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Circular

No. AN/IV/I.Tax/Circular, dated 24th June 2020

To,

The Officer In-charge

1. All Sections of Main Office
2. All Sub-Offices under this Organisation.
3. IFA (CC) Lucknow
4. CDA RTC, Lucknow
5. AO NCC Directorate, Lucknow

Subject : **Income-tax deduction from salaries during the financial year 2020-21 (assessment year : 2021-22) under section 192 of the Income-tax Act, 1961.**

In Finance Act, 2020, the Government has introduced a new income tax regime under section 115BAC that comprises a significant change in the tax slab rates. Taxpayers have been provided an option whether they want to pay taxes according to the new regime or if they want to continue paying according to the existing regime (Old Tax Regime).

For the purpose of assessing and deduction of income-tax for the financial year 2020-21 (assessment year 2021-2022) all the officers and staff are requested to submit a "Self Declaration" stating the module of tax deduction chosen.

Where the official chooses tax deduction as per old module, the "Self Declaration" must also reflect all the savings details like insurance premium, NCS, infrastructure bonds, rent paid, HBA interest and exemption applicable to Schedule Tribes, etc. However, the proof of savings documents must reach this office by October 31, 2020 failing which the exemptions will no longer be applicable.

The contents of this letter may please be got noted by all the officers and staff of respective office/sections. Officers-In-charge are requested to verify the correctness of option exercised by the officers/staff serving under them. Declaration/option form, duly completed in all respect may be forwarded to AN-IV section of this office so that it may reach on or before July 15, 2020 according to which this office will commence deduction of income-tax as per liability on an average basis from the salary. In case the declaration is not received by the stipulated time or the choice of module is not duly mentioned in the declaration, the individual shall be deemed to have opted for the deduction of income-tax as per the old tax regime.

(Sd.) . . . .
Rankaj Prakash Singh, IDAS,
DCDA (GO AN-IV)

Self declaration

I, Shri/Smt/Kum . . . . . designation . . . . . employee A/c No. . . . . , serving in the office of . . . . opt for the old tax module/new tax module (strike out whichever is not applicable) for the financial year 2020-2021 (assessment year 2021-2022).

I may be allowed the following exemptions claimed for old tax module on production of relevant documents within October 31, 2020.

Sl. No.	*Types of savings*	*Section*	*Policy No. / Folio No. /Bank A/c No. /Reference No.*	*Amount for the full year*
1	Interest on home loan	24(b)		
2	Principal of home loan	80C		
3	Public Provident Fund*	80C		
4	NSC	80C		
5	Bond	80C		
6	Medical premium	80D		

7	LIC/PLI	80C		
8	LIC/PLI	80C		
9	LIC/PLI	80C		
10	LIC/PLI	80C		
11	ELSS	80C		
12	Bank deposit under tax savings	80C		
13	Sukanya Samriddhi	80C		
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Note : The option once exercised is final and can not be changed during the current financial year.

Signature . . . . . .
Date . . . . . .

they were not in accordance with the agreement and the expenses of Rs. 8.82 crores was not genuine. A perusal of the report makes it apparent that these amounts were recorded as expenses to merely claim deduction with no real activity being carried out. The payments also being governed by section 40A(2)(b) are also excessive and unreasonable. Therefore, the assessee has wrongly claimed deduction of Rs. 8.82 crores.

3. The assessee has claimed to have engaged Vardhman International (Vardhaman) for the purpose of creating trader's database and paid a sum of Rs. 2.21 crores. The site visits by the auditor has revealed that Vardhman does not exist at the address stated in the invoice. There is no evidence to substantiate that the work was performed by Vardhman. Thus, the assessee has claimed excess deduction of Rs. 2.21 crores.

4. The assessee has claimed donation under section 80G of the Act to the tune of Rs. 2,65,04,500. During the year under consideration, the assessee has claimed to have paid donation of Rs. 1.75 crores to Arunodaya Charitable Trust. The report of the auditor has revealed non-existence of the aforesaid trust. Thus, the assessee has claimed excess deduction of Rs. 87.50 lakhs (being 50 per cent. of the amount claimed to have been paid) and that the income has escaped assessment to that extent.

5. The assessee has claimed to have engaged Splash Media and Infra Ltd. for the purpose of outdoor advertising to display hoarding at Mahim causeway and Haji Ali locations in Mumbai from December 9 to March 10 and expended a sum of Rs. 86.03 lakhs for the same. The payments made to Splash Media and Infra Ltd. are non-genuine and that even the said party has not recorded the said amount as revenue in its books of account. Accordingly, the sum of Rs. 86.03 lakhs has escaped assessment as the assessee has claimed excess deduction on this ground.

6. The assessee has claimed advertisement expenses on engaging Mediacom Communications as its media agency for outdoor, print and TV campaigns. However, the assessee could not even submit the confirmation of Mediacom Communication.

7. NBHC was a wholly owned subsidiary of the assessee which was sold to FTIL, related to the assessee-company. The assessee has claimed to have paid a sum of Rs. 4.51 crores as warehousing charges to NBHC. The assessee has been unable to provide address of the warehouse for which charges have been claimed. Site visits by the

auditor has revealed that some of the warehouses did not exist and some belonged to other companies. The assessee has also paid rent for unused warehouses where no physical deliveries had taken place. Thus, the assessee has claimed excessive expenditure of Rs. 4.51 crores as warehousing charges.

8. The assessee has entered into technology agreements with FTIL, management. The auditor has pointed that there was no proper procedure or bidding for awarding these agreements after the change in the assessee's management, these charges have been reduced by 1/3rd of actual consideration. This shows that highly unreasonable expenditure is paid to the related concern FTIL and has been claimed by the assessee in the year under consideration.

9. The assessee disclosed around 235 related parties. A background and public domain check has identified 676 additional related parties of the assessee. Various payments to these parties have been made without underlying documents or agreements. In this regard, the genuineness and reasonableness of these expenses stands unsubstantiated.

In view of the above and considering the material on record coupled with the fact of voluminous and complex nature of the accounts, it is established that the accounts of the assessee are manipulated on various grounds. Hence, the assessee has not disclosed fully and truly all material facts necessary for the assessment carried out under section 143(3) for the year under consideration. Accordingly I have reason to believe that the income chargeable to tax of the assessee of more than Rs. 36.80 crores for the year under consideration has escaped assessment within the meaning of section 147 of the Income-tax Act, 1961 for the assessment year 2010-11. Hence, the assessee's case is required to be reopened for reassessment under section 147 of the Act for the assessment year 2010-11. As per section 151(1) of the Act, since the case is being reopened after the expiry of four years from the end of the assessment year 2010-11, notice under section 148 is to be issued after obtaining administrative approval of the Principal Commissioner of Income-tax.

3 The petitioner objected to the issuing of the impugned notice before the Assessing Officer. However, the same was rejected by an order dated July 28, 2017 by the Assessing Officer.

4 The first grievance of the petitioner is to the jurisdiction of the Assessing Officer to issue the impugned notice dated March 30, 2017 particularly when the regular assessment was completed on March 22, 2013 under

section 143(3) of the Act. The impugned notice admittedly is beyond a period of four years from the end of the assessment year 2010-11. Therefore, it is submitted that in the absence of any failure to fully and truly disclose of material facts, the impugned notice is hit by the first proviso to section 147 of the Act. This is more particularly so as the reasons do not indicate the failure of which material fact not being disclosed. In particular it is submitted that at the time of regular assessment proceeding leading to the order dated March 30, 2017, the special audit report dated August 21, 2014 was not even published much less available.

We note that the assessment for the subject assessment year 2010-11 **5** was completed on March 22, 2013 under section 143(3) of the Act. At that time admittedly the report of the special auditor dated April 21, 2014 was not available. Therefore, it is contended that the impugned notice would be hit by the proviso as it is beyond the period of four years relevant to the assessment year 2010-11, as there was no failure on the part of the petitioner to truly and fully disclose material facts necessary for assessment. This was at the time when the assessment was completed on March 22, 2013. In support reliance is placed upon the decision of the apex court in the case of *Indian Oil Corporation* v. *ITO* [1986] 159 ITR 956 (SC) ; [1986] 3 SCC 409. The above decision will have no application, as in that case during the regular assessment proceeding allocation of expenses had been done on the basis of the auditor's opinion. During the regular assessment proceedings the auditor's opinion was sought for, but not produced. Nevertheless the regular assessment was completed without awaiting for the auditor's opinion. In the above circumstances, the court held that there is no failure to disclose fully and truly all basic facts. As against the above in this case the special audit report dated April 21, 2014 is not available during the regular assessment, leading to order dated March 22, 2013. The special audit report is the fresh tangible material now available with the Assessing Officer. On examination of the special audit report dated August 21, 2014, the Assessing Officer found that claims made by the assessee-petitioner for deduction and expenditures were excessive and to that extent the claims made were prima facie bogus (subject to examination in assessment proceedings). In fact the Supreme Court in *Phool Chand Bajrang Lal* v. *ITO* [1993] 203 ITR 456 (SC) has observed as under (page 473 of 203 ITR) :

> ". . . . Acquiring fresh information, specific in nature and reliable in character, relating to the concluded assessment which goes to expose the falsity of the statement made by the assessee at the time of the original assessment is different from drawing a fresh inference from

the same facts and material which were available with the Income-tax Officer at the time of the original assessment proceedings. The two situations are distinct and different. Thus where the transaction itself, on the basis of subsequent information is found to be a bogus transaction, the mere disclosure of that transaction at the time of the original proceedings cannot be said to be a disclosure of 'true' and 'full' facts in the case and the Income-tax Officer would have jurisdiction to reopen the concluded assessment in such a case."

6 Therefore in the above circumstances prima facie the petitioner cannot take shelter of the first proviso to section 147 of the Act. Further the reasons recorded does indicate that the special audit report dated April 21, 2014 is the basis of the reopening notice. Thus in the above facts, it cannot be said that the Assessing Officer did not have reasonable belief that prima facie income chargeable to tax has escaped assessment.

7 The second grievance is of non-application of mind by the Assessing Officer to issue the impugned notice, as it is issued upon the borrowed satisfaction of the special audit. On perusal of the reasons recorded, we find that it does indicate application of mind by the Assessing Officer to the facts in the context of audit report to reach the reasonable belief that the income chargeable to tax has escaped assessment. The special audit report was the tangible material which formed the basis of the Assessing Officer's reasonable belief. Thus there is no merit in the above grievance also.

8 It was then contended that the special audit report dated April 21, 2014 was for purposes other than to detect tax evasion. Thus, it could not be relied upon as tangible material to issue the impugned notice. In support our attention was invited to the fact that the special audit report was directed by the Forward Market Commission on October 17, 2013, and the scope of the audit was inter alia to examine in terms of clauses 10 (a) to 10 (d) are as follows :

(a) Examine the trading data of IBMA and trading done by any other entity related to the promoters or group companies directly or indirectly on MCX.

(b) review the risk management system (margining system, defaults, warehouses etc.) at MCX.

(c) Examine all related parties (entities related directly or indirectly with the group companies of the promoter/anchor investor) transactions of any nature.

(d) All major financial transactions above value of Rs. 25 lakhs.

Further attention is also invited to the disclaimer clause of the audit report dated April 21, 2014 that the audit report has been prepared for Forward Market Commission and the petitioner. Thus, the same cannot be relied upon by a third party and further that it does not constitute examination/review in accordance with the generally accepted audit standards prescribed by the Institute of Chartered Accountants of India. Therefore, the report prepared on certain information which may be hearsay and may not be accurate and reliable could not be relied upon which is a hearsay, has been identified in the report. **9**

We find that the power of the Assessing Officer to reopen an assessment under section 147/148 of the Act on the basis of reasonable belief is not fettered or circumscribed, to be formed only on material found during a tax audit or with material found during examining a case of tax evasion. In fact the basis of fresh tangible material is unqualified, i.e., the source of the material could be from any place, however, the only precondition is that on the basis of the material so found/obtained by the Assessing Officer, he himself must form a reasonable belief that income chargeable to tax has escaped assessment before issuing a notice for reopening. In fact the apex court has observed in *Asst. CIT* v. *Rajesh Jhaveri Stock Brokers P. Ltd.* [2007] 291 ITR 500 (SC) has observed that if the Assessing Officer for whatever reasons (material) has reason to believe that income chargeable to tax has escaped assessment then jurisdiction is conferred upon the Assessing Officer to reopen the assessment. Without prejudice to the above in this case, the remit/scope of report of the special audit included expenditure in excess of Rs. 25 lakhs, related party transactions etc. Therefore there is no merit in this objection and prima facie the Assessing Officer has jurisdiction to issue the impugned notice. **10**

It was next contended that criminal proceedings initiated on the basis of the special audit report was quashed by this court. Therefore, the same cannot form the basis of reasonable belief of the Assessing Officer. The considerations which come into play in criminal proceedings and in tax proceedings are entirely different. The special audit report dated August 21, 2014, has itself not been declared to be bad by any court. The facts recorded therein may not form the basis for criminal proceedings but from that to conclude that even a reasonable belief of income chargeable to tax has escaped assessment (cannot be formed subject to further enquiry during assessment proceedings) is to say that least, too much of a stretch. This is only a prima facie view and the petitioner would have full opportunity to establish that no income chargeable to tax has escaped assessment during the reassessment proceedings. Therefore, this grievance also does not have merit. **11**

12 It was lastly submitted that the objection to the reasons were not appropriately considered by the order disposing of the objections. We have at this stage found that the reasons recorded by the Assessing Officer does indicate that there was sufficient material for the Assessing Officer to come to prima facie satisfaction that the income chargeable to tax has escaped assessment. The objections raised by the petitioner have been dealt with in the light of the apex court decision in *GKN Driveshafts (India) Ltd.* v. *ITO* [2003] 259 ITR 19 (SC) to have a second look at the notice after consideration of the petitioner-assessee's objections. The order disposing of the objections have dealt with the objections in some detail inasmuch as each objection has been considered and found unacceptable. This view while disposing of the objection does not close all options on merits, which are available to the assessee in the reassessment proceedings. The order disposing of objections, in our view on facts cannot be said to be suffering from non-application of mind to the objections raised by the petitioners. In the above view, this grievance of the petitioner also does not have merit.

13 We are conscious of the fact that there is sanctity attached to the orders of assessment passed under section 143(3) of the Act. The Assessing Officer is entitled to reopen an assessment only if the jurisdictional requirements as pointed out under sections 147 and 148 of the Act is satisfied. Therefore, though the orders of assessment passed under section 143(3) of the Act have sanctity attached, it does not grant immunity to an assessee from proceedings for reopening of assessment under section 147/148 of the Act, provided the jurisdictional requirements therein are satisfied, at the time when the reopening notice is issued.

14 In the above view, we find no merit in this petition. Accordingly, the petition is dismissed.

15 At this stage Mr. Padavekar, the learned counsel appearing for the petitioner states that the petitioner seeks stay of the order for a period of six weeks from today. We have at the stage of admission found no merit in the petitioner's case. There is no reason why the petitioner should not subject itself to reassessment proceedings under the Act. The issues raised by the petitioner in this petition are not novel and/or debatable issues. If we were of that view, we would have admitted the petition for consideration. Therefore, we decline the prayer for stay.

[2020] 423 ITR 455 (Guj)

[IN THE GUJARAT HIGH COURT]

PRINCIPAL COMMISSIONER OF INCOME-TAX

v.

TORRENT PRIVATE LIMITED

MS. HARSHA DEVANI and **BHARGAV D. KARIA** JJ.

April 9, 2019.

SS ▸ ITA 1961, s 115JB
AY ▸ 2003-04
HF ▸ Assessee

COMPANY—COMPUTATION OF BOOK PROFITS—EFFECT OF *Explanation* TO SECTION 115JB(2)—AMOUNT SET ASIDE AS PROVISION FOR DIMINUTION IN VALUE OF ASSET—MATERIAL ON RECORD SHOWING THAT SUCH PROVISION HAD BEEN REDUCED FROM ASSETS SIDE OF THE BALANCE-SHEET—PROVISION CANNOT BE ADDED TO BOOK PROFITS—INCOME-TAX ACT, 1961, S. 115JB.

Section 115JB for the Income-tax Act, 1961, provides for computation of book profits of companies. The Explanation *to sub-section (2) of section 115JB of the Act says that for the purposes of that section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2) as increased by the factors enumerated thereunder. Clause (i) thereof mentions the amount or amounts set aside as provision for diminution in the value of any asset. If the provision for diminution in value of investment is not a mere provision made by the assessee by merely debiting the profit and loss account and crediting the provision for bad and doubtful debt, but by simultaneously obliterating such provision from its account by reducing the corresponding amount from the loans and advances on the assets side of the balance-sheet and consequently, at the end of the year showing the loans and advances on the assets side of the balance-sheet as net of the provision for bad debt, it would amount to a write off and such actual write off would not be hit by clause (i) of the* Explanation *to sub-section (2) of section 115JB. Accounting Standard 13 provides for "accounting for investments" and deals with accounting for investments in financial statements of enterprises and related disclosure requirements. Paragraph 32 thereof says that investments classified as long term investments should be carried in the financial statements at cost. However, provision for diminution shall be made to recognise a decline, other than temporary, in the value of the*

investments, such reduction being determined and made for each investment individually.

Held, *that the provision for diminution of value of investment to the extent of Rs. 13.85 crores had actually been reduced from the assets side of the balance-sheet and, therefore, was in the nature of a write off. Under the circumstances, the amount of Rs. 13.85 crores though bearing the nomenclature of provision for diminution of value of investment, having been actually written off, could not be added to the book profits under section 115JB(2)(i).*

Cases referred to :

CIT *v.* HCL Comnet Systems and Services Ltd. [2008] 305 ITR 409 (SC) (para 10)

CIT *v.* Indian Petrochemicals Corporation Ltd. [2017] 10 ITR-OL 275 (Guj) (para 10)

CIT *v.* Kirloskar Systems Ltd. [2013] 40 taxmann.com 124 (Karn) (para 10)

CIT v. Vodafone Essar Gujarat Ltd. [2017] 397 ITR 55 (Guj) [FB] (para 5)

CIT *v.* Yokogawa India Ltd. [2012] 17 taxmann.com 15 (Karn) (para 10)

Southern Technologies Ltd. *v.* Joint CIT [2010] 320 ITR 577 (SC) (para 10)

Vijaya Bank *v.* CIT [2010] 323 ITR 166 (SC) (para 5)

R/Tax Appeal No. 1225 of 2018.

M. R. Bhatt, Senior Advocate with *Mrs. Mauna M. Bhatt* for the appellant.

B. S. Soparkar for the respondent.

JUDGMENT[1]

The judgment of the court was delivered by

1 MS. HARSHA DEVANI J.—In this appeal under section 260A of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), the appellant-Revenue has challenged the order dated April 13, 2018 passed by the Income-tax Appellate Tribunal, Ahmedabad "B" Bench, Ahmedabad (hereinafter referred to as the "Tribunal") in ITA No. 1163/Ahd/2014.

2 Vide order dated March 26, 2019, this court had admitted the appeal on the following substantial question of law :

1. Oral judgment.

"Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was justified in deleting disallowance of provision for diminution in value of investment of Rs. 13,85,00,000 while computing book profit under section 115JB of the Income-tax Act, 1961 ?"

3 The assessment year is 2003-04 and the relevant accounting period is the previous year 2002-03. In this case, the assessee filed the return of income for the assessment year 2003-04 on November 17, 2003 declaring nil total income. The assessment was completed under section 143(3) of the Act on March 31, 2006 determining nil total income and book profit at Rs. 16,01,06,069. In the assessed book profit, an addition of Rs. 13,85,00,000 was made on account of provision for diminution in the value of investment. It appears that the matter went up to the Tribunal, which by an order dated June 30, 2011, set aside the order passed by the Commissioner (Appeals) and restored certain issues to the file of the Assessing Officer for adjudication afresh in the light of the discussion made in its order after allowing reasonable opportunity of hearing to the assessee.

4 The Assessing Officer, thereafter, framed assessment under section 143(3) read with section 254 of the Act and added the provision for diminution in value of investment of Rs. 13,85,00,000 in the computation of book profit under section 115JB of the Act. The assessee carried the matter in appeal before the Commissioner (Appeals), who upheld the order passed by the Assessing Officer. The assessee carried the matter in further appeal before the Tribunal and succeeded.

5 Mr. M. R. Bhatt, senior advocate, learned counsel for the appellant submitted that provision for bad debt and actual write off of bad debts under section 36(1)(vii) of the Act for a banking company is entirely different and affects business profits, whereas in the case of the assessee such provision for diminution of value of investment and its write off will affect long-term/short-term capital gains. Referring to the decision of this court in the case of *CIT* v. *Vodafone Essar Gujarat Ltd.* [2017] 397 ITR 55 (Guj) [FB], it was submitted that in the case of *Vijaya Bank* v. *CIT* [2010] 323 ITR 166 (SC), the assessee therein, besides debiting the profit and loss account and creating a provision for bad and doubtful debt, had simultaneously obliterated the said provision from its accounts by reducing the corresponding amount from loans and advances/debtors on the asset side of the balance-sheet and consequently at the end of the year, the figures of loans and advances or the debtors on the asset side of the balance-sheet was shown as net of the provision of bad debt ; whereas in the present case there are two more aspects which are required to be looked into. Firstly, that there are varied

types of investments and it is not clear as to in case of which investment there is diminution of profit, which has not been answered by the Tribunal ; secondly, whether the reduction or gain is in the nature of long-term or short-term capital gains.

5.1 Reference was made to paragraph 33 of the Accounting Standards produced by the learned counsel for the assessee, to submit that the same have not been complied with as there is no write off as noted by the Commissioner (Appeals), which factor has not been considered by the Tribunal. It was submitted that, therefore, the provisions of clause (i) of the *Explanation* to section 115JB(2) of the Act would be squarely applicable to the facts of the present case and that the Assessing Officer had rightly added the amount set aside as provision for diminution in the value of investment to the book profit computed under section 115JB of the Act.

6 On the other hand, Mr. B. S. Soparkar, learned advocate for the respondent-assessee, submitted that the Commissioner (Appeals) was wrong in stating that the assessee has not shown the details correctly. The attention of the court was invited to the relevant entries in the balance-sheet which form part of the paper book, to point out that all the facts are clearly reflected therein (reference to which shall be made at an appropriate stage). As regards the contention raised by the learned counsel for the Revenue that it is not clear as to whether the reduction or gain is in the nature of long-term or short-term capital gains, it was submitted that in the absence of any transfer there is no question of showing capital gains or loss. It was submitted that the Tribunal was wholly justified in holding that the amount of Rs. 13.85 crores shown as diminution in value of investment is not liable to be added while computing the book profit under section 115JB of the Act and that the appeal being devoid of merit deserves to be dismissed.

7 The sole question that arises for consideration in this appeal is whether the provision for diminution in the value of investment of Rs. 13.85 crores made by the assessee is required to be added while computing the book profit under section 115JB of the Act.

8 The *Explanation* to sub-section (2) of section 115JB of the Act says that for the purposes of that section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2) as increased by the factors enumerated thereunder. Clause (i) thereof reads as under :

> "(i) the amount or amounts set aside as provision for diminution in the value of any asset ;"

What is required to be examined is whether in the facts of the present **9**
case, the amount of Rs. 13.85 crores which is provision for diminution in value of assets, required to be added to the book profit while computing the net profit under section 115JB of the Act.

In this regard it may be germane to refer to the decision of this court in **10**
the case *CIT* v. *Vodafone Essar Gujarat Limited* (supra), wherein the court has held thus (page 67 of 397 ITR) :

> "It can thus be seen that in the case of *Southern Technologies Ltd.* v. *Joint CIT* [2010] 320 ITR 577 (SC), the Supreme Court explained that if an assessee debits an amount of doubtful debt to the profit and loss account and credits the asset account like sundry debtor's account, it would constitute a write off of an actual debt. On the other hand, if an assessee debits provision for doubtful debt to the profit and loss account and makes a corresponding credit to the current liabilities and provisions on the liabilities side of the balance-sheet, then it would constitute a provision for doubtful debt and in such a case after April 1, 1989, the assessee could claim no deduction under section 36(1)(vii) of the Act.
>
> This principle was further clarified in the case of *Vijaya Bank* (supra) by observing that in the case on hand, the assessee besides debiting the profit and loss account and creating a provision for bad and doubtful debt, had simultaneously obliterated the said provision from its accounts by reducing the corresponding amount from loans and advances/debtors on the asset side of the balance-sheet and consequently, at the end of the year, the figure of loans and advances or the debtors on the asset side of the balance-sheet was shown as net of the provision for the bad debt. Thereafter, the Supreme Court rejecting the Revenue's contention that for the bank to take benefit of section 36(1)(vii), must close the account of the debtors, decided the question in favour of the assessee.
>
> The above decisions of the Supreme Court in the cases of *Southern Technologies Ltd.* v. *Joint CIT* [2010] 320 ITR 577 (SC) and *Vijaya Bank* (supra) thus bring out a clear distinction between a case where the assessee may make a provision for doubtful debt and a case where the assessee after creating such a provision for bad and doubtful debt by debiting in profit and loss account also simultaneously removes such provision from its account by reducing the corresponding amount from the loans and advances on the asset side of the balance-sheet. The later would be an instance of write off and not a mere provision.

The Karnataka High Court in the case of *CIT* v. *Yokogawa India Ltd.* [2012] 17 taxmann.com 15 (Karn) applying such principle found that the case on hand was one of a debt which was an amount receivable by the assessee and not any liability payable by the assessee and observed that clause (c) of the *Explanation* to section 115JA/115JB, would not apply. In the context of applicability of clause (i) of *Explanation 1*, relying on the decision of the Supreme Court in the case of *Vijaya Bank* (supra), the court observed that there is a dichotomy between actual write off and provision for bad and doubtful debt. A mere debit to the profit and loss account would constitute a bad and doubtful debt but it would not constitute actual write off. However, if simultaneously such amount is obliterated from the accounts by reducing corresponding loans and advances on the asset side, the same would amount to a write off. It was concluded as under :

'Therefore, after the *Explanation* the assessee is now required not only to debit the profit and loss account but simultaneously also reduce the loans and advances or the debtors from the assets side of the balance-sheet to the extent of the corresponding amount so that, at the end of the year, the amount of loans and advances/debtors is shown as net of the provisions for the impugned bad debt. Therefore, in the first place if the bad debt or doubtful debt is reduced from the loans and advances or the debtors from the assets side of the balance-sheet the *Explanation* to section 115JA or 115JB is not at all attracted.'

In case of *CIT* v. *Kirloskar Systems Ltd.* [2013] 40 taxmann.com 124 (Karn), the Karnataka High Court adopted the same principle.

By way of culmination of the above judicial pronouncements and statutory provisions, the situation that arises is that prior to the introduction of clause (i) of *Explanation 1* to section 115JB, as held by the Supreme Court in the case of *CIT* v. *HCL Comnet Systems and Services Ltd.* [2008] 305 ITR 409 (SC), the then existing clause (c) did not cover a case where the assessee made a provision for bad or doubtful debt. With insertion of clause (i) of *Explanation* with retrospective effect, any amount or amounts set aside for provision for diminution in the value of the asset made by the assessee, would be added back for computation of book profit under section 115JB of the Act. However, if this was not a mere provision made by the assessee by merely debiting the profit and loss account and crediting the provision for bad and doubtful debt, but by simultaneously obliterating such provision from its accounts by reducing the corresponding amount from the loans and advances on the asset side of the balance-sheet and

consequently, at the end of the year showing the loans and advances on the asset aside of the balance-sheet as net of the provision for bad debt, it would amount to a write off and such actual write off would not be hit by clause (i) of *Explanation 1* to section 115JB. The judgment in the case of *CIT* v. *Deepak Nitrite Ltd.* (supra) fell in the former category whereas from the brief discussion available in the judgment it appears that the case of *CIT* v. *Indian Petrochemicals Corporation Ltd.* [2017] 10 ITR-OL 275 (Guj), fell in the later category."

Thus, what the court has held in the above decision, is that if the provision for diminution in value of investment is not a mere provision made by the assessee by merely debiting the profit and loss account and crediting the provision for bad and doubtful debt, but by simultaneously obliterating such provision from its account by reducing the corresponding amount from the loans and advances on the asset side of the balance-sheet and consequently, at the end of the year showing the loans and advances on the asset side of the balance-sheet as net of the provision for bad debt, it would amount to a write off and such actual write off would not be hit by clause (i) of the *Explanation* to sub-section (2) of section 115JB of the Act. **11**

The facts of the case are required to be examined in the light of the above principles. **12**

Before adverting to the merits of the rival contentions, it may be germane to refer to Accounting Standard (AS) 13, which provides for "Accounting for Investments" and deals with accounting for investments in the financial statements of enterprises and related disclosure requirements. Accounting Standard 13 is in three parts, Introduction : comprised of paragraphs 1-3, *Explanation* comprised of paragraphs 4-25 and Main Principles comprised of paragraphs 26-35. Under the *Explanation* Part of Accounting Standard 13, paragraphs 14 to 19 fall under the heading "Carrying Amount of Investments". Paragraphs 14 to 16 thereunder deal with current investments, whereas paragraphs 17 to 19 deal with long-term investments. Paragraph 17, inter alia, says that long-term investments are usually carried at cost. However, when there is a decline, other than temporary, in the value of a long-term investment, the carrying amount is reduced to recognise the decline. Paragraph 18 says that long-term investments are usually of individual importance to the investing enterprise. The carrying amount of long-term investments is, therefore, determined on an individual investment basis. Paragraph 19 says that where there is a decline, other than temporary, in the carrying amounts of long-term investments, the resultant deduction in the carrying amount is charged to **13**

the profit and loss statement. The reduction in the carrying amount is reversed when there is a rise in the value of the investment, or if the reasons for the reduction no longer exist.

14 Paragraph 25 of the *Explanation* part of Accounting Standard 13 deals with "Disclosure" and provides thus :

> "25. The following disclosures in financial statements in relation to investments are appropriate :
>
> (a) The accounting policies for the determination of carrying amount of investments ;
>
> (b) The amounts included in profit and loss statement for :
>
> (i) interest, dividends (showing separately dividends from subsidiary companies), and rentals on investments showing separately such income from long term and current investments. Gross income should be stated, the amount of income-tax deducted at source being included under advance taxes paid ;
>
> (ii) profits and losses on disposal of current investments and changes in the carrying amount of such investments ;
>
> (iii) profits and losses on disposal of long term investments and changes in the carrying amount of such investments ;
>
> (c) significant restrictions on the right of ownership, realisibility of investments or the remittance of income and proceeds of disposal ;
>
> (d) the aggregate amount of quoted and unquoted investments, giving the aggregate market value of quoted investments ;
>
> (e) other disclosures as specifically required by the relevant statute governing the enterprise."

15 Paragraphs 31 and 32 fall under the heading "Carrying amount of investments" in the third part of Accounting Standard 13, viz., Main Principles. Paragraph 32 thereof, which is relevant for the present purpose, says that investments classified as long-term investments should be carried in the financial statements at cost. However, provision for diminution shall be made to recognise a decline, other than temporary, in the value of the investments, such reduction being determined and made for each investment individually.

16 Paragraph 33 falls under the heading "Changes in carrying amounts of investments" and reads thus :

> "33. Any reduction in the carrying amount and any reversals of such reductions should be charged or credited to the profit and loss statement."

The facts of the present case may be examined in the light of the prin- 17
ciples enunciated by the Supreme Court as well as this court in the decisions on which reliance has been placed by the learned counsel for the respective parties as well as the above referred to provisions of Accounting Standard 13.

A perusal of the "Details of provision for diminution in value of invest- 18
ment" for the assessment year 2003-04 as reflected in the balance-sheet (at page 57 of the paper book) shows that the provision created in the year is of Rs. 69,46,73,244. Provision written back on account of rise in value as per paragraph 33 of Accounting Standard 13 is Rs. 55,61,73,244. The net amount of provision debited to profit and loss is Rs. 69,46,73,244 minus Rs. 55,61,73,244 which comes to Rs. 13,85,00,000.

A perusal of the details of "Provision for diminution in the value of 19
investments" as on March 31, 2003 (page 60 of the paper book) shows that the total provision required as on March 31, 2003 is Rs. 839,621,779 ; provision available as on March 31, 2002 is Rs. 701,121,779 ; and the provision for the year ended March 31, 2003 is Rs. 138,500,000.

Schedule IV of the Schedule annexed to and forming part of the 20
accounts (page 31 of the paper book), shows that the total investment as at March 31, 2003 is Rs. 5,742,306,638. Deducting the amount of provision for diminution in value of investments, viz., Rs. 839,621,779 the total investment as at March 31, 2003 comes to Rs. 4,902,684,859. It may be noted that the provision for diminution in value of investment as at March 31, 2002 is Rs. 701,121,779 and the provision in diminution of value of investments as at March 31, 2003 is Rs. 839,621,779. The difference between the provision for diminution of value of investment as at March 31, 2002 and March 31, 2003 is Rs. 13,85,00,000. This amount of Rs. 13,85,00,000, which is the provision for diminution in value of investment for the year under consideration, is duly reflected in the profit and loss account. Thus, the entry is routed through profit and loss account.

In terms of the accounting standards, in view of the decline in the value 21
of the provisions created in the current year (as shown at page 57 of the paper book) the carrying amount of such investments has been reduced and in case of provisions where there was a rise in the value, the provisions are written back and the net amount of provision has been debited to the profit and loss account. Thus, in so far as the provision for diminution of value of investment to the extent of Rs. 13.85 crores is concerned, the same has actually been reduced from the asset side of the balance-sheet and, therefore, is in the nature of a write off. Under the circumstances, the amount of Rs. 13.85 crores though bearing the nomenclature of provision

for diminution of value of investment, having been actually written off, cannot be added to the book profit under section 115JB(2)(i) of the Act.

22 In so far as the contention that the details of the investments in respect of which there was a diminution in value are not provided is concerned, the Commissioner (Appeals) has recorded in the audited profit and loss account, on the expenditure side there are provisions for diminution in value of investments of Rs. 13,85,00,000 (last year nil) ; this provision is against the total provision in the balance-sheet of Rs. 83,96,21,779 ; no details are available in any form or category that to which type or kind of investment such diminution is related out of the total provisions. He has further recorded that the assessee's annual report and audited accounts do not reveal of such write off because, the diminution of asset in the balance-sheet at Schedule IV for investment reflect "Provision in diminution in value of investment of Rs. 83,96,21,779 without specifying the details of type of investment of long-term investments and current investments in shares, debentures, mutual funds, Government securities etc. to which such value apply. Further out of this only Rs. 13,85,00,000 was debited in audited profit and loss account as "provision for diminution in value of investments". There are no details which type of shares, securities, debentures etc. are written off and why out of Rs. 83,96,21,779 only Rs. 13,85,00,000 is considered. The learned counsel for the appellant has reiterated the above reasoning adopted by the Commissioner (Appeals).

23 In the opinion of this court, the above findings recorded by the Commissioner (Appeals) that no details have been produced, is contrary to the record of the case, inasmuch as, in the balance-sheet which forms part of the paper book, the details of diminution in the value of investment are clearly set out in the statement at page 57 of the paper book. The Tribunal, in the impugned order, has after perusing the statement referred to hereinabove which formed part of the paper book, has found that the assessee has duly followed the netting principle in terms of the decision of this court in the case of *CIT* v. *Vodafone Essar Gujarat Limited* (supra). Thus, the Commissioner (Appeals) has proceeded on incorrect factual findings, whereas the Tribunal has properly appreciated the material on record while holding that the assessee has duly followed the netting principle propounded in the Full Bench decision of this court in *Vodafone Essar Gujarat* (supra).

24 In the light of the above discussion, no infirmity can be found in the view adopted by the Tribunal so as to warrant interference. The question, therefore, is answered in the affirmative, that is, in favour of the assessee and against the Revenue. It is hereby held that the Income-tax Appellate

Tribunal was justified in deleting the disallowance of provision for diminution in value of investment of Rs. 13,85,00,000 while computing book profit under section 115JB of the Income-tax Act, 1961. The appeal, therefore, fails and is, accordingly, dismissed.

[2020] 423 ITR 465 (Bom)

[In the Bombay High Court]

PRINCIPAL COMMISSIONER OF INCOME-TAX

v.

HINDUSTAN OIL EXPLORATION CO. LTD.

Akil Kureshi and Sarang V. Kotwal JJ.

March 25, 2019.

SS ▸ ITA 1961, s 42(1)(a)
AY ▸ 2008-09
HF ▸ Assessee

Business expenditure— Exploration and extraction of oil— Conditions precedent for deduction—Expenditure should be infructuous or abortive exploration expenses and area should be surrendered prior to commencement of commercial production—Meaning of expression "surrender"—Does not always connote voluntary surrender—Assessee entering into production sharing contract with Government of India and requesting for extension at end of contract period—Government refusing extension—Assessee entitled to deduction under section 42(1)(a)—Income-tax Act, 1961, s. 42(1)(a).

Interpretation of taxing statutes—Legislative intent—Liberal interpretation.

Words and phrases—"Surrender"—Meaning of.

The assessee was engaged in the business of exploration and extraction of mineral oil. It entered into a production sharing contract with the Government of India on October 8, 2001 for the purposes of oil exploration. According to the contract a licence was issued to a consortium of three companies which included the assessee, to carry out the exploration initially for a period of three years and the entire exploration was to be completed within a period of 7 years in three phases. At the end of the period extension was denied by the Government of India. In its nil return of income filed for the assessment year 2008-09, the assessee claimed deduction under section 42(1)(a) of the

Income-tax Act, 1961 on the expenditure on oil exploration on the ground that the block was surrendered on March 15, 2008. The Assessing Officer was of the opinion that it had not surrendered the right to carry on oil exploration since the assessee was interested in extension of time which was denied by the Government of India and disallowed the claim. The Commissioner (Appeals) allowed the appeal filed by the assessee. The Tribunal found that according to article 14 of the contract relinquishment and termination of agreement were two different concepts and that by a letter dated March 28, 2007, the assessee was informed that its contract stood relinquished. The Tribunal held that the assessee was covered by the deduction provision contained in section 42, that such expenditure was not amortised or was not being allowed partially year after year and it had to be allowed in full, and therefore there was no justification to deny the benefit of deduction to the assessee. On appeal :

Held, *dismissing the appeal, that as long as the commercial production had not begun and the expenditure was abortive or infructuous exploration expenditure, the deduction would be allowed. The term "surrender" itself was a flexible one and did not always connote the meaning of voluntary surrender. The surrender could also take place under compulsion. The assessee had no choice but to surrender the oil blocks, because the Government of India had refused to extend the validity period of the contract. Admittedly commercial production of oil had not commenced. The act of the assessee to handover the oil blocks before the commencement of commercial production was covered within the expression "any area surrendered prior to the beginning of commercial production by the assessee". The provisions of section 42 recognized the risks of the business of exploration which activity was capital intensive and high in risk of the entire expenditure not yielding any fruitful result and provided for special deduction. The purpose of the enactment would be destroyed if interpreted rigidly. For the applicability of section 42(1)(a) the elements vital were that the expenditure should be infructuous or abortive exploration expenses and that the area should be surrendered prior to the beginning of the commercial production by the assessee. As long as these two requirements were satisfied, the expenditure in question would be recognised as a deduction. The term "surrender" had to be appreciated in the light of these essential requirements of the deduction clause. It was not the contention of the Department that the expenditure was infructuous or abortive exploration expenditure. The interpretation of section 42(1)(a) by the Tribunal and its order holding the assessee eligible for deduction thereunder were not erroneous.*

Income Tax Appeal No. 184 of 2017.

Arvind Pinto, Advocate, for the appellant.

Nishit Gandhi, Advocate, for the respondent.

JUDGMENT

This is an appeal filed by the Revenue to challenge the judgment of Income-tax Appellate Tribunal. The following questions are presented for our consideration : 1

"1. Whether in law and on the facts of the instant case, was the Tribunal justified in holding that the company was eligible for deduction under section 42(1)(a) ignoring the fact that the company had not surrendered its block ; rather it had sought for an extension of time to fulfill its contract ?

2. Whether in law and on the facts of the instant case, was the Tribunal in error in its interpretation of section 42(1)(a) that deals with the surrender of an area of exploration and not the relinquishment of the contract as concluded by the Tribunal ?"

Brief facts are as under : 2

The respondent-assessee, Hindustan Oil Exploration Company Ltd. is engaged in the business of exploration and extraction of oil. The issue pertains to the assessee's return of income for the assessment year 2008-09. The return filed by the assessee for the said assessment year declared nil income. In the return, the assessee had claimed a deduction of a sum of Rs. 99.96 crores under section 42 of the Income-tax Act, 1961 (for short "the Act").

The assessee-company had entered into a production sharing contract (PSC) with the Government of India on October 8, 2001 for the purposes of oil exploration. As per the production sharing contract, a consortium of three companies of which the assessee was a part, was issued a licence for carrying out exploration of oil in the Kaveri Basin by the Government of India. The initial period of contract was for three years. The entire oil exploration had to be completed in seven years in three phases. At the end of the said period, the company had asked for extension, which was denied by the Government of India. The deduction of Rs. 99.96 crores was claimed by the company which was an expenditure in oil exploration on the ground that the block was surrendered on March 15, 2008. Reliance in this respect was made to section 42(1)(a) of the Act. 3

The Assessing Officer was of the opinion that this was not a case of surrender of right to carry on oil exploration since the assessee was interested in extension of time, which was denied by the Government of India. The issue eventually reached the Tribunal. The Tribunal by the impugned 4

judgment rejected the Revenue's appeal and held that looking to the specific purpose for which section 42 of the Act was enacted, the purposive interpretation thereof was necessary and resultantly the present case would be covered by the deduction provision contained in section 42 of the Act. The Tribunal held and observed as under :

"We have heard the rival submissions and perused the material before us. We find that to encourage the oil exploration Government of India introduced a new policy and simultaneously made amendment in the Act, that the assessee had made an application in pursuance of production sharing contract and was allotted area for exploration with effect from March 16, 2001, that it was allowed to explore the area for seven years in three phases, that it had informed the BSE that it could not extract oil in two of the wells, that in the year 2006 the Government notified that extension could be granted to the earlier allottees, that vide its application, dated January 16, 2008, the assessee requested for an extension, that the DGHC rejected the application filed by it for extending the exploration period that the Assessing Officer held that there was no voluntary surrender of the oil fields, that the assessee could not claim deduction under section 42(1) of the Act. In our opinion, purposive interpretation of the provisions of the Act will be useful to decide the issue. Section 42 of the Act was brought on the statute with a very specific purpose to encourage oil exploration. Purpose to introduce it was to tide over the ever increasing import bill of petroleum products. Production sharing contract is the testimony of the efforts and intention of the Government to deal with the oil crisis. To encourage the oil exploration area incentive in the form of introduction of section 42(1) was given to the assessees. As an exception capital expenditure and other expenditure are fully allowed, under section 42(1)(a) of the Act, even when the exploration of oil results in failure. Such expenditure is not being amortised or is not being allowed partially year after year it has to be allowed in full. If the background of the legislation is considered it becomes clear that there was no scope for bringing in the concept of voluntary surrender/forced surrender. The Act has not provided such terms in the section and therefore there was no justification in denying the assessee a legitimate benefit. Article 4 of the production sharing contract had distinguished relinquishment and termination of contracts. Article 4 of the production sharing contract (Pg. of the PB) if the contractor exercises the option provided in paragraph (b) of article 3.5 the contractor shall, after any development area has been

designated, relinquished all of the contract area not included within the said development area'. Article 30 of production sharing contract (pg. 1.84) deals with termination of contract. It provides 10 circumstances under which the Government could terminate the contract. Clearly relinquishment and termination of agreement are two different concepts as per the production sharing contract. In his letter, dated March 28, 2007, the DGHC has informed the assessee that its contract stood relinquished. We would like to reproduce the relevant portion of the letter and the same reads as under :

'Since Phase III exploration period is expired on March 16, 2008 and the consortium has not fulfilled the terms laid down for extension as per policy for extension beyond exploration period, hence the block CYOSN97/1 stands relinquished as per article 4.3 of production sharing contract with effect from the date of completion of phase III, i.e., March 15, 2008.'

The termination condition of the production sharing contract deals with totally different situations. We find that the letter dated March 28, 2007 talks of article 4 and not of the production sharing contract. Clearly, the case of the assessee does not fall in the category of termination. Considering the above, we are of the opinion that the order of the FAA does not suffer from any legal or factual information. So, confirming his order, we decide effective ground of appeal against the Assessing Officer."

The facts as noted are not seriously in dispute. The assessee having been awarded a contract for oil exploration in Kaveri basin for a total period of 7 years could not complete, the project within such time[1]. The assessee therefore had to surrender the block to the Government of India. Admittedly, commercial production of oil had not commenced. In view of such facts, the question is, whether the Tribunal was correct in holding that the assessee's claim of deduction under section 42 of the Act was justified. 5

Section 42 of the Act pertains to special provision for deduction in case of business for prospecting etc. for mineral oil. We are concerned with sub-section (1) of the section 42 which reads as under : 6

Special provision for deductions in the case of business for prospecting, etc., for mineral oil.—(1) For the purpose of computing the

1. The contract envisaged oil exploration in three phrases ; initial phase would be completed within three years and thereafter there would be two phases of 2 years each. Thus, the total period of contract was for 7 years. At the end of the period of 7 years, the assessee asked for extension of time which the Government of India denied.

profits or gains of any business consisting of the prospecting for or extraction or production of mineral oils in relation to which the Central Government has entered into an agreement with any person for the association or participation of the Central Government or any person authorised by it in such business (which agreement has been laid on the Table of each House of Parliament), there shall be made in lieu of, or in addition to, the allowances admissible under this Act, such allowances as are specified in the agreement in relation—

(a) to expenditure by way of infructuous or abortive exploration expenses in respect of any area surrendered prior to the beginning of commercial production by the assessee ;

(b) after the beginning of commercial production, to expenditure incurred by the assessee, whether before or after such commercial production, in respect of drilling or exploration activities or services or in respect of physical assets used in that connection, except assets on which allowance for depreciation is admissible under section 32 :

Provided that in relation to any agreement entered into after the 31st day of March, 1981, this clause shall have effect subject to the modification that the words and figures 'except assets on which allowance for depreciation is admissible under section 32' had been omitted ; and

(c) to the depletion of mineral oil in the mining area in respect of the assessment year relevant to the previous year in which commercial production is begun and for such succeeding year or years as may be specified in the agreement ;

and such allowances shall be computed and made in the manner specified in the agreement, the other provisions of this Act being deemed for this purpose to have been modified to the extent necessary to give effect to the terms of the agreement."

7 In terms of sub-section (1) of section 42, for the purpose of computing the profits or gains of any business consisting of the prospecting for or extraction or production of mineral oils in relation to which the agreement has been entered into with the Central Government in lieu of or in addition to, the allowances admissible under the Act such allowances as are specified in agreement in relation to inter alia, in terms of clause (a) of any expenditure by way of infructuous or abortive exploration expenses in respect of any area surrendered prior to the beginning of the commercial production by the assessee would be admissible. For the applicability of clause (a) of sub-section (1), the elements vital are that the expenditure should be infructuous or abortive exploration expenses and that the area

should be surrendered prior to beginning of the commercial production by the assessee. In other words, as long as these two requirements are satisfied, the expenditure in question would be recognized as a deduction. The emphasis of this provision is of infructuous or abortive exploration expenses and that there is surrender prior to the beginning of the commercial production. The term "surrender" in this clause, therefore, has to be appreciated in the light of these essential requirements of the deduction clause. The Revenue in our opinion has put unnecessary stress on the term "surrender" while the main focus of the clause is on infructuous or abortive exploration expenditure in respect of area surrendered prior to the beginning of the commercial production. As long as the commercial production has not begun and the expenditure is abortive or infructuous exploration expenditure, the deduction would be allowed. The term "surrender" itself is a flexible one and does not always connote the meaning of voluntary surrender. As in the present case, the surrender can also take place under compulsion. The assessee had no choice but to surrender the oil blocks, because the Government of India refused to extend the validity period of the contract. Nevertheless, the act of the assessee to handover the oil blocks before the commencement of commercial production would as well be covered within the expression "any area surrendered prior to the beginning of commercial production by the assessee". The Revenue does not dispute that the expenditure was infructuous or abortive exploration expenditure.

In the result we do not find that the Tribunal has committed any error. **8**

Section 42 of the Act recognizes the risks of the business of oil exploration which activity is capital intensive and high in risk of the entire expenditure not yielding any fruitful result. The entire purpose or enactment would be destroyed if the rigid interpretation of the Revenue is accepted. **9**

In the result the income-tax appeal is dismissed. **10**

[2020] 423 ITR 472 (Mad)

[IN THE MADRAS HIGH COURT]

HITACHI POWER EUROPE GMBH

v.

INCOME-TAX SETTLEMENT COMMISSION AND OTHERS

DR. MS. ANITA SUMANTH J.

February 17, 2020.

SS ▸ ITA 1961, Chap XIX-A
AY ▸ 2015-16 to 2018-19
HF ▸ Assessee

SETTLEMENT OF CASES—POWERS OF SETTLEMENT COMMISSION—APPLICATION FOR SETTLEMENT OF CASE—SETTLEMENT COMMISSION CANNOT CONSIDER MERITS OF CASE AT THAT STAGE—INCOME-TAX ACT, 1961, CHAP. XIX-A.

The scheme of Chapter XIX-A of the Income-tax Act, 1961 is to provide a holistic resolution of issues that arise from an assessment in the case of an assessee that has approached the Commission. The question of full and true disclosure and the discharge of tax liability at all stages prior to final hearing, should be seen only in the context of the issues offered for settlement and the remittances of additional tax thereupon. Issues decided by the Commission and the liability arising therefrom, will be payable only at the stage of such determination, which is the stage of final hearing under section 245D(4) of the Act.

In June 2010, the National Thermal Power Corporation had invited bids under the international competitive bidding for the supply and installation of eleven 660 megawatt steam generators at five locations in India. A bid was successfully submitted by B, a company incorporated in India and engaged in providing turnkey solutions for coal based thermal power plants. B sub-contracted a portion of the scope of work under three contracts to its joint venture company, which in turn sub-contracted a portion thereof to the assessee. One of the contentions raised by the assessee on the merits was that the scope of work under each of the contracts was separate and distinct in all respects including the delineation of the work itself, the modes of execution of the contract and the payments therefor. For this reason, the assessee took the stand that the income from offshore supplies would not be liable to tax in India. Returns of income had been filed by the assessee in respect of assessment years 2015-16, 2016-17, 2017-18 and 2018-19 offering to tax the income from

onshore supply and services only. While assessment proceedings were pending the assessee applied for settlement of the case. The Settlement Commission held that the contract was composite and indivisible and hence the applicant, i. e., the assessee, had failed to make a full and true disclosure of income. On a writ petition against the order :

Held, *that the assessee had just applied for settlement of the case. The Commission however, in considering the "validity" or otherwise of the application proceeded to delve into the merits of the matter even at that stage. The order of the Settlement Commission was beyond the scope of section 245D(2C) having been passed on the merits of the issue raised.*

JYOTENDRASINHJI *v.* S. I. TRIPATHI [1993] 201 ITR 611 (SC) ; KULDEEP INDUSTRIAL CORPORATION *v.* ITO [1997] 223 ITR 840 (SC) *and* R. B. SHREERAM DURGA PRASAD AND FATECHAND NURSING DAS *v.* SETTLEMENT COMMISSION (IT AND WT) [1989] 176 ITR 169 (SC) *followed.*

ABDUL RAHIM *v.* ITSC [2018] 408 ITR 467 (Mad) *distinguished.*

Cases referred to :

Abdul Rahim *v.* ITSC [2018] 408 ITR 467 (Mad) (para 26)

CIT *v.* Express Newspaper Ltd. [1994] 206 ITR 443 (SC) (para 22)

Jyotendrasinhji *v.* S. I. Tripathi [1993] 201 ITR 611 (SC) (para 25)

Kuldeep Industrial Corporation *v.* ITO [1997] 223 ITR 840 (SC) (para 25)

Omaxe Ltd. *v.* Asst. CIT [2012] 25 taxmann.com 190 (Delhi) (para 24)

R. B. Shreeram Durga Prasad and Fatechand Nursing Das *v.* Settlement Commission (IT and WT) [1989] 176 ITR 169 (SC) (para 25)

W. P. No. 3706 of 2019 and W. M. P. Nos. 4084, 4087, 10425 and 10426 of 2019.

P. S. Raman, Senior Counsel and *R. Sivaraman* for the petitioner.

Mrs. Hema Muralikrishnan, Senior Standing Counsel, for the respondents.

JUDGMENT

DR. MS. ANITA SUMANTH J.—Heard the detailed submissions of the petitioner represented by Mr. P. S. Raman, learned senior counsel for Mr. R. Sivaraman, learned counsel and the respondents represented by Mrs. Hema Muralikrishnan, learned senior standing counsel. 1

The petitioner has challenged an order passed by the Income-tax Settlement Commission (SC/Commission) in terms of section 245D(2C) of the Income-tax Act, 1961 (Act) dated January 9, 2019. 2

3 The petitioner is a company incorporated under the laws of Germany engaged in the design and construction of fossil-fired power plant as well as supply of key components, such as utility steam generators, and other ancilliary equipment. During June, 2010, the National Thermal Power Corporation (NTPC) had invited bids under international competitive bidding for the supply and installation of 11*660 MW steam generators at five locations in India. A bid was successfully submitted by one BGR Energy Systems Limited (BGRE), a company incorporated in India and engaged in providing turnkey solutions for coal based thermal power plants.

4 I desist from adverting to the specifics of the contracts themselves or the manner in which the work has been apportioned and allocated by NTPC/BGRE to other parties, since it is not entirely necessary to decide the legal issue that has been raised in this writ petition. Suffice it to say that BGRE had sub-contracted a portion of the scope of work under three contracts to its joint venture company BGR Boilers Private Limited (BGRB), which, in turn, sub-contracted a portion of the same to the petitioner.

5 One of the contentions raised by the petitioner on merits was that the scope of work under each of the contracts is separate and distinct in all respects including the delineation of the work itself, the modes of execution of the contract and the payments therefor. For this reason, the petitioner had taken the stand that the income from offshore supplies would not be liable to tax in India and this stream of revenue thus did not figure in its return of income or accompanying financials.

6 The returns of income had thus been filed by the petitioner in respect of the assessment years (AY) 2015-16, 2016-17, 2017-18 and 2018-19 offering to tax the income from onshore supply and services only.

7 The contention of the Revenue on merits is that the scope of work entrusted to the petitioner remains indivisible and that the bifurcation of the same between offshore supply on the one hand and onshore supply and services on the other was artificial and solely for the purpose of reduction of income tax liability.

8 The petitioner has earlier filed an application under section 197 of the Act on November 16, 2018 seeking a determination of the liability by way of tax deduction in respect of income from all three revenue streams, namely, offshore supply, onshore supply and onshore service. This aspect of the matter is mentioned solely for the purpose of ascertaining disclosure of the petitioner of all relevant facts before the Department.

9 A survey came to be conducted in the project office of the petitioner on October 12 and 13, 2017 wherein certain materials appear to have been found, indicating to the Department that the transaction as between itself

and BGRB was a single, indivisible transaction. The Department thus, being of the view that tax ought to have been remitted on the income from offshore supply as well, issued a show-cause notice containing the aforesaid proposal. The petitioner states that no opportunity was granted to it to respond to the notice and an order of draft assessment under section 144C of the Act was passed on December 31, 2017. This was assailed by way of writ petition in W. P. No. 1248 of 2018 before the Madras High Court. Though an interim order was granted on January 22, 2018 staying all further proceedings in relation to the assessment year 2015-16, the petitioner withdrew its writ petition on October 24, 2018 and instead approached the Dispute Resolution Panel (DRP) by way of objections filed on November 5, 2018.

10 At that stage, the petitioner approached the Supreme Court by way of an application under section 245C of the Act. The application was taken up for admission and an order passed on November 26, 2018 after hearing only the petitioner and at a stage anterior to receipt of the Departments' report on the application filed.

11 At paragraph 4.1.5 of the order dated November 26, 2018, the Commission notes the submissions of the petitioner in regard to the non-taxability of income from offshore supply. It also notes the specific submission that further and detailed submissions in that regard would be made in the course of subsequent proceedings. Again, at paragraph 6 reference is made to the transaction in relation to offshore supply and the taxability of the same. It was also specifically noted that no additional income has been offered along with the application in this regard. The decision to admit the matter for further hearing is in the following terms :

> "7. On examination of the SOF and related material and on thoughtful consideration of the facts as discussed during the course of hearing, we find that technical parameters in the application with regard to pendency of assessment proceedings, tax liability exceeding the threshold limit, payment of application fee of Rs. 500 and intimation to the Assessing Officer have been duly fulfilled by the applicant. The applicant has also explained the manner in which the additional income is derived in the SOF. On the basis of the material placed before us we are of the view that at present, there is prima facie no material which warrants the conclusion that true and full disclosure has not been made by the applicant or it has not disclosed the manner of earning such income. Hence, all the requirements laid down under section 245C(1) have been fulfilled by the applicant. We accordingly hold that the above application is fit to be allowed to be

proceeded with further. This order is being accordingly passed and is without prejudice to the finding that may be given in the later stage of proceedings.

8. In view of the above, we allow the above settlement application to be proceeded with further under section 245D(1) of the Income-tax Act."

12 A report on the application was thereafter filed by the Commissioner in terms of section 245D(2B) of the Act. Thereafter, the matter was listed for decision on the aspect of "validity" or otherwise of the application. The report of the Commissioner deals with the aspects of correctness and adequacy of the additional taxes and interest remitted as well as compliance with the requirement under section 245C(4) of the Act.

13 As regards full and true disclosure of income, the Commissioner reiterates the stand of the Revenue in the draft assessment order to the effect that the division of the contract between offshore and onshore components is but an artificial bifurcation, and the contract is composite, liable to be construed as one whole, with the entirety of the income being offered to tax in India.

14 The petitioner, in the application for settlement, has framed the following issues for resolution :

"2.1 Whether the applicant is taxable in India on account of income earned from offshore supply of goods ?

2.2 Determination of the total income of the applicant for each of the assessment years, being the assessment year 2015-16 to the assessment year 2018-19 as per the provisions of the Act.

2.3. Determination of the total tax liability of the applicant for each of the four assessment years under consideration.

2.4 Any other issue that may be considered fit by the hon'ble Settlement Commission in the interest of justice or to make the settlement effective."

15 Thus the question of whether the contract is divisible or indivisible is a matter laid down before the Commission for consideration and what the Commissioner has done in his report is only to reiterate the stand of the Department that the contracts are, in fact, and in his opinion, indivisible.

16 The Supreme Court however, in considering the "validity" or otherwise of the application proceeds to delve into the merits of the matter even at that stage, concluding that the contract was composite and indivisible and hence the applicant, i.e., the petitioner herein, had failed to make a full and true disclosure of income.

In my considered view, this tantamounts to putting the cart before the horse. Certainly, if the Commission decides adverse to the petitioner in final hearing, holding that the contract and transactions were composite and indivisible, there would be an additional tax liability upon the petitioner. This demand however can be raised only once a decision has been rendered in terms of section 245D(4) by the Commission on the issues posed before it, the first of which is, whether at all the income from offshore supply is liable to tax in India. The question of full and true disclosure and the discharge of tax liability at all stages prior to final hearing, should be seen only in the context of the issues offered for settlement and the remittances of additional tax thereupon. Issues decided by the Commission and liability arising therefrom, will be payable only at the stage of such determination, which, in my considered view, is the stage of final hearing under section 245D(4). **17**

In fact, section 245D(6) clarifies this point, as follows : **18**

> "245D. *Procedure on receipt of an application under section 245C.*— . . . .
>
> (6) Every order passed under sub-section (4) shall provide for the terms of settlement including any demand by way of tax, penalty or interest, the manner in which any sum due under the settlement shall be paid and all other matters to make the settlement effective and shall also provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts."

Thus a final order passed by the Supreme Court will provide for the terms of settlement that can include any demand by way of tax, penalty or interest as well. Evidently, this demand raised after final settlement, can only refer to such issues as has been decided by the Commission over and above the additional income disclosed and tax paid by the assessee at the time of filing of application. This has been envisaged and provided for in the statutory scheme of settlement under the Act. **19**

The scheme of Chapter XIXA is to provide a holistic resolution of issues that arise from an assessment in the case of an assessee that has approached the Commission. **20**

Throughout Chapter XIXA, the words "case", "assessment", "matter" and "proceedings" have been used interchangeably with "case" being defined under section 245A(b) as follows : **21**

> "245A. In this Chapter, unless the context otherwise requires,—

(b) 'case' means any proceeding for assessment under this Act, of any person in respect of any assessment year or assessment years which may be pending before an Assessing Officer on the date on which an application under sub-section (1) of section 245C is made."

22 A three judge Bench of the Supreme Court in the case of *CIT* v. *Express Newspaper Ltd.* [1994] 206 ITR 443 (SC) considered the scope and width of proceedings before the Supreme Court in a case that travelled to the Supreme Court from the Madras High Court. At paragraph 9, the Bench states as follows (page 451 of 206 ITR) :

"For a proper delineation of the jurisdiction of the Commission, it is necessary to bear in mind the language of sub-section (1) of section 245C. It provides that at any stage of a case relating to him, an assessee may make an application to the Commission disclosing fully and truly income which has not been disclosed before the Assessing Officer. He must also disclose how the said income has been derived by him besides certain other particulars. This means that an assessee cannot approach the Commission for settlement of his case with respect to income already disclosed before the Assessing Officer. An application under section 245C is maintainable only if it discloses income which has not been disclosed before the Assessing Officer. The disclosure contemplated by section 245C is thus in the nature of voluntary disclosure of concealed income. Unless the income so disclosed exceeds Rs. 50,000, the application under section 245C is not maintainable. It is equally evident that once an application made under section 245C is admitted for consideration (after giving notice to and considering the report of the Commissioner of Income-tax as provided by section 245D) the Commission shall have to withdraw the case relating to that assessment year (or years, as the case may be) from the assessing/appellate/revising authority and deal with the case, as a whole, by itself. In other words, the proceedings before the Commission are not confined to the income disclosed before it alone. Once the application is allowed to be proceeded with by the Commission, the proceedings pending before any authority under the Act relating to that assessment year have to be transferred to Commission and the entire case for that assessment year will be dealt with by the Commission itself. The words 'at any stage of a case relating to him' only make it clear that the pendency of proceedings relating to that assessment year, whether before the Assessing Officer or before the appellate or revisional authority, is no bar to the filing of an

application under section 245C so long as the application complies with the requirements of section 245C."

Thus, once an assessee has approached the Settlement Commission at **23** the appropriate stage (in the case of this petitioner, there is no dispute on this score) all issues in relation to the assessment for that assessment year are at large before the Supreme Court. This is evidently to ensure that a single forum, a high powered one at that, will take into account the submissions of both parties and arrive at a decision on all issues that arise from such case/proceeding, in a comprehensive manner.

I may also make useful reference to a decision of the Delhi High Court **24** that had occasion to consider the case of a reassessment in *Omaxe Ltd.* v. *Asst. CIT* [2012] 25 taxmann.com 190 (Delhi). In that case, the assessee had approached the Settlement Commission on various counts. After an order of settlement was passed, a notice under section 148 had been issued calling upon the petitioner to file a return of income in regard to the alleged escapement caused by a claim of deduction under section 80-IB(10) of the Act. The assessee resisted the notice on the ground that the assessment for that year had become final by virtue of the order of the Supreme Court. The defence of the Department was that no additional income had been offered in regard to the deduction under section 80-IB(10) as it constituted an issue not covered by the order of the Settlement Commission. The stand of the Revenue was negated on the ground that income from the unit in respect of which deduction was claimed as well as the claim of deduction were duly reflected in the return of income and this issue thus also stood encompassed by the final order of the Commission.

The plenitude of powers that the Settlement Commission enjoys has **25** been long settled by the Supreme Court in *R. B. Shreeram Durga Prasad and Fatechand Nursing Das* v. *Settlement Commission (IT and WT)* [1989] 176 ITR 169 (SC), *Jyotendrasinhji* v. *S. I. Tripathi* [1993] 201 ITR 611 (SC) and *Kuldeep Industrial Corporation* v. *ITO* [1997] 223 ITR 840 (SC) and there can thus be no question that the Commission is empowered to both adjudicate upon as well as settle issues arising from a "case" in respect of which an application is made.

The Revenue relies on a decision of this court in the case of *Abdul* **26** *Rahim* v. *ITSC* [2018] 408 ITR 467 (Mad) ; [2018] 96 taxmann.com 571 (Mad). The facts in that case are different and distinguishable from the one before me. A preliminary order of admission under section 245D(1) was passed on the application of the assessee therein. The Commissioners' report however brought to light certain materials including a pendrive and compact discs that had not been duly disclosed by the petitioner in his

application. Thus when the matter was taken up for admission by the Commission, it was contested by the Revenue on the ground that there was no full and true disclosure by the petitioner. This was accepted by the court in the light of the patent non-disclosure by the assessee therein to have disclosed the pendrive and compact discs, rending the application "invalid", a term that has not been defined, but in respect of which one would have to assign its natural meaning, as used in common parlance.

27 In the light of the discussion as above, I am of the categoric view that the impugned order of the Settlement Commission is beyond the scope of section 245D(2C) having been passed on the merits of the issue raised and set aside the same. This writ petition is allowed. No costs. The connected miscellaneous petitions are closed.

28 The matter will be now taken up for final hearing by the Settlement Commission in terms of section 245D(4) of the Act. Let the petitioner appear, for this purpose, before the Settlement Commission on Monday, March 2, 2020 or on a date as proximate to the aforesaid date as may be convenient to the Settlement Commission to be fixed by issue of prior notice. The Commission will hear both parties on merits, consider all materials before it or that may be placed by the parties before it and pass orders within a period of twelve (12) weeks from the date of first hearing, in accordance with law.

[2020] 423 ITR 480 (Delhi)

[IN THE DELHI HIGH COURT]

SUMAN PODDAR

v.

INCOME-TAX OFFICER

VIPIN SANGHI and **SANJEEV NARULA** JJ.

September 17, 2019.

SS ▶ ITA 1961, s 10(38)
AY ▶ 2014-15
HF ▶ Department

EXEMPTION—LONG-TERM CAPITAL GAINS—CONCURRENT FINDING OF FACT ON APPRECIATION OF EVIDENCE BY ASSESSING OFFICER AND APPELLATE AUTHORITIES THAT TRANSACTIONS NOT GENUINE—BURDEN OF PROOF—NO EVIDENCE OF ACTUAL SALE PRODUCED BY ASSESSEE—DENIAL OF EXEMPTION—PROPER—INCOME-TAX ACT, 1961, S. 10(38).

For the assessment year 2014-15, the assessee claimed exemption under section 10(38) of the Income-tax Act, 1961 on account of long-term capital gains. The Assessing Officer held that the transaction which pertained to the sale of shares by the assessee purchased from the entity S which had since merged with the company C, (which was identified by the Bombay Stock Exchange as a penny stock company being used to obtain bogus long-term capital gains) to be a bogus transaction and denied the exemption claimed. The Commissioner (Appeals) upheld the order of the Assessing Officer. The assessee submitted that the transactions were made by way of cheques in the assessment year 2012-13, that such investment was accepted by the Department and that he had produced before the Assessing Officer the relevant document in respect of the dematerialised account, the purchase of shares of S, the contract notes and other relevant documents. The Tribunal, inter alia, held that the assessee had failed to prove that the share transactions were genuine and could not furnish evidence regarding the sale of shares except the copies of the contract notes and cheques received against the overwhelming evidence collected by the Department regarding the entire operation of the affairs of the assessee and confirmed the order of the Commissioner (Appeals). On appeal :

Held, *dismissing the appeal, that the findings returned by the Assessing Officer, the Commissioner (Appeals) and the Tribunal to deny the exemption claimed by the assessee under section 10(38) on account of long-term capital gains were based on appreciation of evidence and there was ample justification for them. The Tribunal had in depth analysed the balance-sheets and the profit and loss accounts of the company C which showed that the astronomical increase in the share price of C which had led to the returns of 491 per cent. for the assessee was unjustified. The financial parameters of the company C could not justify the price in excess of Rs. 500 at which the assessee had claimed to have sold the shares to obtain the long-term capital gains. It was not explained why anyone would purchase those shares at such high price. No evidence of actual sale except the contract notes issued by the share broker were produced by the assessee and it could not be said that the findings of fact were perverse so as to give rise to a question of law.*

[The Supreme Court has dismissed the special leave petition filed by the assessee against this judgment : see [2020] 420 ITR (St.) 7—Ed.*]*

Cases referred to :

CIT *v.* Jasvinder Kaur (Smt.) [2013] 357 ITR 638 (Gauhati) (para 7)

CIT *v.* Nipun Builders and Developers Pvt. Ltd. [2013] 350 ITR 407 (Delhi) (para 7)

ITO *v.* Shamin M. Bharwani [2016] 69 taxmann.com 65 (Mum) (para 7)

Sanjay Bimalchand Jain *v.* ITO [2018] 89 taxmann.com 196 (Bom) (para 7)

Sumati Dayal *v.* CIT [1995] 214 ITR 801 (SC) (para 7)

I. T. A. No. 841 of 2019.

Arvind Kumar and *Ms. Devina Sharma*, Advocates, for the appellant.

None appeared for the respondent.

JUDGMENT

C.M. No. 41505 of 2019 (exemption)

1 Exemption allowed, subject to all just exceptions.

2 The application stands disposed of.

I. T. A. No. 841 of 2019

3 The present appeal is directed against the order dated July 25, 2019 passed by the Income-tax Appellate Tribunal (ITAT) Delhi Bench "G", New Delhi, in I. T. A. No. 1006/Del/2019 for the assessment year 2014-15 whereby the Tribunal had rejected the appeal preferred by the appellant/assessee. The appellant had filed return of income for the assessment year 2014-15 declaring income of Rs. 4,96,650. The return of the appellant was selected for scrutiny. The appellant had booked long-term capital gains (LTCG) of Rs. 73,77,806 and sought exemption under section 10(38) of the Income-tax Act, 1961. The Assessing Officer on consideration of the replies and responses of the assessee in pursuance of the notices issued to the assessee, computed the net taxable income at Rs. 78,74,456. The Assessing Officer added the amount of Rs. 73,77,806 by denying the exemption claimed under section 10(38) of the Act on account of long-term capital gains. The Assessing Officer (AO) found the transaction pertaining to the purchase of shares by the appellant-assessee of M/s. Smartchamps IT and Infra Ltd., which was merged with M/s. Cressanda Solutions Ltd., to be a bogus transaction by holding that M/s. Cressanda Solutions Ltd. was a penny stock company. The appeal preferred by the appellant before the learned Commissioner of Income-tax (Appeals) met the same fate and the findings of fact in relation to the transaction being bogus were upheld by the Commissioner of Income-tax (Appeals). The further appeal preferred before the Income-tax Appellate Tribunal has been dismissed and the Income-tax Appellate Tribunal has once again found the said transaction to be bogus.

We have, therefore, at the outset put it to the learned counsel for the appellant that since there are consistent findings of fact and the entire dispute raised by the appellant is factual, there is no reason for the court to entertain the present appeal and no question of law arises for our determination. 4

The counsel for the appellant has submitted that the findings returned by the Assessing Officer, the Commissioner of Income-tax (Appeals) and the Income-tax Appellate Tribunal are perverse since, according to the appellant, there was no basis for concluding that the transaction entered into by the appellant for purchase of shares of M/s. Smartchamps IT and Infra Ltd. (which was later merged with M/s. Cressanda Solutions Ltd.) was bogus. The counsel for the appellant submits that the appellant had made cheque payment for the purchase of 1,500 shares of M/s. Smartchamps IT and Infra Ltd. in the assessment year 2012-13, and that investment was accepted by the Department. He further submits that the appellant had produced all the relevant materials before the Assessing Officer, namely, the documentation relating to opening of the dematerialised account , the purchase of shares of M/s. Smartchamps IT and Infra Ltd., the contract notes, and other relevant documents. 5

Learned counsel for the appellant has taken us through the impugned order. Having heard the learned counsel and perused the records including the impugned order, we are of the view that there is absolutely no merit in the present appeal. The Income-tax Appellate Tribunal has extensively discussed the evidence and materials on the basis of which the Assessing Officer recorded his findings with regard to the genuineness of the transaction in question. The findings returned by the Assessing Officer, the Commissioner of Income-tax (Appeals) and the Tribunal are based on appreciation of evidence and there is ample justification for them. Thus, it cannot be said that the findings of fact are perverse. The relevant discussion found in the impugned order reads as follows : 6

> "9. We have gone through the rationale given by both the parties pertaining to their arguments. In this case, it is an uncontroverted fact that the assessee has failed to prove the genuineness of the transaction. The Assessing Officer has worked out the glaring facts, which cannot be ignored and which are clearly indicative of the non-genuine nature of the transactions. The assessee could not satisfactorily explain how the investments in the absence of any evidence as to the financials, growth and operations of the company could earn profit of 491 per cent. over a short period of 5 months from the date of allotment of shares (February 21, 2013-date of allotment and July 18, 2013

to September 12, 2013 - date of sale) of Cressanda Solutions Ltd. against the purchase of 15,000 shares of Smartchamps IT and Infra Ltd. on September 22, 2011. Most importantly, in spite of earning so much of profit, the assessee has never embarked upon any transactions for investments with the broker or in any other dealing of shares. The revenue from the operations of Cressanda Solutions Ltd. for the year March 2012 was Rs. 00 and, for the year March 2013 is Rs. 0.99 crores. The financials of the company proving that the entity is a penny stock company are as under :

Balance-sheet of Cressanda Solution . . . . . in Rs. . . . . crores.

	Mar 16 12 mths	*Mar 15 12 mths*	*Mar 14 12 mths*	*Mar 13 12 mths*	*Mar 12 12 mths*
Equities and Liabilities Share-holder Funds					
Equity share capital	30.36	30.36	30.36	30.36	9.00
Total share capital	30.36	30.36	30.36	30.36	9.00
Reserves and surplus	—	-0.65	-0.82	0.63	-8.89
Total reserves and surplus	—	-0.65	-0.82	0.63	-8.89
Total shareholders' funds	29.29	29.71	29.54	30.99	0.11
Non-Current Liabilities					
Long-term borrowings	0.00	0.00	0.00	0.00	1.48
Other long-term liabilities	0.00	0.00	0.00	0.00	0.15
Long-term provisions	0.00	0.00	0.00	0.00	0.05
Total non-current liabilities	0.00	0.00	0.00	0.00	1.68
Current Liabilities					
Trade payables	0.00	0.00	23.82	22.35	0.00
Other current liabilities	0.01	0.10	0.32	0.56	0.00
Short-term provisions	0.00	0.00	0.00	0.08	0.00
Total current liabilities	0.01	0.10	24.14	22.99	0.00
Total capital and liabilities	29.30	29.81	53.68	53.98	1.79
Assets : Non-Current Assets					
Tangible assets	0.03	0.04	0.05	0.06	0.00
Fixed assets	0.03	0.04	0.05	0.06	0.00
Non-current investments	0.00	0.00	0.00	1.09	1.09
Long-term loan and advances	18.96	18.87	24.11	25.11	0.00

Other non-current assets	10.21	10.60	0.15	0.77	0.65
Total non-current assets	29.20	29.50	24.31	27.03	1.74
CURRENT ASSETS					
Inventories	0.00	0.00	0.00	0.70	0.00
Trade receivables	0.00	0.00	29.13	26.01	0.00
Cash and cash equivalents	0.10	0.23	0.18	0.18	0.04
Short-term loans and advances	0.00	0.00	0.00	0.00	0.01
Other current assets	0.00	0.08	0.05	0.05	0.00
Total current assets	0.10	0.31	29.37	26.95	0.05
Total assets	29.30	29.81	53.68	53.98	1.79

Profit and loss account of Cressanda Solution . . . . . in Rs. Cr.. . . .

	Mar 16 12 mths	*Mar 15 12 mths*	*Mar 14 12 mths*	*Mar 13 12 mths*	*Mar 12 12 mths*
Income					
Revenue from operations [gross]	0.00	0.00	6.44	0.99	0.00
Revenue from operations [net]	0.00	0.00	6.44	0.99	0.00
Total operating Revenues	0.00	0.00	6.44	0.99	0.00
Other income	0.03	0.17	0.14	0.07	0.02
Total Revenue	0.03	0.17	6.58	1.06	0.02
Expenses					
Operating and direct expenses	0.00	0.00	5.14	0.08	0.00
Changes in inventories of FG, WIP and stock in trade	0.00	0.00	0.70	0.00	0.00
Employee benefit expenses	0.05	0.04	0.03	0.06	0.00
Depreciation and amortization expenses					
Other expenses	0.14	0.28	2.14	0.41	0.04
Total expenses	0.20	0.32	8.02	0.57	0.04
	Mar 16 12 mths	*Mar 15 12 mths*	*Mar 14 12 mths*	*Mar 13 12 mths*	*Mar 12 12 mths*
Profit and loss before exceptional, extra ordinary items and tax	0.17	-0.15	-1.44	0.49	-0.02
Profit and loss before tax	0.17	-0.15	-1.44	2.49	-0.02

Tax expenses continued operations current tax	0.00	0.00	0.00	0.09	0.00
Tax for earlier years	0.25	0.00	0.00	0.00	0.00
Total tax expenses	0.25	0.00	0.00	0.09	0.00
Profit/loss after tax and before extra ordinary items	0.42	-0.15	-1.44	0.40	-0.02
Profit/loss from continuing operations	0.42	-0.15	-1.44	0.40	-0.02
	Mar 16 12 mths	*Mar 15 12 mths*	*Mar 14 12 mths*	*Mar 13 12 mths*	*Mar 12 12 mths*
Other additional information earnings per share					
Basic EPS (Rs.)	0.01	-0.01	-0.48	0.13	-0.02
Diluted EPS (Rs.)	0.01	-0.01	-0.48	0.13	-0.02
(emphasis supplied)					

7 Thus, the Tribunal has in depth analysed the balance-sheets and the profit and loss accounts of Cressanda Solutions Ltd. which shows that the astronomical increase in the share price of the said company which led to returns of 491 per cent. for the appellant, was completely unjustified. Pertinently, the EPS of the said company was Rs. 0.01 as in March 2016, it was Rs. - 0.01 as in March 2015 and -0.48 as in March 2014. Similarly, the other financial parameters of the said company cannot justify the price in excess of Rs. 500 at which the appellant claims to have sold the said shares to obtain the long-term capital gains. It is not explained as to why anyone would purchase the said shares at such high price. The Tribunal goes on to observe in the impugned order as follows :

> "10. With such financials and affairs of business, the purchase of share of face value Rs. 10 at the rate of Rs. 491 by any person and the assessee's contention that such transaction is genuine and credible and arguing to accept such contention would only make the decision of the judicial authorities a fallacy.
>
> 11. The evidence put forth by the Revenue regarding the entry operation fairly leads to a conclusion that the assessee is one of the beneficiaries of the accommodation entry receipts in the form of long-term capital gains. *The assessee has failed to prove that the share transactions are genuine and could not furnish evidence regarding the sale of shares except the copies of the contract notes, cheques received against the overwhelming evidence collected by the Revenue regarding*

the operation of the entire affairs of the assessee. This cannot be a case of intelligent investment or a simple and straight case of tax planning to gain benefit of long-term capital gains. The earnings at 491 per cent. over a period of 5 months is beyond human probability and defies business logic of any business enterprise dealing with share transactions. The net worth of the company is not known to the assessee. Even the brokers who co-ordinated the transactions were also unknown to the assessee. All these facts give credence to the unreliability of the entire transaction of shares giving rise to such capital gains. The ratio laid down by the hon'ble Supreme Court in the case of *Sumati Dayal* v. *CIT* [1995] 214 ITR 801 (SC) is squarely applicable to the case. Though the assessee has received the amounts by way of account payee cheques, the transactions cannot be treated as genuine in the presence of the overwhelming evidence put forward by the Revenue. The fact that in spite of earning such steep profits, the assessee never ventured to involve himself in any other transaction with the broker cannot be a mere coincidence of lack of interest. Reliance is placed on the judgment in the case of *CIT* v. *Nipun Builders and Developers Pvt. Ltd.* [2013] 350 ITR 407 (Delhi), wherein it was held that it is the duty of the Tribunal to scratch the surface and probe the documentary evidence in depth, in the light of the conduct of the assessee and other surrounding circumstances in order to see whether the assessee is liable to the provisions of section 68 or not. In the case of *NR Portfolio*, it was held that the genuineness and credibility are deeper and obtrusive. Similarly, the bank statements provided by the assessee to prove the genuineness of the transactions cannot be considered in view of the judgment of the hon'ble court in the case of *Pratham Telecom India Pvt. Ltd.*, wherein, it was stated that bank statement is not sufficient enough to discharge the burden. Regarding the failure to accord the opportunity of cross-examination, we rely on the judgment of *Prem Castings Pvt. Ltd.* Similarly, the Tribunal in the case of *Udit Kalra*, I. T. A. No. 6717/Del/2017 for the assessment year 2014-15 has categorically held that when there was specific confirmation with the Revenue that the assessee has indulged in non-genuine and bogus capital gains obtained from the transactions of purchase and sale of shares, it can be a good reason to treat the transactions as bogus. The differences of the case of *Udit Kalra* (supra) attempted by the learned authorised representative does not add any credence to justify the transactions. The Investigation Wing

has also conducted enquiries which proved that the assessee is also one of the beneficiaries of the transactions entered into by the companies through multiple layering of transactions and entries provided. *Even the Bombay Stock Exchange listed this company as being used for generating bogus long-term capital gains.* On the facts of the case and judicial pronouncements will give rise to only conclusion that the entire activities of the assessee is a colourable device to obtain bogus capital gains. The hon'ble High Court of Delhi in the case of *Udit Kalra*, ITA No. 220 of 2009 held that the company had meager resources and astronomical growth of the value of the company's shares only excited the suspicion of the Revenue and hence, treated the receipts of the sale of shares to be bogus. The hon'ble High Court has also dealt with the arguments of the assessee that he was denied the right of cross-examination of the individuals whose statements led to the enquiry. The learned authorised representative's argument that no question of law has been framed in the case of *Udit Kalra* (supra) also does not make any tangible difference to the decision of this case. Since the additions have been confirmed based on the enquiries by the Revenue, taking into consideration the ratio laid down by the various High Courts and the hon'ble Supreme Court, our decision is equally applicable to the receipts obtained from all the three entities. Further, reliance is also placed on the orders of various courts and Tribunals listed below.

M. K. Rajeshwari v. *ITO* in ITA No. 17231/Bangl/2018, order dated October 12, 2018.

Abhimanyu Soin v. *Asst. CIT* in ITA No. 9511/Chd/2016, order dated April 18, 2018.

Sanjay Bimalchand Jain v. *ITO* [2008] 89 taxmann.com 196 (Bom)

Dinesh Kumar Khandelwal, HUF v. *ITO* in I. T. A. No. 58 & 59/Nag/2015, order dated August 24, 2016.

Ratnakar M Pujari v. *ITO* in I. T.A No. 995/Mum/2012, order dated August 3, 2016.

Disha N. Lalwani v. *ITO* in I. T. A. No. 6398/Mum/2012, order dated March 22, 2017.

ITO v. *Shamin M. Bharwani* [2016] 69 taxmann.com 65 (Mum).

Usha Chandresh Shah v. *ITO* in I. T. A. No. 6858/Mum/2011, order dated September 26, 2014.

CIT v. *Smt. Jasvinder Kaur* [2013] 357 ITR 638 (Gauhati).

12. The facts as well as the rationale given by the hon'ble High Court are squarely applicable to the case before us. Hence, keeping in view the overall facts and circumstances of the case that the profits earned by the assessee are a part of major scheme of the accommodation entries and keeping in view the ratio of the judgments quoted above, we, hereby decline to interfere in the order of the learned Commissioner of Income-tax (Appeals)." (emphasis[1] supplied)

From the above extract, it would be seen that the Cressanda Solutions Ltd. was in fact identified by the Bombay Stock Exchange as a penny stock company being used for obtaining bogus long-term capital gains. No evidence of actual sale except the contract notes issued by the share broker were produced by the assessee. No question of law, therefore arises in the present case and the consistent finding of fact returned against the appellant are based on evidence on record. **8**

In the aforesaid facts and circumstances, we do not find any merit in the present appeal and the same is dismissed. **9**

[2020] 423 ITR 489 (Karn)

[IN THE KARNATAKA HIGH COURT]

SURESH KUMAR T. JAIN

v.

INCOME-TAX OFFICER

RAVI MALIMATH and **K. NATARAJAN** JJ.

November 20, 2018.

SS ▸ ITA 1961, ss 41, 68
AY ▸ 2005-06
HF ▸ Department

INCOME—BUSINESS INCOME—REMISSION OR CESSATION OF LIABILITY—AMOUNTS SHOWN AS CREDITS—FINDING THAT LIABILITIES DID NOT EXIST—ASSESSMENT OF AMOUNTS UNDER SECTION 41 JUSTIFIED—INCOME-TAX ACT, 1961, s. 41.

CASH CREDITS—CREDITS FOUND TO BE FICTITIOUS—AMOUNTS ASSESSABLE UNDER SECTION 68—INCOME-TAX ACT, 1961, s. 68.

1. Here printed in italics.

The assessee filed his return of income for the assessment year 2005-06 declaring a total income of Rs. 6,06,780. The return was processed under section 143(1) of the Income-tax Act, 1961. Subsequently a survey under section 133A of the Act was conducted in the business premises. During the course of survey, the assessee was asked to produce the books of account for the assessment years 2005-06 and 2006-07. He did not produce them at the time of survey. He stated that the books were in the auditor's office and would be submitted later. A physical stock was taken at the time of survey. In spite of several reminders and opportunities, neither the books of account nor any material were produced by the assessee. Notice under section 148 was served on the assessee. During the course of assessment proceedings, the assessee was asked to produce the details of sundry creditors with complete addresses and confirmation letters from the creditors. He furnished the list of creditors with addresses in 39 cases and in 10 cases, no addresses were provided. No confirmation letter was filed by the assessee, in spite of several reminders, except in two cases. Thereafter, letters were addressed to the sundry creditors at the addresses given by the assessee. In response to these letters, 23 creditors furnished the details called for. On considering them, it was found that the return of income did not tally with the figures confirmed by the sundry creditors. The details of outstanding balances as confirmed by 23 sundry creditors amounted to Rs. 24,579 as against Rs. 35,57,868 shown by the assessee for the same 23 creditors. The discrepancy amounted to Rs. 35,33,289 (Rs. 35,57,868 minus Rs. 24,579). Out of the balance 26 creditors, in 4 cases, the credit balance were confirmed as nil. In 10 cases, the assessee did not furnish the addresses. In the case of the balance of 12 creditors, notices were returned unserved on the grounds of "insufficient address", "no such person", etc. and the total of such amount worked out to Rs. 29,75,621. In view of such discrepancies, the assessee was asked to furnish his explanation as to why the discrepancies in the sundry creditors' balances should not be added back to the income. In response, a reply was furnished. After considering it the Assessing Officer came to the conclusion that the amount brought forward as balances of creditors of Rs. 50,09,199 were no longer liable and as the trading liability ceased to exist, added it back to the returned income as cessation of liability as he did the balance amount of Rs. 14,99,711 which was also proven to be not genuine and was treated as unexplained credits. This was upheld by the Commissioner (Appeals) and the Tribunal. On appeal :

Held, *dismissing the appeal, that no request was made by the assessee to cross-examine the creditors. In the absence of any request being made, the question of granting an opportunity would not arise for consideration. In*

fact, the assessee requested for copies of the sworn statement and the confirmation letters obtained by the Department from the creditors. All of them were furnished to him. No objections were raised by him. Hence the Tribunal was justified in upholding the additions by applying the provisions of section 41(1) and section 68.

ANDAMAN TIMBER INDUSTRIES *v.* CCE [2016] 38 GSTR 117 (SC) (para 8) *and* CIT *v.* ALVARES AND THOMAS [2017] 394 ITR 647 (Karn) (para 5) *referred to.*

Income Tax Appeal No. 160 of 2010.

Smt. Jinita Chatterjee and *S. Parthasarathi*, Advocates, for the appellant.

K. V. Aravind, Advocate, for the respondent.

JUDGMENT

The judgment of the court was delivered by

RAVI MALIMATH J.—The assessee is an individual dealing in telephone **1**
instruments, mobile accessories and electronic goods. On March 31, 2006, he filed his return of income for the assessment year 2005-06 declaring a total income of Rs. 6,06,780. The said return was processed under section 143(1) of the Income-tax Act, 1961, (for short, "the Act"). On March 12, 2007, a survey under section 133A of the Act was conducted in the business premises. During the course of survey, the assessee was asked to produce the books of account for the assessment years 2005-06 and 2006-07. He did not produce the same at the time of survey. The books produced were pertaining only to purchasers and that too partly. There was no sales register, stock register, cash book, etc. he stated that the books are in the auditor's office and would be submitted later. A physical stock was taken at the time of survey. In spite of issuing several reminders and opportunities, neither the books of account nor any material were produced by the assessee. Notice under section 148 of the Act was served on the assessee. In response to the notice, the assessee filed a letter dated August 30, 2007, wherein he has stated that he has already filed his return of income on March 31, 2006, which is to be considered as a return filed in response to the notice. The assessee was heard.

During the course of assessment proceedings, the assessee was asked to **2**
produce the details of sundry creditors with complete addresses and confirmation letters from the creditors. He furnished the list of creditors with addresses in 39 cases and in 10 cases, no addresses were provided. No confirmation letter was filed by the assessee, in spite of several reminders, except in 2 cases. Thereafter, letters were addressed to the sundry creditors

as per the addresses given by the assessee. In response to these letters, 23 creditors have furnished the details called for. On considering the same, it is found that the return of income did not tally with the figures confirmed by the sundry creditors. The details of outstanding balances as confirmed by 23 sundry creditors amounted to Rs. 24,579 as against Rs. 35,57,868 shown by the assessee for the same 23 creditors. The discrepancy amounted to Rs. 35,33,289 (Rs. 35,57,868 minus Rs. 24,579). Out of the balance 26 creditors, in 4 cases, the credit balance were confirmed as nil. In 10 cases, the assessee did not furnish the addresses. In balance of 12 creditors, notice were returned unserved on the grounds of "insufficient address", "no such person", etc. and the total of such amount was worked out to Rs. 29,75,621. In view of such discrepancies, the assessee was given a show-cause letter to furnish his explanation as to why the said discrepancies in the sundry creditors' balances should not be added back to the income. In response, a reply was furnished, wherein the assessee has taken the following objections :

"(a) To qualify for inclusion or addition of any income, investments or credit, such income, investment or credit should accrue or arise during the period from April 1, 2004 to March 31, 2005.

(b) Although the business income is considered under section 28, certain special item of income or investment or credit are brought to tax under specified section of the Act. It is not clear as to under which head the impugned amount would be brought to tax.

(c) The sundry creditors are only 'trade creditors' and not 'cash creditors'. 'Trade creditors' represents persons who have supplied goods and to whom the assessee has not paid purchase consideration at the end of the relevant assessment years.

(d) If at all the said amount is to be assessed it should be assessed under section 68 of the Income-tax Act.

(e) By applying the provisions of section 68, the so called 'credit' should pertain to 'that previous year', i.e., previous year ended on March 31, 2005 and hence any credit pertaining to any other 'previous year' cannot be charged to tax for the previous year ended on March 31, 2006, i.e., the assessment year 2005-06.

The assessee has also furnished details of such amounts which totals to Rs. 32,39,713 in the said letter. The assessee contended further that out of Rs. 35,33,289 proposed by me for addition on unexplained credit, a sum of Rs. 32,39,713 does not pertain to the previous year ended on March 31, 2005 and the provisions of section 68 does not apply.

(f) The assessee also submitted that out of total creditors amounting to Rs. 29,75,621 shown in annexure-II, a sum of Rs. 17,69,486 was old balance brought forward from March 31, 2004 and does not pertain to the accounting year ended on March 31, 2005 and therefore, this amount of Rs. 17,69,686 also cannot be added for the assessment year 2005-06. Thus, the difference as detailed below was worked out by the assessee."

3 With regard to the creditors, whose addresses were not furnished, the assessee submitted that balance of total creditors as arrived at was Rs. 29,75,621 and reducing the balance as pertaining to the period ended March 31, 2004 of Rs. 32,39,713. The difference was Rs. 12,06,135. It was argued that some of them have closed their business or have shifted to other towns. However, the assessee undertook to produce proper and cogent evidence in support of the purchases made by those creditors. The assessee requested for the copies of the sworn statement recorded and the confirmation letters obtained by the Department from the creditors. The same was furnished to him. Thereafter, the assessee has not raised any objections regarding the additions proposed. Thereafter, the Assessing Officer came to the conclusion that the amount brought forward balances of creditors of Rs. 50,09,199 is proven to be no longer liable and as the trading liability ceased to exist, it was added back to the returned income as cessation of liability and the balance amount of Rs. 14,99,711 was also proven to be not genuine and this, too, was added back to the returned income as unexplained credits. Questioning the same, the assessee preferred an appeal before the Commissioner of Income-tax (Appeals), which was dismissed. The same was challenged before the Tribunal, which was also dismissed. Hence, the present appeal.

4 By the order dated June 13, 2011, the appeal was admitted to consider the following substantial question of law :

"Whether the finding of the Tribunal upholding the impugned addition made by applying the provisions of sections 41(1) and 68 which were made by mere accepting the statements of the creditors who had not been examined and without giving opportunity for cross-examination and upholding the application of section 68 in respect of trade credits outstanding at the end of the year on account of purchases, when the purchases have not been disputed and the trading results have been fully accepted is perverse and arbitrary ?"

5 Smt. Jinita Chatterjee, the learned counsel appearing for the appellant, contends that the provisions of sections 41(1) and 68 of the Act could not

have been invoked by the Revenue. It is contended that the list of creditors having been furnished, there is cessation of liability and therefore, the findings recorded by the Assessing Officer and as confirmed by the Tribunal is incorrect. She relies on the judgment of this court dated March 24, 2016 passed in *CIT* v. *Alvares and Thomas* [2017] 394 ITR 647 (Karn), Income Tax Appeal No. 658 of 2015 with reference to paragraph No. 9, wherein it was held that in legal parlance, merely because the creditor could not be traced on the date when the verification was made, the same is not a ground to conclude that there was cessation of liability. Cessation of liability has to be cessation in law, of the debt to be paid by the assessee to the creditor. The debt is recoverable even if the creditor has expired, by the legal heirs of the deceased creditor. Under the circumstances, in the present case, it can hardly be said that the liability had ceased. If the liability had not ceased or the benefit was not taken by the assessee in respect of such trade liability, the conditions precedent were not satisfied for invoking section 41(1) of the Act in the instant case.

6 The same is disputed by Sri K. V. Aravind, the learned counsel for the respondent. He contends that the judgment is not applicable to the facts and circumstances of the case on hand. In the said judgment, the creditors could not be traced on the date when the verification was made. However, in the instant case, i.e., the creditors have replied and he places reliance on paragraph No. 5.1 of the order of the Assessing Officer. He pleads that details of the outstanding balances as confirmed by 23 sundry creditors amounts to Rs. 24,579 as against Rs. 35,57,868 shown by the assessee for the very same 23 creditors. In paragraph No. 5.2, it is indicated that out of the balance 26 creditors, in 4 cases, the credit balance confirmed as nil and in 10 cases, the assessee has not furnished the addresses of the creditors and in 12 cases, the notices are returned as unserved for "insufficient address", "no such person", etc. and the total of such amounts worked out to Rs. 29,75,621. Therefore, this is not a case, where the creditors could not be traced on the date when the verification was made as in the aforesaid judgment relied upon. Here is a case, where the creditors have confirmed the balance and provided the details as called for.

7 Therefore, on considering the contentions, we are of the view that the judgment would not come to the aid of the appellant, as the facts narrated are different to the facts of the present case. Therefore, the said judgment would not be applicable to the case on hand.

8 It is further contended that there was no opportunity granted to the appellant for cross-examination of the creditors. The appellant's counsel relies on the judgment of the hon'ble Supreme Court in the case of

Andaman Timber Industries v. *CCE* [2016] 38 GSTR 117 (SC) Civil Appeal No. 4228 of 2006, disposed of on September 2, 2015, wherein it was held that even when the assessee disputed the correctness of the statements and wanted to cross-examine, the adjudicating authority did not grant the opportunity to the assessee. Therefore, on failure to grant such opportunity, the impugned orders become untenable. Therefore, by placing reliance on the said judgment, she pleads that an opportunity to cross-examine may be granted.

The same is disputed by the learned counsel for the respondent. These **9**
are not statements made on oath. These are replies given by the creditors. Therefore, the question of enabling the assessee to cross-examine them is misplaced. He further contends that there was no request made by the assessee to cross-examine these persons.

The reply furnished by the assessee has been extracted at paragraph **10**
No. 7 of the assessment order therein. There is no request made by the assessee seeking to cross-examine any of the persons. No material is brought on record to indicate that such a request was made.

In the aforesaid judgment of the hon'ble Supreme Court, the statements **11**
made by the creditors were disputed. Further, the assessee made a request to cross-examine the creditors. Such request was not acceded to by the Assessing Officer. Therefore, the hon'ble Supreme Court was of the view that the failure to grant an opportunity to cross-examine the creditors would render the impugned order as bad in law. However, in the facts of this case, no such request was made to cross-examine the creditors. In the absence of any request being made, the question of granting an opportunity would not arise for consideration. In fact, the assessee requested for copies of the sworn statement and the confirmation letters obtained by the Department from the creditors. All of them were furnished to him. No objections were raised by him. Thereafter, the Assessing Officer passed the impugned order.

Under these circumstances, the plea of the assessee that accepting the **12**
statement of the creditors without granting an opportunity to the assessee to cross-examine is incorrect. Therefore, we are of the view that the Tribunal was justified in upholding the impugned additions by applying the provisions of section 41(1) and section 68 of the Act. That the statement of the creditors were accepted, after granting substantial opportunity to the assessee, wherein the assessee has not made any request to cross-examine the witnesses and therefore, cannot contend that no opportunity was given to cross-examine the creditors. Consequently, the substantial question of law is answered in favour of the Revenue and against the assessee.

In these circumstances, the appeal is dismissed.

[2020] 423 ITR 496 (Ker)

[IN THE KERALA HIGH COURT]

COMMISSIONER INCOME-TAX (TDS)

v.

JEEVAN TELECASTING CORPORATION LTD.

K. VINOD CHANDRAN and **ASHOK MENON** JJ.

August 10, 2018.

HF ▶ Remanded

APPEAL TO APPELLATE TRIBUNAL—POWERS OF TRIBUNAL—POWER TO REMAND CASE—POWER CANNOT BE USED WITHOUT APPLYING MIND MERELY FOLLOWING DECISION OF SUPREME COURT—INCOME-TAX ACT, 1961.

The Tribunal being the fact finding authority ought to look into the facts before ordering a remand on the basis of the directions issued by the Supreme Court. The Tribunal being a creature of the statute, cannot adopt the directions issued by the Supreme Court without looking into the distinction on the facts, on which the directions were issued as against the facts available in the case before it. The Supreme Court's powers to issue directions cannot be assumed by the Tribunal to issue directions in a similar manner. The decision of the Supreme Court in the case of CIT *v.* Eli Lilly and Co. (India) P. Ltd. [2009] 312 ITR 225 (SC) *was on the peculiar facts and cannot apply across the board with respect to all instances of failure to deduct and pay to the Government the tax deducted at source.*

Orders of penalty were passed under section 271C of the Income-tax Act, 1961. The allegation against the assessee was with respect to there being no deduction of tax at source on the various transactions entered into by the assessee and delay in payment of tax deducted at source in certain instances. The transactions on which the allegations were raised were : (1) payment against contracts, commission, rent, salary, professional and consultancy charges not deposited or deposited late for the aforesaid years, (2) tax deduction under section 194J as against payment of uplink charges, (3) tax deduction under section 194J from payment of backhaul link usage charges, (4) tax deduction on equipment hire charges, and (5) tax deduction on camera rental payments. The Tribunal followed the directions of the Supreme Court in CIT *v.* Eli Lilly and Co. (India) P. Ltd. [2009] 312 ITR 225 (SC) *and* CIT *v.* Bharti

Cellular Ltd. [2011] 330 ITR 239 (SC). *The Supreme Court had in* Eli Lilly and Co. (India) P. Ltd. *directed the Assessing Officer to examine and find out whether interest had been paid or recovered for the period between the date on which tax was deductible till the date on which the tax was actually paid. The Tribunal hence directed the Assessing Officer also so to do, on the question of tax deduction as raised under issues (1), (4) and (5). On the question of the tax deduction under section 194J, the direction in* Bharti Cellular Ltd. *was followed in so far as directing examination of a technical expert to ascertain as to whether there was a human intervention which alone could lead to the TDS being deducted as has been laid down in* Bharti Cellular Ltd. *On appeal :*

Held, *that deduction of tax at source on rent on machinery or plant or equipment was introduced first by the Finance Act, 2007 with effect from June 1, 2007. Hence, for the period financial years 2003-04 to 2006-07, there could be no allegation of failure to deduct tax at source. For the hire charges and the rental charges, the issue assumed relevance only for the financial year 2007-08 which had to be looked into. Even before the amendment bringing in the proviso to section 201(1), there was a circular issued by the Central Board of Direct Taxes, which was referred to by the Supreme Court in* Hindustan Coca Cola Beverage P. Ltd. *v.* CIT [2007] 293 ITR 226 (SC). *The circular declared that no demand visualised under section 201(1) of the Income-tax Act should be enforced after the tax deductor had satisfied the officer in charge of tax deducted at source, that taxes due had been paid by the recipient. However, this will not alter the liability to charge interest under section 201(1A) of the Act till the date of payment of taxes by the recipient or the liability for penalty under section 271C of the Income-tax Act. On the tax deduction from payment of contracts, commission, rent, salary, professional and consultancy charges for the financial years 2003-04 to 2007-08, the assessee should produce sufficient evidence before the Tribunal as laid down in Circular No. 275/201/95-IT(B), dated January 29, 1997. The Tribunal should look into it and after verification, pass appropriate orders in terms of the directions of the Supreme Court in* Hindustan Coca Cola Beverage P. Ltd. *With respect to the payments of uplink charges and backhaul link usage charges, the Tribunal should examine an expert as produced by the assessee and the Department shall be permitted to cross examine the expert and produce any further evidence or witnesses on its behalf. The issue should be decided on the basis of the decision in* Bharti Cellular Ltd. *There could be no liability on hire charges and camera rental payments for the financial years 2003-04 to 2006-07.*

Cases referred to :

CIT *v.* Bharti Cellular Ltd. [2011] 330 ITR 239 (SC) (para 3)

CIT *v.* Eli Lilly and Co. (India) P. Ltd. [2009] 312 ITR 225 (SC) (para 3)

Hindustan Coca Cola Beverage P. Ltd. *v.* CIT [2007] 293 ITR 226 (SC) (para 10)

Income Tax Appeal Nos. 100, 104 to 112 of 2011.

P. K. R. Menon, Senior Counsel, Government of India (Taxes) and *Jose Joseph*, Standing Counsel, for Income-tax Department, for the appellant.

Joseph Markos, Senior Counsel and *Ramesh Cherian John,* Advocate, for the respondent.

JUDGMENT

The judgment of the court was delivered by

1 K. VINOD CHANDRAN J.—The Revenue is before this court against the order of the Income-tax Appellate Tribunal which remanded the issue for consideration to the Assessing Officer (AO). The question of law raised is reframed as follows :

> "Whether the Tribunal could have adopted the directions issued by the hon'ble Supreme Court in a decision where the facts or law therein are not applicable squarely to the facts of the present case ?"

2 I. T. A. Nos.100, 104, 105, 106 and 107 of 2011 arise from the orders passed under sub-sections (1) and (1A) of section 201 of the Income-tax Act, 1961 ("Act" for short). ITA Nos.108, 109, 110, 111 and 112 of 2011 arise from the orders of penalty passed under section 271C of the Act. The allegation against the assessee was with respect to there being no deduction of tax at source on the various transactions entered into by the assessee in the said years as also delay in payment of tax deducted at source (TDS) in certain instances. The transactions on which the allegations were raised were five in number :

(1) Tax deductions to be made from the payment against contracts, commission, rent, salary, professional and consultancy charges not deposited or deposited late for the aforesaid years.

(2) Tax deduction under section 194J as against payment of uplink charges.

(3) Tax deduction under section 194J from payment of backhaul link usage charges.

(4) Tax deduction on equipment hire charges and

(5) Tax deducted on camera rental payments.

3 The Tribunal followed the directions of the hon'ble Supreme Court in *CIT* v. *Eli Lilly and Co. (India) P. Ltd.* [2009] 312 ITR 225 (SC) and *CIT* v.

Bharti Cellular Ltd. [2011] 330 ITR 239 (SC) ; [2010] 234 CTR (SC) 146. The hon'ble Supreme Court had in *Eli Lilly* (surpa) directed the Assessing Officer to examine and find out whether interest has been paid or recovered for the period between the date on which tax was deductible till the date on which the tax was actually paid. The Tribunal hence directed the Assessing Officer in the present case also so to do, on the question of tax deduction as raised under issues (1), (4) and (5). On the question of the tax deduction under section 194J, the direction in *Bharti Cellular Ltd.* (supra) was followed in so far as directing examination of a technical expert to ascertain as to whether there is a human intervention which alone could lead to the TDS being deducted as has been laid down in *Bharti Cellular Ltd.* (supra).

The learned standing counsel, Government of India (Taxes) appearing **4**
for the Revenue would submit that the Tribunal ought not to have issued such directions as issued by the hon'ble Supreme Court. The Tribunal ought to have first examined whether the facts and law apply and only then could have directed the Assessing Officer to make an enquiry. It is pointed out that *Eli Lilly* (supra) arises in a totally different context where there was a dispute as to whether the home salary received by foreigners in their home State in foreign currency was assessable to tax within India as income arising in India. There was a bona fide dispute raised for the first time on which dispute the hon'ble Supreme Court answered finally by the above decision and in that context directed an enquiry into the payment of tax by the employee itself. This cannot have any application to the facts of the present case is the submission. On the question of deduction under section 194J, it is the submission that the Tribunal itself could have examined the expert and there was no requirement for a remand to the Assessing Officer.

We cannot but observe that the Tribunal being the fact finding authority **5**
ought to have looked into the facts without making a remand on the basis of the directions issued by the hon'ble Supreme Court. The Tribunal being a creature of the statute, cannot adopt the directions issued by the hon'ble Supreme Court without looking into the distinction on facts, on which the directions were issued as against the facts available in the case before it. The hon'ble Supreme Court's powers to issue directions cannot be assumed by the Tribunal to issue directions in a similar manner. In any event, we notice that the issues could be dealt with by the Tribunal itself.

Eli Lilly (supra) was a case in which the question arose as to whether **6**
the employees of the foreign company deputed to an Indian company are liable to tax for the amounts received as salary from the foreign company

paid in their home country, which was termed as home salary by the hon'ble Supreme Court. The first question to be decided was whether there was any liability on such expatriates ; who were at the time residing and working in India, for the amounts they received outside the country. The hon'ble Supreme Court found that section 9(1)(ii) speaks of tax liability on the amount accrued within India and the test to be applied is whether the payments of home salary paid abroad by the foreign company to the expatriates had any connection or nexus with his rendition of service in India. On facts, it was found that expatriates were working within India for the Indian company in the said period and were not at all discharging any duties for the foreign company. On reading sections 9(1)(ii) and 5(2)(b) it was held that income which falls under the head salaries, if it is deemed to accrue or arise in India, the same would be taxable even if it is paid to the expatriates at their home country in foreign currency. The hon'ble Supreme Court had also noticed that therein the recipient of salary was clearly identifiable and in such circumstances, there was a direction issued to the Assessing Officer to verify whether they had satisfied the tax even with respect to their home salary, in which event, the assessee was found to have been absolved from the liability. We cannot but observe that this decision was on the peculiar facts and cannot apply across the board with respect to all instances of failure to deduct and pay to the Government tax deducted at source.

7 We observe so especially looking at the decision of the hon'ble Supreme Court in *Eli Lilly* (supra) and the caveat made, at the outset itself, as hereinbelow (page 244 of 312 ITR) :

> "At the outset, we wish to clarify that our judgment is confined strictly to the question of deductibility of tax from the income chargeable under the head 'Salaries' under section 192(1). This introduction is important for the reason that unlike other sections in Chapter XVII-B regulating deduction of tax at source out of other payments, section 192 requires such deduction on 'estimated income' chargeable under the head 'Salary' and at the time of payment of salary." (para 22)

It is in this context that the hon'ble Supreme Court dealt with the scope of section 201(1) and 201(1A) finding the liability to be a vicarious liability especially noticing the master-servant relationship in so far as the assessee-company and the recipient of salary. We are unable to find a broad application of the principles laid down therein to every instance of failure to deduct tax at source. The decision on the scope of section 271C was also rendered on the peculiar facts arising therein, which was stated so (page 252 of 312 ITR) :

> "The concept of aggregation or consolidation of the entire income chargeable under the head "Salaries" being exigible to deduction of tax at source under section 192 was a nascent issue. It has not been considered by this court before. Further, in most of these cases, the tax deductor-assessee has not claimed deduction under section 40(a)(iii) in computation of its business income. This is one more reason for not imposing penalty under section 271C because by not claiming deduction under section 40(a)(iii), in some cases, higher corporate tax has been paid to the extent of Rs. 906.52 lakhs." (para 36)

The said principle on which the penalty under section 271C was avoided, would also not apply in the present case. In the circumstances, we are not convinced that there could be any remand, by the Tribunal, as has been made by the hon'ble Supreme Court in *Eli Lilly* (supra).

8 The further directions in the order of the Tribunal was relying upon *Bharti Cellular Ltd.* (supra) wherein the hon'ble Supreme Court had dealt with the cellular services provided, wherein there was no human intervention involved at all. If there was no such human intervention, there could be no fees for technical services was the specific finding. This also could be looked into by the Tribunal on examination of evidence as adduced by the assessee.

9 On the question of hire and rental charges, the learned senior counsel points out that the rent on machinery or plant or equipment was introduced first with the Finance Act, 2007 with effect from June 1, 2007. Hence, we are of the opinion that between financial years 2003-04 to 2006-07, there can be no allegation raised of failure to deduct tax at source. For the hire charges and the rental charges are concerned, the issue assumes relevance only for the financial year 2007-08 which has to be looked at.

10 On the question of tax deducted at source, the learned senior counsel also has a case that even before the present amendment bringing in the proviso to section 201(1), there was a circular issued by the Central Board of Direct Taxes, which was referred to by the hon'ble Supreme Court in *Hindustan Coca Cola Beverage P. Ltd.* v. *CIT* [2007] 293 ITR 226 (SC). The relevant paragraph is quoted hereunder (page 230 of 293 ITR) :

> "Be that as it may, Circular No. 275/201/95-IT(B) dated January 29, 1997, issued by the Central Board of Direct Taxes, in our considered opinion, should put an end to the controversy. The circular declares 'no demand visualized under section 201(1) of the Income-tax Act should be enforced after the tax deductor has satisfied the officer-in-charge of tax deducted at source, that taxes due have been paid by the deductee-assessee. However, this will not alter the liability to charge

interest under section 201(IA) of the Act till the date of payment of taxes by the deductee-assessee or the liability for penalty under section 271C of the Income-tax Act'."

11 On the tax deduction from payment of contracts, commission, rent, salary, professional and consultancy charges for the financial years 2003-04 to 2007-08, the assessee shall produce sufficient evidence before the Tribunal as has been laid down in Circular No. 275/201/95-IT (B) dated January 29, 1997. The Tribunal shall look into it and after verification, pass appropriate orders as per the directions of the hon'ble Supreme Court in *Hindustan Coca Cola Beverage P. Ltd.* (supra).

12 With respect to the payments of uplink charges and backhaul link usage charges, the Tribunal shall examine an expert as produced by the assessee and the Department shall be permitted to cross-examine the expert as also produce any further evidence or witnesses on their behalf. The issue shall be decided on the basis of the decision in *Bharti Cellular Ltd.* (supra). It is made clear that there can be no liability on hire charges and camera rental payments for the financial years 2003-04 to 2006-07. The order of the Assessing Officer as confirmed by the appellate authority is deleted for the said years. The Tribunal shall pass appropriate orders as per the directions issued. The income-tax appeals are remanded for fresh consideration as per the directions hereinabove.

13 The rental charges and hire or equipment charges shall be sustained only for the financial year 2007-08, the assessment year of which is 2008-09. However, the assessee shall be given an opportunity to produce sufficient evidence as per the circular aforementioned on which appropriate orders shall be passed on the liability of the assessee.

The income-tax appeals are partly allowed and remanded with the above directions. No order as to costs.

[2020] 423 ITR 503 (Bom)

[In the Bombay High Court — Panaji Bench]

PRINCIPAL COMMISSIONER OF INCOME-TAX

v.

ANDREW TELECOMMUNICATIONS P. LTD.

N. M. Jamdar and **Prithviraj K. Chavan** JJ.

July 16, 2018.

SS ▸ ITA 1961, s 144C
HF ▸ Assessee

Assessment—Draft assessment order—International transaction—Determination of arm's length price—Order under section 144C—Order set aside and fresh assessment ordered—Fresh draft assessment order necessary—Income-tax Act, 1961, s. 144C.

Appeal to Appellate Tribunal—Powers of Tribunal—Tribunal has power to admit additional ground of appeal—Income-tax Act, 1961.

Section 144C of the Income-tax Act, 1961 lays down a scheme for reference to the Dispute Resolution Panel. The Assessing Officer in the first instance forwards a draft of the proposed order of assessment to the eligible assessee if he proposes to make any variation in the income or loss which is prejudicial to the interests of the assessee. The issuance of a draft assessment order is not an empty formality. When a draft assessment order is passed and copy is given to the assessee, the assessee can raise objections before the Dispute Resolution Panel on any of the proposed variations. There is a right given to the assessee to object, and to have the objections considered not by the Assessing Officer, but by the Dispute Resolution Panel. There is nothing in the scheme of section 144C to infer that if proceedings were to be started afresh on remand, the draft assessment order need not be given.

The assessee filed its return of income declaring a loss. The assessment order was passed under section 143(3) on an income of Rs. 31,21,13,590 on the basis of the order passed by the Transfer Pricing Officer under section 92CA(3). The assessee filed its objection before the Dispute Resolution Panel. The Panel directed the Assessing Officer to modify the order. The Assessing Officer passed an order giving effect to the revised transfer pricing adjustment of Rs. 44,18,04,792. The assessee filed an appeal before the Tribunal against the order passed by the Assessing Officer under section 144C(13). Since the Transfer Pricing Officer had changed in the meanwhile, the

Tribunal held that the new Transfer Pricing Officer should have given hearing to the assessee and by an order set aside the assessment order. An appeal to the Commissioner (Appeals) was partly allowed. On further appeal to the Tribunal, the assessee raised the additional ground that after the remand, a fresh draft assessment order had not been passed. The Tribunal allowed the additional ground and held that the assessment was not valid. On appeal :

Held, *dismissing the appeal, (i) that a draft assessment order was an essential requirement of the scheme of section 144C and in view of the admitted factual position, the Tribunal was not in error in admitting the additional ground of appeal.*

(ii) That the Tribunal set aside the entire exercise and the matter was relegated to the Assessing Officer. Once the matter was sent back to be decided afresh it went back to the stage of section 144C(1) of the Act. Since the Tribunal set aside the proceedings on the ground of violation of the principles of natural justice, the first exercise was void and without jurisdiction. Therefore, nothing remained on the record, including the draft assessment order. Therefore, issuance of a draft assessment order was necessary. Proceedings were to be started afresh on remand. Non-issuance of the draft assessment order thus vitiated the final assessment order.

Cases referred to :

CIT (Deputy) *v.* Control Risks India Pvt. Ltd. (Special Leave Petition (Civil) No. 7090 of 2018) (para 14)

Control Risks India Pvt. Ltd. *v.* Deputy CIT (W. P. (C) No. 5722 of 2017, dated July 27, 2017) (para 14)

International Air Transport Association *v.* Deputy CIT [2016] 7 ITR-OL 227 (Bom) (para 14)

JCB India Ltd. *v.* Deputy CIT [2017] 398 ITR 189 (Delhi) (para 14)

National Thermal Power Co. Ltd. *v.* CIT [1998] 229 ITR 383 (SC) (para 12)

Turner International India Pvt. Ltd. *v.* Deputy CIT [2017] 398 ITR 177 (Delhi) (para 14)

Zuari Cement Ltd. *v.* Asst. CIT (W. P. (C) No. 5557 of 2012, dated 21-2-2013) (para 17)

Tax Appeal No. 144 of 2017.

Ms. Amira Razaq, Junior Central Government Standing Counsel, for the appellant.

Percy Pardiwala, Senior Advocate, with *Ms. Priyanka Kamat*, Advocate, for the respondent.

JUDGMENT

The judgment of the court was delivered by

N. M. Jamdar J.—The Revenue has filed this appeal taking exception to the order passed by the Income-tax Appellate Tribunal, Panaji, on January 21, 2016. By the impugned order, the Tribunal dismissed the appeal filed by the Revenue and confirmed the order passed by the Commissioner of Income-tax (Appeals) dated March 13, 2015. The assessee had filed cross-objection which the Tribunal allowed. 1

The respondent-assessee had taken an additional ground before the Tribunal that the order was passed by the Assessing Officer without forwarding a draft of the proposed order of assessment contrary to the procedure laid down under section 144C of the Income-tax Act. The Tribunal held that the factual assertion of the assessee was correct and the absence of draft assessment order goes to the root of the assessment. Consequently the Tribunal held the same in favour of the respondent-assessee. 2

In this appeal the Revenue contends that the order passed by the Tribunal is incorrect in view of the provisions of section 144C(13) of the Act and there is no need for a draft assessment order in the said sub-section and that the assessee never took any objection to the non-issuance of the draft order. It is also contended that if the matter is remanded, a draft assessment order is not necessary. These according to the Revenue are the substantial questions of law in the present appeal. 3

We have heard Ms. A. Razaq, learned standing counsel for the appellant-Revenue and Mr. P. Pardiwala, learned senior advocate for the respondent-assessee. 4

Since the appeal raises a question relating to section 144C of the Income-tax Act, a brief overview of this provision is necessary. Section 144C lays down a scheme for reference to Dispute Resolution Panel. The Assessing Officer at the first instance forwards a draft of the proposed order of assessment to the eligible assessee if he proposes to make any variation in the income or loss which is prejudicial to the interest of the assessee. Once such a draft order is received, the assessee can, within 30 days accept the variations or file his objections to the Dispute Resolution Panel. If the assessee accepts the variations or no objections are received within a period specified, the Assessing Officer proceeds to complete the assessment on the basis of draft order. When an objection is lodged with the Dispute Resolution Panel, the Dispute Resolution Panel issues necessary directions for the guidance of the Assessing Officer. Before passing any directions, the Dispute Resolution Panel takes into consideration 5

the draft order, the objections, evidence furnished by the assessee, report of the Transfer Pricing Officer, the Assessing Officer or Valuation Officer as the case may be, the record relating to the draft order, the evidence collected by the Panel, and the result of the enquiry. The Dispute Resolution Panel may confirm, reduce or enhance the variations. Direction issued by the Dispute Resolution Panel is binding on the Assessing Officer. Before issuing any directions, the Dispute Resolution Panel is required to give opportunity of hearing. After such directions are received from the Dispute Resolution Panel, the Assessing Officer proceeds to complete the assessment under section 144C(13) of the Act. If the Assessing Officer proceeds to complete the assessment pursuant to the directions issued by the panel under section 144C(13), he is not required to give further opportunity of hearing to the assessee. This is broadly the scheme of section 144C.

6 Turning now to the facts of the case at hand, the assessee is in the business of manufacturing and assemblying of telecommunication cables, wave-guides, connector antennas and accessories and also trades in the related products. The assessee filed its return of income on November 29, 2006 declaring a loss of Rs. 14,93,68,912. The assessment order was passed under section 143(3) on December 16, 2009 on an income of Rs. 31,21,13,590 on the basis of the order passed by the Transfer Pricing Officer under section 92CA(3) dated October 30, 2009. The Transfer Pricing Officer concluded that the excess payment being adjustment under section 92CA in the manufacturing segment towards the purchase of goods from the associated enterprises was at Rs. 50,50,38,712 and the income derived from the industrial undertaking was at Rs. 14,66,97,731 against returned loss of Rs. 35,83,40,981.

7 The assessee filed its objection before the Dispute Resolution Panel on January 28, 2010. The Panel, by order dated September 24, 2010, directed the Assessing Officer to modify the order passed on arm's length price by the Transfer Pricing Officer. The Transfer Pricing Officer, by its order dated October 29, 2010, directed the transfer pricing adjustment be made under section 92CA at Rs. 44,18,04,792. The Assessing Officer passed an order on November 24, 2010, giving effect to the revised transfer pricing adjustment of Rs. 44,18,04,792.

8 The assessee filed an appeal before the Income-tax Appellate Tribunal against the order passed by the Assessing Officer under section 144C(13) dated November 24, 2010. Since the Transfer Pricing Officer had changed in the meanwhile, the Tribunal held that the new Transfer Pricing Officer

should have given hearing to the assessee and by order dated October 1, 2012 set aside the assessment order dated November 24, 2010.

9 The matter was sent back to the Transfer Pricing Officer who gave hearing to the assessee and passed a fresh order on January 30, 2014. Thereafter, the Assessing Officer, without issuing any draft assessment order, proceeded to pass an order on February 2, 2015. The assessee challenged the said order before the Commissioner of Income-tax (Appeals) and the appeal was partly allowed by the Commissioner of Income-tax (Appeals) by order dated March 13, 2015. As against this order, the Revenue filed the Income Tax Appeal No. 271 of 2015 before the Income-tax Appellate Tribunal and the assessee filed a Cross Objection No. 62 of 2015.

10 Before the Tribunal, the assessee filed an additional ground on September 4, 2015, which reads thus :

> "The Assessing Officer has erred in passing the assessment order dated March 12, 2014 without forwarding a draft of the proposed order of assessment to the assessee and thereby not following the procedure laid down in section 144C of the Income-tax Act, 1961. The appellant submits the order dated March 12, 2014 is void, bad in law, non est and a nullity."

The Tribunal entertained the additional ground and disposed of the appeal with the following observations :

> "10. We have considered the rival submissions. As it is noticed that the draft assessment order has not been produced before us to counter the specific allegations in respect of non-availability of the draft assessment order, we are of the view that the assessment order passed is liable to be annulled, respectfully following the decision of the hon'ble Andhra Pradesh High Court in the case of *Zuari Cement Ltd.* (supra), wherein it has been held that where the assessment order has been passed contrary to the mandatory provisions of section 144C of the Act and violation thereof, the assessment order is liable to the declared as one without jurisdiction, null and void and unenforceable."

11 It was an admitted position before the Tribunal and so also in this court that before the order was passed by the Assessing Officer on February 2, 2015, no draft assessment order was given. The question that is debated before us is whether it was necessary.

12 As regards the admission of the additional ground before the Tribunal, the Tribunal had relied on the decision of the Supreme Court in the case of *National Thermal Power Co. Ltd.* v. *CIT* [1998] 229 ITR 383 (SC). As stated

earlier, there is no factual dispute that there was no draft assessment order. A draft assessment order is an essential requirement of the scheme of section 144C and in view of the admitted factual position, the Tribunal was not in error in admitting the additional ground.

13 Ms. Razaq, the learned standing counsel contended that since the proceedings themselves show that the order was passed under section 144C(13) and as per the scheme of the section there was no requirement of any draft assessment order. It was also submitted that upon remand it is not necessary to issue draft assessment order again.

14 Mr. Pardiwala contended that a draft assessment order ought to have been issued and upon failure of the Officer to do so the assessee has lost a valuable right. Mr. Pardiwala submitted that, when the Dispute Resolution Panel sent the proceedings back to the Transfer Pricing Officer, categorical observations were made that the order was passed in violation of the principles of natural justice and exercise had to be taken afresh. He submitted that therefore the earlier draft assessment order did not exist and a fresh draft order had to be issued and the failure has vitiated the further proceedings and, therefore, there is no error in the order passed by the Tribunal and no question of law arises. Mr. Pardiwala relied upon the decisions in the case of the *Deputy CIT* v. *Control Risks India Pvt. Ltd.* (Special Leave Petition (Civil) No. 7090 of 2018) ; *Control Risks India Pvt. Ltd.* v. *Deputy CIT* (W. P. (C) No. 5722 of 2017 and C. M. No. 23860 of 2017 (Stay) dated July 27, 2017), *International Air Transport Association* v. *Deputy CIT* [2016] 7 ITR-OL 227 (Bom) ; W. P. (L) No. 351 of 2016 dated February 18, 2016 ; *JCB India Ltd.* v. *Deputy CIT* [2017] 398 ITR 189 (Delhi) ; W. P. (C) No. 3399 of 2016 dated September 7, 2017 and *Turner International India Pvt. Ltd.* v. *Deputy CIT* [2017] 398 ITR 177 (Delhi) ; W. P. (C) No. 4260 of 2015, dated May 17, 2017.

15 It is settled law that mere wrong reference to a provision in the order cannot be determinative of the source of power. Questions which therefore arise for consideration are as follows. Firstly, what was the effect of not issuing the draft assessment order by the Assessing Officer. Secondly, when the proceedings were remanded whether a draft assessment order was required to be issued. Thirdly, whether the order of the Assessing Officer could be said to be an order under section 144C(13).

16 We have gone through the order of the Tribunal dated October 1, 2012 by which the proceedings were remanded. The Tribunal noted that during the course of the proceedings, a new Transfer Pricing Officer took charge of the assessee's case and he passed an order without issuing any show cause and without hearing the assessee. The Tribunal upheld the grievance

of the assessee that a notice ought to have been issued when the new Transfer Pricing Officer took charge by observing thus :

> "11. In view of the aforesaid decision of the hon'ble Supreme Court and the other case law, we are of the view that the new Transfer Pricing Officer should have given a show-cause notice and also the copy of the material gathered by him which he wanted to use against the assessee prior to making adjustment. There is clear cut violation of principles of natural justice. We, accordingly, set aside the assessment order and restore the matter back to the file of the Assessing Officer in the interest of justice and fair play to both the parties as in our opinion no prejudice shall be caused to either of the parties if matter is restored to the file of the Assessing Officer. The Assessing Officer is directed to pass a fresh order in accordance with law after providing adequate and sufficient opportunity of being heard on the various objections and then decide the matter afresh in accordance with law."

