 263 of the Act merely because he has a different opinion in the matter; albeit in a case of "lack of inquiry" such course of action was open. For the sake of clarity the relevant observations of the Hon'ble High Court are culled out as under:

"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].

\*\*\*\*\* 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.

\*\*\*\*\* 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 inquiries 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)."

Analyzing the scope and gamut of "Explanation 2" to Sec. 263 of the Act, the Hon'ble High Court in the case of M/s Brahma Centre Development Pvt. Ltd. (supra) while approving the order of the Tribunal had, inter-alia, observed that as the A.O in the case before them while framing the assessment had conducted enquiry on the issue involved and arrived at a possible view, therefore, the Pr. CIT could not have assumed jurisdiction u/s 263 of the Act. The Hon'ble High Court in the said case was, inter alia, seized of the following issue :

- “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?”

Answering the aforesaid issue in the backdrop of Clause (a) and (b) of “Explanation 2” to Sec. 263 as was canvassed by the department, the Hon’ble High Court while approving the order of the Tribunal had held that as it was not a case of no enquiry and necessary verifications were carried out by the A.O, therefore, the order could not have been revised by the Pr. CIT under Sec. 263 of the Act, observing as under:

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

(emphasis supplied by us)

Also, we find that a similar view had been taken by the ITAT, Pune in the case of Nalco Company, USA City (IT & TP) Vs. CIT, ITA No. 1217/Kol/2017; dated 05.02.2021. The Tribunal had observed that for triggering the "Explanation 2" to Sec. 263 the existence of either of the four conditions in Clause (a) to (d) was a sine qua non. Referring to Clause (a) of "Explanation 2" (with which we are concerned in the present case), it was observed by the Tribunal that as the A.O while framing the assessment had carried out a preliminary inquiry on the issue involved by seeking relevant explanation

and had carried out necessary verification, therefore, on the said count itself the application of Clause (a) to “Explanation 2” of Sec. 263 was ousted.

14. As in the present case before us the A.O while framing the assessment had made exhaustive examination and carried out necessary verifications on the issue which had formed the very basis for selection of the assessee’s case for limited scrutiny assessment, i.e. large share application money received against unallotted shares, and had only after exhaustive deliberations arrived at a possible and a plausible view and accepted the claim of the assessee of having received genuine share application money from the investor company i.e. M/s. Sakshi Real Estate Pvt. Ltd., therefore, there was no justification for the Pr. CIT to have invoked his jurisdiction u/s 263 of the Act for the purpose of supplanting his view on the issue in hand, on the ground that appraisal of the material that was available before the A.O ought to have been done in a different manner, which, thus, would have resulted to a contrary view as was advocated by him. We, thus, in terms of our aforesaid observations not being able to persuade ourselves to subscribe to the exercise of the revisional jurisdiction by the Pr. CIT set-aside the order passed by him u/s 263 of the act, dated 30.03.2018 and restore the order passed by the A.O u/s 143(3), dated 31.03.2016.

15. Resultantly, the appeal filed by the assessee is allowed in terms of our aforesaid observations.

16. In the result, appeal filed by the assessee is allowed in terms of our aforesaid observations.

Order pronounced under rule 34(4) of the Appellate Tribunal Rules, 1963, by placing the details on the notice board.

Sd/-  
**ARUN KHODPIA**  
**(ACCOUNTANT MEMBER)**

Sd/-  
**RAVISH SOOD**  
**(JUDICIAL MEMBER)**

रायपुर/ RAIPUR ; दिनांक / Dated : 17<sup>th</sup> October, 2022  
\*\*\*SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The Pr. CIT, Bilaspur (C.G)
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर बेंच,  
रायपुर / DR, ITAT, Raipur Bench, Raipur.
5. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary  
आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur.