

**| आयकर अपीलिय अधिकरण न्यायपीठ, मुंबई |**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"A" BENCH, MUMBAI**

**BEFORE SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER**  
**&**  
**SHRI RAJ KUMAR CHAUHAN, HON'BLE JUDICIAL MEMBER**

**I.T.A. No. 1560/Mum/2024**  
**Assessment Year: 2018-19**

<b>M/s. Akshar Developers</b> Unit No. 0047, O Wing Ground Floor Akshar Business Park Plot No. 03, Sector 25 Vashi Navi Mumbai -400075 <b>[PAN: AAKFA0455B]</b>	Vs	<b>Pr. Commissioner of Income Tax,</b> <b>(Central), Pune</b>
<b>अपीलार्थी/ (Appellant)</b>		<b>प्रत्यर्थी/ (Respondent)</b>

Assessee by :	Ms. Ritika Agarwal, A/R
Revenue by :	Dr. K.R. Subhash, CIT, D/R

सुनवाई की तारीख/**Date of Hearing** : 08/10/2024  
घोषणा की तारीख/**Date of Pronouncement** : 11/10/2024

**आदेश/ORDER**

**PER NARENDRA KUMAR BILLAIYA, AM:**

This appeal by the assessee is preferred against the order dated 13/03/2024 passed by Id. PCIT [hereinafter 'Id. PCIT'] pertaining to AY 2018-19.

2. The sum and substance of the grievance of the assessee is that the Id. PCIT erred in assuming jurisdiction u/s 263 of the Act and further erred in holding that the assessment order dated 29/09/2021 is not only erroneous but prejudicial to the interest of the revenue.

3. Representatives of both the sides were heard at length. Case records carefully perused and the relevant documentary evidence brought on record duly considered.

4. Briefly stated the facts of the case are that the return of income was originally filed on 31/10/2018 declaring total income at Rs.94,90,890/-. The return of income was selected for scrutiny through CASS and accordingly statutory notices were issued and served upon the assessee. During the course of scrutiny assessment proceedings, the notices u/s 142(1) of the Act dated 04/11/2020 required the assessee *inter alia* to furnish details of unsecured loans/deposits taken during the year including squared up loans and also details of loans/advances and deposits given, including the accounts squared up during the year. Vide reply dated 18/11/2020, the assessee complied with the queries raised by the AO.

4.1. Again, a showcause notice was issued on 11/06/2021, which reads as under:-



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
INCOME TAX DEPARTMENT  
OFFICE OF THE ASSISTANT COMMISSIONER  
OF INCOME TAX  
CENTRAL CIRCLE 4, THANE

To, AKSHAR DEVELOPERS 7,8,PLOT NO.42,SHREEJI SEVA OPP,SEAWOOD RLY STAT NERUL(W) NAVI MUMBAI 400706 ,Maharashtra India	
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PAN: AAKFA0455B	AY: 2018-19	DIN & Notice No: ITBA/AST/F/143(3)(SCN)/20 21-22/1033408553(1)	Dated: 11/06/2021	Hearing Date and Time: 16/06/2021 12:30 PM
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SHOW CAUSE NOTICE

This case has been centralized to this charge after transfer from DCIT, Central Circle-4(3), Mumbai vide order u/s 127 of the Income tax Act, 1961 of Principal Commissioner of Income Tax, Central-II, Mumbai dated 15/04/2021, the copy of which is attached herewith.

2018-19

1. A. Non Payment of TDS deducted but not deposited to government account amounting to Rs 29,76,947/-.

As per your submission and on verification of your Form 3CD annexure to the Tax Audit report it is noticed that no payment of TDS has been paid/made to the Government which has been deducted by your goodself during the assessment year 2018-19 before filing of the return of Income. **Therefore, in view of the above, you are hereby required to show cause as to why addition u/s 43B for non payment of TDS within the prescribed time limit may not be made and added to your total income.**

2. B. Unsecured loans

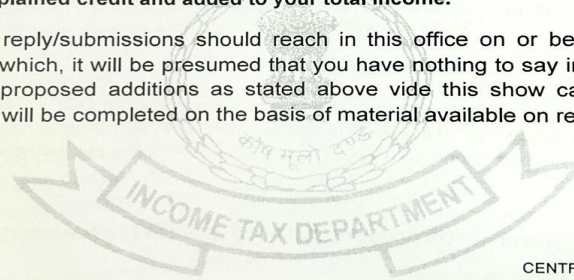
On perusal of the balance sheet for the year under consideration it is noticed that unsecured loans of Rs 28,56,76,369/- has been claimed by the assessee. The confirmations of the loan parties submitted till date does not include bank statement. Hence to establish the creditworthiness you are requested to submit the bank statement of the concerned parties showing the transactions done during the year under consideration. **In view of the above, you are hereby required to show cause as to why the unsecured loans claimed by you may not be treated as unexplained credit and added to your total income.**

3) C. Interest free loans:

During the year under consideration the assessee has advanced loans and advances to the tune of Rs 31,16,96,725/- and on the other hand the assessee has obtained unsecured loans on which interest is being paid. Hence showcause as to why the interest paid should not be disallowed proportionately.

- 4) As per the information available in this office, it is noticed that you have made an accommodation entry of unsecured loan of Rs 58,25,000/- from entry provider Shri Ashwin Kanji Shah for the year under consideration. In this connection you are requested to provide all the relevant documents to substantiate your claim. **In view of the above, you are hereby required to show cause as to why the unsecured loans of Rs 58,25,000/- from entry provider Shri Ashwin Kanji Shah may not be treated as unexplained credit and added to your total income.**

Your reply/submissions should reach in this office on or before **16<sup>th</sup> June 2021** failing which, it will be presumed that you have nothing to say in the matter and you accept proposed additions as stated above vide this show cause notice and assessment will be completed on the basis of material available on record



BHARATH R.  
CENTRAL CIRCLE 4, THANE

For Akshar Developers

*[Signature]*  
Partner

4.2. On 06/09/2021, another showcause notice was issued which is as under:-

GOVERNMENT OF INDIA MINISTRY OF FINANCE INCOME TAX DEPARTMENT OFFICE OF THE ASSISTANT COMMISSIONER OF INCOME TAX CENTRAL CIRCLE 4, THANE				
<p>To, AKSHAR DEVELOPERS 7.8,PLOT NO.42,SHREEJI SEVA .OPP. SEAWOOD RLY STAT NERUL(W) NAVI MUMBAI 400706 ,Maharashtra India</p>				
PAN: AAKFA0455B	AY: 2018-19	DIN & Notice No: ITBA/AST/F/143(3)(SCN)/20 21-22/1035306362(1)	Dated: 06/09/2021	Hearing Date and Time: 09/09/2021 11:12 AM
<b>SHOW CAUSE NOTICE</b>				
<p>It is noted that during the year under consideration the assessee has granted interest free loans and advances and also paid interest expense. A show cause notice was issued to the assessee to show cause as to why proportionate disallowance should not be made, to which the assessee submitted as the source of interest free loans and advances is the interest free funds. In this regard you are required to furnish the bank statements highlighting the source and the amount of interest free loans and advances given. On failure of which a proportionate disallowance would be made for the interest expenses paid during the year.</p>				
<p>BHARATH R. CENTRAL CIRCLE 4, THANE</p>				
<p>(In case the document is digitally signed please refer Digital Signature at the bottom of the page)</p>				
<p>For Akshar Developers <i>[Signature]</i> Partner</p>				

4.3. The assessee filed a detailed reply which reads as follows:-

BEFORE THE ASST. COMMISSIONER OF INCOME TAX  
CENTRAL CIRCLE – 4, THANE

M/s. Akshar Developers  
7, 8, Plot no. 42, Shreeji Seva,  
Opp. Seawood Rly. Station,  
Nerul (West), Navi Mumbai – 400 706,  
Maharashtra, India.  
PAN: AAKFA0455B

---Assessee

In the matter of show cause  
notice dated 11/06/2021 issued  
in case of assessment  
proceedings for AY 2018-19.

The assessee respectfully submits:

1. That the said notice is issued without jurisdiction. As per the order dated 26/07/2019 issued by PCIT (Central), Pune u/s. 127(2) of the Income Tax Act, 1961, ITO - Ward 28(1)(1), Mumbai is the jurisdictional officer of the assessee. A copy of said transfer order is annexed hereto for your reference and marked as **"Exhibit-A"**.

Without prejudice,

2. Non-Payment of TDS deducted but not deposited to government account amounting to Rs 29,76,947/-: TDS is not covered by Sec 43B, since 43B deals with the allowability / disallowability of "Expense" & TDS is not an expense in itself for the deductor. It is just a mode of discharging the consideration. TDS is not something, which is debited to Profit & Loss Account and opening words of Sec 43B says - *"Notwithstanding anything contained in any other provision of this Act a deduction otherwise allowable under this Act in respect of....."*.
3. Unsecured loans: Kindly find enclosed the bank statement of lenders as required annexed hereto and marked as **"Exhibit-B"**.

For Akshar Developers

  
Partner

For Akshar Developers  
Partner

  
Partner

4. Interest free loans:

- a. It is stated that the amount advances are all for the business purpose and pertain to transactions carried out in the past.
- b. Even otherwise the observation that the assessee has advanced loans and advances to the tune of Rs 31,16,96,725/- during the year is factually erroneous. In fact, in the year under assessment, the amount of loan and advance is Rs.22,83,64,675/- which too are for business purpose. Therefore, there is no occasion for treating the interest on amount borrowed as disallowable. The detailed working will be submitted within a week.
- c. It is further submitted that the amount borrowed corresponding to the interest claim has been utilised only for the purpose of business. For this purpose, we are preparing a separate cash flow statement and shall submit to you in a week's time.

5. Unsecured loans of Rs 58,25,000/-:

- a. Your goodself has relied upon certain "information". We request you to kindly provide us the said "information" so that we may be able to place our rebuttal.
- b. It is submitted that the said amount is not accommodation entries. Rather these are genuine transaction supported by the following documents:
  - Name, address and PAN of the lenders;
  - Confirmation from lenders;
  - Bank statement of lenders highlighting the loan amount;
  - Bank statement of assessee highlighting the loan amount;
  - ITR of the lenders.

For Akshar Developers

  
Partner

For Akshar Developers

  
Partner

Particulars	Loan amount (Rs.)	Loan received date	PAN	Address	Confirmation	ITR of lender	Bank statement of lender	Bank statement of assessee
Manish M. Joshi (H.U.F)	5,00,000	16/06/2017	Yes	Yes	Yes	Yes	Yes	Yes
Nitin Krishan Rajgor HUF	3,00,000	16/06/2017	Yes	Yes	Yes	Yes	Yes	Yes
Daksha Gautam Shah	5,50,000	16/06/2017	Yes	Yes	Yes	Yes	Yes	Yes
Kirit Kumar T. Rajput - HUF	2,75,000	17/05/2017	Yes	Yes	Yes	Yes	Yes	Yes
Pravin L. Mamania (HUF)	4,50,000	16/06/2017	Yes	Yes	Yes	Yes	Yes	Yes
Jyoti H. Bheda	5,25,000	15/05/2017	Yes	Yes	Yes	Yes	Yes	Yes
Rajul Khusal Lalan	3,25,000	16/06/2017	Yes	Yes	Yes	Yes	Yes	Yes
Veena Kamlesh Solanki	5,00,000	16/06/2017	Yes	Yes	Yes	Yes	Yes	Yes
Dhiren M. Hariya	3,25,000	15/05/2017	Yes	Yes	Yes	Yes	Yes	Yes
Manish D. Vikam	3,50,000	16/05/2017	Yes	Yes	Yes	Yes	Yes	Yes
Meeta K. Gada	4,00,000	16/06/2017	Yes	Yes	Yes	Yes	Yes	Yes
Pushpa Kantilal Gada	3,00,000	16/06/2017	Yes	Yes	Yes	Yes	Yes	Yes
Bhavesh Shantilal Gala	3,25,000	16/06/2017	Yes	Yes	Yes	Yes	Yes	Yes
Nayana Paresh Gala	3,00,000	16/06/2017	Yes	Yes	Yes	Yes	Yes	Yes
Heena Hasmukh Majithia	4,00,000	17/05/2017	Yes	Yes	Yes	Yes	Yes	Yes
<b>Total</b>	<b>58,25,000</b>							

Details of the above enclosed as "Exhibit-C".

c. Moreover, the said amount stands repaid as under:

Sr.no.	Particulars	Loan amount (Rs.)	Loan repaid date
1	Manish M. Joshi (H.U.F)	5,00,000	06/11/2020
2	Nitin Krishan Rajgor HUF	3,00,000	06/11/2020
3	Daksha Gautam Shah	5,50,000	06/11/2020
4	Kirit Kumar T. Rajput - HUF	2,75,000	06/11/2020
5	Pravin L. Mamania (HUF)	4,50,000	06/11/2020
6	Jyoti H. Bheda	5,25,000	06/11/2020
7	Rajul Khusal Lalan	3,25,000	06/11/2020
8	Veena Kamlesh Solanki	5,00,000	06/11/2020
9	Dhiren M. Hariya	3,25,000	06/11/2020
10	Manish D. Vikam	3,50,000	06/11/2020
11	Meeta K. Gada	4,00,000	06/11/2020
12	Pushpa Kantilal Gada	3,00,000	06/11/2020

For Akshar Developers

*Hari*  
Partner

For Akshar Developers

*Hari*  
Partner

13	Bhavesh Shantilal Gala	3,25,000	06/11/2020
14	Nayana Paresh Gala	3,00,000	06/11/2020
15	Heena Hasmukh Majithia	4,00,000	06/11/2020
	<b>Total</b>	<b>58,25,000</b>	

In support of the repayment, kindly find enclosed our bank statement of the assessee highlighting the repayment entries annexed hereto and marked as "Exhibit-D".

Respectfully submitted.

For M/s. Akshar Developers  
For Akshar Developers

*Hari*  
Partner

(Hari Mujat)

Partner

Encl.: As above.

For Akshar Developers

*Hari*  
Partner

4.4. Exhibit 102 to 105 are the evidence for uploading the documents with the Income Tax Department. The detailed reply relating to query relating to TDS reads as under:-

**BEFORE THE ASST. COMMISSIONER OF INCOME TAX  
CENTRAL CIRCLE – 4, THANE**

**M/S. AKSHAR DEVELOPERS  
PAN: AAKFA0455B**

-----Assessee

In the matter of Show Cause Notice dated 24/08/2021 issued in connection with assessment proceedings for **AY 2018-19**.

26<sup>th</sup> August, 2021

1. The assessee has challenged the jurisdiction on the ground of invalid transfer of case from Vashi, Navi Mumbai to Mumbai and again from Mumbai to Thane. Without prejudice to the said objection, the assessee is submitting the following reply.
2. Point no. 1: Why 30% of the total expenditure should not be disallowed since TDS on these expenses amounting to Rs.29,76,947/- has not been paid before due date u/s. 139(1).
  - a. That during the year under consideration, the Appellant had incurred the following expenditure which are debited to the work-in-progress account of "Decorium" under the head "indirect expenses":

Nature of expenditure	Name of the Payee	Amount of expenditure	TDS deducted	Annexure Ledger account showing expenses debited to WIP account of "Decorium"
Professional fees	Atharva Engineering Consultancy Service	Rs.90,000/-	Rs.9,000/-	<b>Exhibit A-1</b>
Professional fees	BANM	Rs.20,13,358/-	Rs.2,01,334/-	<b>Exhibit A-2</b>

Professional fees	L&T Finance Ltd.	Rs.2,22,50,000/-	Rs.22,25,000/-	<b>Exhibit A-3</b>
Interest	Options Developers & Builders	Rs.54,16,130/-	Rs.5,41,613/-	<b>Exhibit A-4</b>
Total		Rs.2,97,69,488/-	Rs.29,76,947/-	

- b. That out of the total TDS of Rs.29,76,947/-, the Appellant has duly paid TDS of Rs.27,66,613/- on 20/03/2020 i.e. during AY 2020-21. In support, kindly find enclosed:
- Challan showing payment of TDS of Rs.11,58,617/- - "**Exhibit B-1**".
  - Challan showing payment of TDS of Rs.16,07,996/- - "**Exhibit B-2**".
- c. That as stated above, the said expenditure is capitalised in work in progress of "Decorium" project which is still under progress. Thus, the disallowance of 30% of expenditure, even if made, would only go to reduce the work-in-progress and cannot be treated as income of the year in assessment.
- d. That in any case, since the TDS amounting to Rs.27,66,613/- is paid on 20/03/2020 i.e. during AY 2020-21 as evident from Exhibit B-1 and B-2, the said disallowance in the impugned assessment would have to be allowed / added to work in progress for AY 2020-21. In this connection, reference is invited to 1<sup>st</sup> proviso to section 40(a)(ia) of the Act.
- e. That thus, there is no loss to the department as only the year of allowability has undergone a change, rendering the entire exercise tax neutral. The following Courts have expressed anguish on shifting of year for levy of tax:

**For Akshar Developers**

  
Partner

- (a) *CIT v. Excel Industries Ltd. (2013) 358 ITR 295 (SC)*; and  
(b) *CIT v. Nagri Mills Co. Ltd. (1958) 33 ITR 681 (Bom.)*.

f. That if such expenditure is not allowed in the current assessment year then, it would amount to double jeopardy:

- (a) Once by treating it as an income of the year under appeal;  
(b) Again by not allowing the said expense in the work-in-progress for the next year.

g. That we are supported by the decision of the hon'ble Gujarat High Court in the case of *PCIT v. M/s. Adani Infrastructure and Developers Pvt. Ltd. bearing ITA no. 1 of 2021, order dt. 08/01/2021* ("Exhibit C") wherein at para no. 5, the Court has held as under:

*"5. Thus, it appears that the Tribunal has taken the view that the assessee had offered tax in the subsequent year and if any addition is made in the year under consideration, the same may amount to double addition, which would be contrary to the provisions of law. In such circumstances, we are of the view that no error could be said to have been committed by the Tribunal in taking such view."*

h. That in light of above facts and law, it submitted that no disallowance ought to be made.

3. Point no. 2: The tax audit report clause 34 shows that there is interest payable under section 201(1A)/206(7) of Rs. 6,09,994/- also furnish whether any interest was paid u/s 201(1A) reported in clause 34 of Form 3CD was disallowed in the computation of income. Please explain why the same should not be added to total income.

a. As per the tax audit report, the assessee was liable to pay interest 201(1A)/206(7) of Rs. 6,09,994/-. However, the same is not paid during the year under consideration and thus, the said amount is not claimed as expenditure in the profit and loss account / debited to work in progress account. Even the auditor in his audit report has not mentioned the details of payment of such liability. The screenshot of audit report is

For Akshar Developers

*[Signature]*  
Partner

reproduced below for your ready reference (the date of payment column is blank since the amount is not paid by the assessee during the year under consideration and even till the date of audit report i.e. 31/10/2018).

	31/03/2018	31/03/2018	31/03/2018	Yes
34 c	Whether the assessee is liable to pay interest under section 201(1A) or section 206C(7). If yes, please furnish Yes			
	S.No	Tax deduction and collection Account Number (TAN)	Amount of interest under section 201(1A)/206C(7) is payable	Dates of payment
	1	MUMA21071B	609994	0
35 a	In the case of a trading concern, provide quantitative details of principal items of goods traded			

- b. Thus, since, the assessee has not claimed the expense, no disallowance of Rs.6,09,994/- can be made.
4. Point no. 3: Your goodself has observed that multiple notices have been issued by this office from time to time for which no compliance has been made.
- a. The said observation is erroneous. The assessee has complied with all the notices till date. The following chart is compiled for your ready reference:

Date of Notice	Due date for submission	Date of Submission	Submission	Filed / Mailed	Acknowledgment proof
23.09.2019	08.10.2019	01.10.2019	Details fully provided	Adjournment Filed	<b>Exhibit C-1</b>
04.11.2020	19.11.2020	19.11.2020	Details fully provided	Filed	<b>Exhibit C-2</b>
19.02.2021	23.02.2021	23.02.2021	Details fully provided	Filed	<b>Exhibit C-3</b>
21.04.2021	24.04.2021	24.04.2021	Details fully provided	Filed	<b>Exhibit C-4</b>
11.06.2021	16.06.2021	16.06.2021	Pending Details - cash flow (annexed as per point no. 4 to this submission)	Mailed as site under upgradation--- filed details on mail	<b>Exhibit C-5</b>
15.06.2021	21.06.2021	21.06.2021	Details fully provided	Mailed as site under upgradation ---filed details on mail	<b>Exhibit C-6</b>
24.08.2021 [Current notice]	30.08.2021				

For Akshar Developers  
Partner

5. Chart showing source and application of funds: Details pending as per notice dated 11/06/2021 and submission dated 16/06/2021, point no. 4 is annexed hereto and marked as "Exhibit D". From the said annexure, it is evident that the assessee has utilized only interest free funds to give interest free loans.

Kindly consider the above submission as due compliance to your notice. In case any further details are required, kindly let us know in writing.

Respectfully submitted.

**For M/s. Akshar Developer**  
For Akshar Developers

  
Partner  
**(Hari Bhachubhai Mujat)**

Partner

Encl.: As above.

4.5. After considering the detailed submissions, the assessment order was framed u/s 143(3) of the Act vide order dated 29/09/2021 wherein addition of Rs.6,31,002/- was made u/s 40(a)(ia) of the Act and Rs.1,00,00,000/- as unexplained credit u/s 115BBE of the Act.

5. Assuming jurisdiction conferred upon him by the provisions of Section 263 of the Act, the Id. PCIT (Central), Pune issued the following notice:-

GOVERNMENT OF INDIA MINISTRY OF FINANCE INCOME TAX DEPARTMENT PCIT (Central), Pune			
To, AKSHAR DEVELOPERS 7&8, Plot No.42 Shreeji Seva , opp.seawood rly stat Nerul(w) Navi Mumbai 400706 , Maharashtra India			
PAN/TAN: AAKFA0455B	AY: 2018-19	DIN & Notice No : ITBA/REV/F/REV1/2023- 24/1060305256(1)	Dated: 31/01/2024
<b>NOTICE FOR THE HEARING</b>			
<b>M/s/Mr/Ms</b>			
<b>Subject:</b> Notice for Hearing in respect of Revision proceedings u/s 263 of the THE INCOME TAX ACT, 1961 – Assessment Year 2018-19.			
In this regard, a hearing in the matter is fixed on <b>02/02/2024</b> at <b>03:00 PM</b> . You are requested to attend in person or through an authorized representative to submit your representation, if any alongwith supporting documents/information in support of the issues involved (as mentioned below). If you wish that the Revision proceeding be concluded on the basis of your written submissions/representations filed in this office, on or before the said due date, then your personal attendance is not required. You also have the option to file your submission from the e-filing portal using the link: <a href="http://incometaxindiaefiling.gov.in">incometaxindiaefiling.gov.in</a>			
Kindly refer to the above.			
02. In the above mentioned case, on verification of case records for A.Y. 2018-19 it has been observed that the assessee had filed return of income for AY 2018-19 on 31.10.2018 declaring total income at Rs. 94,90,890/-. The scrutiny assessment was completed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') on 29.09.2021 by assessing the total income at Rs. 2,01,21,892/-.			
03. On perusal of the assessment records it is seen that during the year under consideration, the assessee had arrived closing Work in Progress (WIP) amounting to Rs 376,96,12,297/- by considering the Opening WIP of Rs 262,96,93,857/- and added the current year Direct and Indirect expenses of Rs. 113,99,184440/-which had been accepted by the AO during the course of assessment proceedings. However, disallowance of Rs. 2,70,71,100/- was done in assessment order for A.Y. 2017-18 and WIP was reduced to that extent. The			
Note: If digitally signed, the date of digital signature may be taken as date of document. Anavkar Sadan, Bodhi Towers, Salisbury Park, PUNE, Maharashtra, 411037			
<b>For Akshar Developers</b>			

Assessing Officer (AO) failed to disallow the same which has resulted in excess allowance of WIP to the extent of Rs. 2,70,71,100/- resulting in underassessment of income. However, disallowance should have been done and closing Work-in-Progress to that extent should have been reduced. However, neither the assessee had considered the disallowances nor the AO had reduced the amount while arriving the closing WIP of the said Project. The AO failed to disallow the same during the course of assessment proceedings for the year under consideration.

3.1 Further, on perusal of the assessment records it is seen that during the year under consideration, the assessee had debited interest of Rs 10,85,07,588/- against the total borrowing of Rs 150,03,64,851/- (Secured loan of Rs 121,46,88,482/- and Unsecured Loan of Rs 28,56,76,369/-) which comes to @ 7.23% approx. It is further observed that during the year under consideration, the assessee had given total advance of Rs 49,81,20,557/- [Loans & Advances of Rs 31,16,96,725/- and loans and advances against Lands/Plots of Rs 18,64,23,832/-] on which assessee had not received or shown any interest income. The Assessing Officer (AO) should have disallowed the proportionate interest. The proportionate interest to the extent of Rs 2,25,35,673/-  $[(10,85,07,588 \times 31,16,96,725/-) / 150,03,64,851]$  against the loan and advances was required to be disallowed and accordingly, WIP was required to be reduced to that extent. However, neither the assessee had considered the disallowances nor the Assessing Officer(AO) had reduced the amount while arriving the closing WIP of the said Project. Further, it is observed that during current year the partners capital were reduced to Rs 14,78,88,015/- from last year of Rs 18,62,97,150/- and the interest bearing fund were diverted to non interest bearing of loan and advances. Hence, the interest paid was required to be disallowed proportionally. The AO failed to disallow the same during the course of assessment proceedings for the year under consideration.

3.2 Further on perusal of the assessment records it is seen that during the year under consideration, the assessee had claimed expenses on which TDS were being deducted but not paid on or before the due date specified in sub-section 1 of Section 139. It is pertinent to mention here that the same was also certified by the tax Auditor (Vide Clause – 34a of Form-3CD) and taxes were not deposited to Government Account within due date. Also, the date of filing of assessee return and Tax Audit Report is same date i.e 31.10.2018. Further, it is seen that the assessee had submitted that said payment were made on 20.03.2020. Thus, it is crystal clear that said taxes were not paid or deposited before filing of return. Hence, in view of section 40a(ia) r.w.s 194J/194A of I.T.Act, expenses claimed by the assessee to the extent of Rs 89,30,846/- [i.e 30% of Rs 2,97,69,488/- was required to be disallowed and added back to total income of the assessee. However it is observed from the assessment order that AO had added only Rs 6,31,002/- instead of disallowance of

For Akshar Developers

  
Partner

Rs 89,30,846/-. The AO failed to disallow the same during the course of assessment proceedings for the year under consideration.

04. In view of the above, it is found that the assessee firm failed to offer the income and no verification on the aforesaid issues has been done in the assessment proceedings by the AO. As per explanation (2) to section 263(1) of the Act an order without making inquiries or verification which should have been made is deemed to be erroneous in so far as it is prejudicial to the interest of revenue.

05. Considering the above facts of the case it is seen that the AO has not examined and verified the above issues and therefore income has been under assessed. Therefore, assessment order u/s 143(3) of the Act dated 29.09.2021 passed by the AO for A.Y. 2018-19 appears to be erroneous in so far as it is prejudicial to the interest of revenue.

06. In view of the facts and circumstances mentioned above, the assessment order passed u/s 143(3) of the Act in the case of M/s Akshar Developers for A.Y.2018-19 prima facie appears to be erroneous in so far as it is prejudicial to the interest of revenue in terms of the provisions of Explanation-(2)(a) to Section 263(1) of the Income Tax Act. I, therefore, intend to set aside/ modify the assessment order within the meaning of section 263 of the I.T. Act, 1961. An opportunity of being heard is therefore, given to you. You are requested to attend in person or through your authorized representative on **02.02.2024 at 03:00 PM** in my office.

07. If you have authorized any representative to attend on your behalf, please ensure that the Power of Attorney with proper court fee stamp is filed on or before the date of hearing. If you do not wish to attend in person or through your authorized representative, you may file written submission along with necessary evidence in support of your contention before the due date of hearing. Further, it may be noted that no adjournment will be provided and in case on non appearance/non submission of reply, order will be passed on merits.

MOHIT JAIN  
PCIT (Central), Pune

6. A perusal of the notice u/s 263 of the Act with respect to the queries raised during the assessment proceedings, reveals that all the issues raised by the Id. PCIT were considered by the AO while making thorough enquiry during the assessment proceedings. Specific queries were raised by the AO to which specific replies were filed by the assessee.

7. In the light of the afore-stated facts the Hon'ble Supreme Court in *Malabar Industrial Co. Ltd.*, 243 ITR 83, has laid down the following ratio:

*"A bare reading of [section 263](#) of the Income-tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent--if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue-- recourse cannot be had to [section 263\(1\)](#) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous".*

8. The Hon'ble Bombay High Court in the case of *Gabriel India Ltd* 203 ITR 108 has held as under:

*"The power of suo motu revision under subsection (1) is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of revision under this sub-section, viz., (i) the order is erroneous; (ii) by virtue of the order being erroneous prejudice has been caused to the interests of the Revenue. It has, therefore, to be considered firstly as to when an order can be said to be erroneous. We find that the expressions "erroneous", "erroneous assessment" and "erroneous judgment" have been defined in Black's Law Dictionary. According to the definition, "erroneous" means "involving error; deviating from the law".*

*"Erroneous assessment" refers to an assessment that deviates from the law and is, therefore, invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the Assessing Officer in fixing the amount of valuation of the property. Similarly, "erroneous judgment" means "one rendered according to course and practice of court, but contrary to law, upon mistaken view of law; or upon erroneous application of legal principles". 12. 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. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interests of the Revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, viz., that the order is erroneous, is absent. Similarly, if an order is erroneous but not prejudicial to the interests of the Revenue, then also the power of suo motu revision cannot be exercised. Any and every erroneous order cannot be the subject-matter of revision because the second requirement also must be fulfilled. 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, therefore, hold that in order to exercise power under sub-section (1) of [section 263](#) of the Act there must be material before the Commissioner to consider that the order passed by the Income-tax Officer was erroneous in so far as it is prejudicial to the interests of the Revenue. We have already held what is erroneous. It must be an order which is not in accordance with the law or which has been passed by the Income-tax Officer without making any enquiry in undue haste. We have also held as to what is prejudicial to the interests of the Revenue. An order can be said to be prejudicial to the interests of the Revenue if it is not in accordance with the law in consequence whereof the lawful revenue due to the State has not been realised or cannot be realised. There must be material available on the record called for by the Commissioner to satisfy him prima facie that the aforesaid two requisites are present. If not, he has no authority to initiate proceedings for revision. Exercise of power of suo motu revision under such circumstances will amount to arbitrary exercise of power. It is well-settled that when exercise of statutory power is dependent upon the existence of certain objective facts, the authority before exercising such power must have materials on record to satisfy it in that regard. If the action of the authority is challenged before the court it would be open to the courts to examine whether the relevant objective factors were available from the records called for and examined by such authority. 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 in 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. Moreover, in the instant case, the Commissioner himself, even after initiating proceedings for revision and hearing the assessee, could not say that the allowance of the claim of the assessee was erroneous and that the expenditure was not revenue expenditure but an expenditure of capital nature. He simply asked the Income- 11 tax Officer to re-examine the matter. That, in our opinion, is not permissible. Hence the provisions of [section 263](#) of the Act were not

*applicable to the instant case and, therefore, the commissioner was not justified in setting aside the assessment order."*

9. It is a settled position of law that powers u/s 263 of the Act can be exercised by the Commissioner on satisfaction of twin conditions, i.e., the assessment order should be erroneous and prejudicial to the interest of the Revenue. By 'erroneous' is meant contrary to law. Thus, this power cannot be exercised unless the Commissioner is able to establish that the order of the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no action to exercise powers of revision can arise, nor can revisional power be exercised for directing a fuller enquiry to find out if the view taken is erroneous. This power of revision can be exercised only where no enquiry, as required under the law, is done. It is not open to enquire in case of inadequate inquiry. Our view is fortified by the decision of Hon'ble High Court of Bombay in the case of [CIT vs. Nirav Modi](#), [2016] 71 Taxmann.com 272 (Bombay)".

10. The Hon'ble High Court of Gujarat in the case of [CIT vs. Nirma Chemical Works Ltd.](#) 309 ITR 67 has observed as under:

*"if assessment order were to incorporate the reasons for upholding the claim made by an assessee, the result would be an epitome and not an assessment order. In this case, during the assessment proceedings for both the Assessment Years, the Assessing Officer issued a query memo to the assessee, calling upon him to justify the genuineness of the gifts. The Respondent Assessee responded to the same by giving evidence of the communications received from his father and his sister i.e. the donors of the gifts along with the statement of their Bank accounts. On perusal, the Assessing Officer was satisfied about the creditworthiness/capacity of the donors, the source from where these funds have come and also the creditworthiness/ capacity of the donor. Once the Assessing Officer was satisfied with regard to the same, there was no further requirement on the part of the Assessing Officer to disclose his satisfaction in the Assessment Order passed thereon. Thus, this objection on the part of the Revenue cannot be accepted."*

11. We find that the Hon'ble Delhi High Court in the case of [CIT Vs Sunbeam Auto](#) reported in 332 ITR 167 has held as held as under:

*"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 CIT under [s. 263](#) of the IT Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the AO 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 AO had not applied his mind on the issue. There are judgments galore laying down the principle that the AO in the assessing 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 14 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 CIT to pass orders under [s. 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".*

12. Considering the facts of the case in totality, in light of the judicial decisions discussed hereinabove, we do not find any error or infirmity in the assessment order which could make it erroneous and prejudicial to the interest of the revenue. Therefore, we set aside the order of the PCIT and restore that of the Assessing Officer dated 29/09/2021.

**Order pronounced in the Court on 11<sup>th</sup> October, 2024 at Mumbai.**

*Sd/-*  
(RAJ KUMAR CHAUHAN)  
JUDICIAL MEMBER

*Sd/-*  
(NARENDRA KUMAR BILLAIYA)  
ACCOUNTANT MEMBER

Mumbai, Dated 11/10/2024

*SR S.P.*

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

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

आदेशानुसार/ BY ORDER,  
TRUE COPY

Assistant Registrar  
आयकर अपीलीय अधिकरण  
ITAT, Mumbai