Thus, the Tribunal set aside the assessment order and restored the matter back to the file of the Assessing Officer. Ms. Razaq raised a contention that the order of the Panel was not set aside. In paragraph 10 of the order the Tribunal had adverted to this issue. After reaching the conclusion that the assessment has to be set aside, the Tribunal considered to which authority it should be sent to. In that context, the Tribunal noted that even the Dispute Resolution Panel had not dealt with all objections including the objections regarding the denial of natural justice. Therefore, the Tribunal found it necessary that the matter should be de novo considered by the Assessing Officer. It is in this context the matter was relegated to the stage of section 144C(1). Further proceedings were therefore not under section 144C(13) as the entire exercise was set aside to be started afresh. Therefore the contention that the order passed thereafter was under section 144C(13), cannot be accepted.

In the case of *International Air Transport Association*, the Division **17**
Bench of this court has held that the order passed by the Assessing Officer without there being any draft assessment order is illegal and without jurisdiction. The same view has been reiterated in the case of *Zuari Cement Ltd.* v. *Asst. CIT* W. P. (C) No. 5557 of 2012, dated February 21, 2013 (AP) by the Division Bench of the Andhra Pradesh High Court which also held that the failure to pass a draft assessment order under section 144C(1) of the Act would result in rendering the final assessment as one without jurisdiction. This position of law is settled.

18 Now to consider whether after remand, it was necessary to issue a draft assessment order. Firstly, the issuance of a draft assessment order is not an empty formality. When a draft assessment order is passed and copy is given to the assessee, the assessee can raise objections before the Dispute Resolution Panel on any of the proposed variations. There is a right given to the assessee to object, and to have the objections considered not by the Assessing Officer, but by the Dispute Resolution Panel.

19 The Tribunal, by order dated October 1, 2012, set aside the entire exercise and the matter was relegated to the Assessing Officer. Once the matter was sent back to be decided afresh it went back to the stage of section 144C(1) of the Act. Since the Tribunal set aside the proceedings on the ground of violation of principles of natural justice, the first exercise was void and without jurisdiction. Therefore, nothing remained on the record, including the draft assessment order. Therefore, issuance of a draft assessment order was necessary. We do not find from the scheme of section 144C that if the proceedings were to be started afresh on remand, the draft assessment order is not required to be given. Non-issuance of the draft assessment order has thus vitiated the final assessment order.

20 In the case of *JCB India*, the Division Bench of the Delhi High Court in identical circumstances has held that after the remand on facts, the draft assessment order was necessary.

21 The view taken by the Tribunal in the impugned order that for want of issuance of draft order, the assessment order is without jurisdiction, cannot be faulted with. No substantial question of law arises in the present appeal. The appeal is dismissed.

[2020] 423 ITR 510 (Delhi)

[IN THE DELHI HIGH COURT]

TROPEX PROMOTION AND TRADING LTD.

v.

COMMISSIONER OF INCOME-TAX

DR. S. MURALIDHAR and **I. S. MEHTA** JJ.

April 1, 2019.

SS ▸ ITA 1961, ss 68, 147, 148
AY ▸ 1986-87
HF ▸ Assessee

REASSESSMENT—NOTICE—REASON TO BELIEVE THAT INCOME HAD ESCAPED ASSESSMENT—NOTICE BASED ON DISALLOWANCES MADE IN

ASSESSMENT FOR SUBSEQUENT YEAR—NO INFORMATION AVAILABLE WITH ASSESSING OFFICER SPECIFIC TO ASSESSMENT YEAR FOR WHICH NOTICE ISSUED—REASSESSMENT ORDER INVALID—INCOME-TAX ACT, 1961, SS. 68, 147, 148.

During the assessment proceedings under section 143(3) of the Income-tax Act, 1961 for the assessment year 1987-88, the Assessing Officer made disallowances on account of introduction of share capital, expenses for maintenance of an office and losses in the sale and purchases of shares. On the basis of the assessment for the year 1987-88, he issued a notice under section 148 for reopening the assessment for the assessment year 1986-87 under section 147 on the ground that income had escaped assessment on those three accounts and passed a reassessment order adding those amounts to the income of the assessment year 1986-87. The Commissioner (Appeals) and the Tribunal affirmed the reassessment order. On appeal :

Held, *allowing the appeal, that there was no information available with the Assessing Officer specific to the assessment year 1986-87 on the basis of which he could have formed a belief that income of the assessee had escaped assessment under section 147. The reasons for reopening the assessment did not make any reference whatsoever to any "information" in the possession of the Assessing Officer that persuaded him to form the belief that income had escaped assessment. The only "information" available with him was the assessment order for the assessment year 1987-88, and no additions were made to the income of the assessee then. If that was the only basis for the reopening it was not permissible. The jurisdictional requirement of section 147(b) as it stood at the relevant time was not fulfilled. The initiation of reassessment under section 147 was invalid. The additions made by the Assessing Officer under section 68 on account of the additional share capital amount was to be set aside.*

ITO *v.* LAKHMANI MEWAL DAS [1976] 103 ITR 437 (SC) *relied on*.

Cases referred to :

Clagett Brachi Co. Ltd. *v.* CIT [1989] 177 ITR 409 (SC) (para 10)

CIT *v.* Kelvinator of India Ltd. [2010] 320 ITR 561 (SC) (para 9)

HCL Technologies Ltd. *v.* Deputy CIT [2017] 397 ITR 469 (Delhi) (para 9)

ITO *v.* Lakhmani Mewal Das [1976] 103 ITR 437 (SC) (para 16)

Kalyanji Mavji and Co. *v.* CIT [1976] 102 ITR 287 (SC) (para 10)

Max Ventures Investment Holdings P. Ltd. *v.* ITO [2019] 415 ITR 395 (Delhi) (para 10)

Oracle India Pvt. Ltd. *v.* Asst. CIT [2017] 397 ITR 480 (Delhi) (para 9)

Phool Chand Bajrang Lal *v.* ITO [1993] 203 ITR 456 (SC) (para 10)

Unitech Ltd. *v.* Deputy CIT [2017] 397 ITR 547 (Delhi) (para 9)

I. T. A. No. 30 of 2001.

Inder Paul Bansal with *Vivek Bansal*, Advocates, for the appellant.

Ruchir Bhatia, Senior Standing Counsel, for the respondent.

JUDGMENT

The judgment of the court was delivered by

1 DR. S. MURALIDHAR J.—This appeal under section 260A of the Income-tax Act, 1961 is filed by the assessee and is directed against an order dated August 31, 2000 passed by the Income-tax Appellate Tribunal ("ITAT") in ITA No. 7484 of 1992 for the assessment year 1986-87. While admitting this appeal on January 15, 2002, the following questions were framed for consideration by this court :

> "1. Whether on the facts of the case borne on record, the Appellate Tribunal was right in law in upholding the legal validity of the action of the Assessing Officer in initiating reassessment proceedings against the assessee-appellant company for the assessment year 1986-87 under section 147/148 of the Income-tax Act, 1961 for its alleged income of Rs. 76,61,408 on the basis of the observations/ statements of the Assessing Officer in the note recorded by him under the provisions of sub-section (2) of section 148 of the Act, by way of the reasons for initiating the reassessment proceedings ?
>
> 2. Whether on the facts of the case borne on the record, the Appellate Tribunal was right in law in upholding the assessment of the assessee-appellant company under section 68 of the Income-tax Act, 1961, in its reassessment to income-tax under section 147/148 of the Act for the assessment year 1986-87 on an amount of Rs. 75 lakhs, being the amount received by it from the subscribers to its additional share capital raised in its rights issue during the relevant previous year, duly accounted for in its audit books and shown as such in the audited balance-sheet of the said year, on the reasoning that the assessee-company had failed to prove the identity of the share subscribers and their creditworthiness ?"

2 The background facts in brief are that for the assessment year in question, i.e., 1986-87 the return filed by the assessee was picked up for scrutiny. An assessment order was passed on February 16, 1989 by the Assessing Officer under section 143(3) of the Act. During the course of that

the respondent as per note on e-proceedings and the Commissioner (Appeals) has ample powers to pass appropriate orders.

I have considered the arguments advanced on behalf of the petitioner and the respondent. **12**

I have also perused the records filed by the petitioner which precede the passing of the impugned order. As on October 31, 2016 the petitioner has claimed a closing cash of Rs. 38,72,374. The closing cash on hand during the preceding months of the same year is not much in variance with the closing cash on hand as on October 31, 2016. Similarly, during the same period in 2015 also the petitioner has declared amounts similar to the closing cash on hand. For a comparison, the closing cash on hand for the two periods are extracted as under : **13**

	Cash collection Rs.		*Cash deposited Rs.*		*Closing cash on hand Rs.*	
Month	*2015*	*2016*	*2015*	*2016*	*2015*	*2016*
April	97,77,272	22,98,947	80,74,280	80,07,495	3,48,565	2,19,545
May	1,03,23,853	94,16,184	86,09,412	83,18,302	4,82,349	2,75,223
June	1,01,11,274	98,74,688	84,20,104	89,45,100	2,59,214	3,65,133
July	1,00,50,864	93,50,936	78,53,584	86,68,592	2,97,132	4,33,907
August	95,56,583	90,61,621	78,25,801	85,17,878	2,50,891	4,63,886
September	1,03,20,523	89,97,606	88,20,844	82,95,792	2,33,493	2,51,029
October	1,12,45,212	1,23,30,140	90,57,158	75,86,046	2,63,149	38,72,374
November	21,91,998	57,85,655	17,29,735	26,77,716	5,04,612	69,11,913

The Government of India demonetized Rs. 500 and Rs. 1,000 notes on November 8, 2016. Between November 1, 2016 and November 8, 2016, the petitioner had collected a sum of Rs. 57,85,655 which also does not appear to be unusual as compared to collections made during November 2015. Out of the total collection of Rs. 57,85,655 and a closing cash of Rs. 38,72,374 as on October 31, 2016, the petitioner deposited an amount of Rs. 26,77,716 which is also not in variance with the cash deposits made by the petitioner during the preceding financial year. Collection of monthly subscription/dues by the petitioner during the aforesaid period appear to be reasonable as compared to the same period during 2015. **14**

The Government of India has introduced e-governance for conduct of assessment proceedings electronically. It is a laudable step taken by the Income-tax Department to pave way for an objective assessment without human interaction. At the same time, such proceedings can lead to erroneous assessment if the Officers are not able to understand the transactions and the statement of accounts of an assessee without a personal **15**

hearing. The respondent should have to be therefore, at least called for an explanation in writing before proceeding to conclude that the amount collected by the petitioner was unusual.

16 In my view, the petitioner has prima facie demonstrated that the assessment proceeding has resulted in a distorted conclusion on facts that the amount collected by the petitioner during the period was huge and remained unexplained by the petitioner and therefore the same was liable to be treated as unaccounted money in the hands of the petitioner under section 69A of the Income-tax Act, 1961. Therefore, the impugned order making the petitioner liable to tax at the maximum marginal rate of tax by invoking section 115BBE of the Income-tax Act, 1961 placing reliance on the decision of the honourable Supreme Court in *Smt. Shrilekha Banerjee* v. *CIT* [1963] 49 ITR (S.C.) 112 ; AIR 1964 SC 697 appears to be misplaced.

17 Since the assessment proceedings no longer involve human interaction and is based on records alone, the assessment proceeding should have commenced much earlier so that before passing the assessment order, the respondent-Assessing Officer could have come to a definite conclusion on facts after fully understanding the nature of business of the petitioner. It appears that the return of income was filed by the petitioner on November 2, 2017. However, the assessment proceeding commenced much later towards the end of the period prescribed under section 153 of the Income-tax Act, 1961. In my view, the assessment proceeding under the changed scenario would require proper determination of facts by proper exchange and flow of correspondence between the petitioner and the respondent-Assessing Officer.

18 Under these circumstances, the impugned order is set aside and the case is remitted back to the respondent to pass a fresh order within a period of sixty days from the date of receipt of a copy of this order. The petitioner shall file additional representation if any by treating the impugned order as the show-cause notice within a period of thirty days from the date of receipt of a copy of this order. Since the Government of India has done away with the human interaction during the assessment proceedings, it is expected that the petitioner will clearly explain its stand in writing so that the respondent-Assessing Officer can come to an objective conclusion on facts based on the records alone. It is made clear that the respondent will have to come to an independent conclusion on facts uninfluenced by any of the observations contained herein.

19 The writ petition stands allowed with the above observation. No cost. Consequently, connected miscellaneous petitions are accordingly closed.

[2020] 423 ITR 531 (Bom)

[IN THE BOMBAY HIGH COURT]

GAURAV TRIYUGI SINGH

v.

INCOME-TAX OFFICER

UJJAL BHUYAN and MILIND N. JADHAV JJ.

January 22, 2020.

SS ▸ ITA 1961, s 68
AY ▸ 2010-11
HF ▸ Assessee

CASH CREDIT—BURDEN OF PROOF—IDENTITY AND CREDITWORTHINESS OF CREDITOR AND GENUINENESS OF TRANSACTION—ASSESSEE DISCHARGING ONUS BY SATISFYING ALL THREE CONDITIONS—ASSESSEE NOT BOUND TO EXPLAIN SOURCES OF SOURCE—ADDITION OF UNSECURED LOAN AS UNDISCLOSED CASH NOT JUSTIFIED—INCOME-TAX ACT, 1961, S. 68.

Under section 68 of the Income-tax Act, 1961 if an amount is credited in the books of an assessee and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax, as the income of the assessee of the relevant previous year. It is necessary for an assessee to prove prima facie the transaction which results in a cash credit in his books of account. Thus, in order to establish receipt of credit in cash, according to requirement of section 68, the assessee has to explain or satisfy three conditions, namely : (i) identity of the creditor ; (ii) genuineness of the transaction ; and (iii) creditworthiness of the creditor. There is no requirement under the law to explain the source of the source.

During the assessment proceedings, the Assessing Officer found that the assessee had taken an unsecured loan of Rs. 17 lakhs from a creditor ST. The assessee submitted the required loan confirmation, copy of the returns of income and bank statements of the creditor ST. The Assessing Officer was not satisfied and was of the view that the genuineness of the loan was not established by the assessee and that the creditworthiness of the creditor was suspected. Consequently, he added back the amount of Rs. 17 lakhs to the income of the assessee under section 68 as unexplained cash credit. The creditor ST claimed that the amounts lent were received from her sister and brother by way of gifts. The Commissioner (Appeals) confirmed the order of the Assessing Officer. The Tribunal held that out of Rs. 17 lakhs loan given by the creditor ST to the assessee, the loan amount of Rs. 3 lakhs was properly explained

as the assessee had proved the genuineness of the transaction, and the creditworthiness and identity of the creditor. However, the Tribunal upheld the disallowance of the balance amount of Rs. 14 lakhs on the ground that it was full of doubt and the explanation provided by the assessee could not be accepted. On appeal :

Held, *allowing the appeal, that there was no dispute as to the identity of the creditor and the genuineness of the transaction. That apart, the creditor had explained how the credit was given to the assessee. Thus the assessee had discharged the onus which was on him according to the requirement of section 68. What the Assessing Officer had held was that sources of the source were suspect, i. e., he suspected the two sources of the creditor. The Department had made verifications in respect of the donors to the creditor. In view of the discharge of the burden by the assessee, the burden shifted to the Department which could not prove or bring any material to impeach the source of the credit. Though the Department had contended that the creditor had no regular source of income to justify the advancement of the credit to the assessee, the assessee had discharged the onus which was on him to explain the three requirements. It was not required for the assessee to explain the sources of the source of the creditor who provided the money to the assessee. The Tribunal was not justified in sustaining the addition of Rs. 14 lakhs to the income of the assessee as undisclosed cash credit under section 68.*

PRINCIPAL CIT *v.* VEEDHATA TOWER PVT. LTD. [2018] 403 ITR 415 (Bom) *relied on*.

PRINCIPAL CIT *v.* VEEDHATA TOWER PVT. LTD. [2018] 403 ITR 415 (Bom) (para 14) *referred to*.

Income Tax Appeal No. 1750 of 2017.

Dharam V. Gandhi, Advocate, for the appellant.

Sham Walve, Standing Counsel, along with *Pritesh Chatterjee*, Advocate, for the respondent.

JUDGMENT[1]

1 Heard Mr. D. V. Gandhi, learned counsel for the appellant and Mr. Sham Walve, learned standing counsel, Revenue for the respondent.

2 Considering the subject matter of the appeal, we are of the view that the same can be disposed of at this stage itself. Consequently, notice is made returnable forthwith and by consent of the parties, appeal is taken up for final disposal.

1. Oral judgment.

This appeal has been preferred by the assessee under section 260A of the Income-tax Act, 1961, assailing the legality and correctness of the order dated May 11, 2017 passed by the Income-tax Appellate Tribunal, Mumbai Bench "G", Mumbai (Tribunal) in Income Tax Appeal No. 6160/Mum/2016 for the assessment year 2010-11. 3

The short point for consideration in this appeal is the addition of a sum of Rs. 14 lakhs to the income of the assessee by the Assessing Officer under section 68 of the Income-tax Act, 1961 (briefly, "the Act" hereinafter), as modified by the Tribunal. 4

The assessee is an individual and for the assessment year under consideration, he filed a return of income disclosing total income of Rs. 17,04,320. During the assessment proceedings, the Assessing Officer found that the assessee had taken unsecured loan from, amongst others, Smt. Savitri Thakur of an amount of Rs. 17,04,320. The assessee was asked to submit loan confirmation as well as copy of the returns of income and bank statements of Smt. Savitri Thakur. Though those were submitted, the Assessing Officer was not satisfied and took the view that the genuineness of the loan was not established by the assessee ; besides the credit worthiness of Smt. Savitri Thakur was found to be suspect. Consequently, the aforesaid amount of Rs. 17 lakhs was added back to the total income of the assessee under section 68 of the Act as unexplained cash credit vide assessment order dated March 22, 2013. 5

As against the above, the assessee preferred an appeal before the Commissioner of Income-tax (Appeals)-42, Mumbai. By an order dated July 4, 2016, the appellate authority upheld and confirmed the order of the Assessing Officer. 6

The assessee carried the matter further in appeal before the Tribunal. Out of Rs. 17 lakhs loan given by Smt. Savitri Thakur to the assessee, the Tribunal held that the loan amount of Rs. 3 lakhs was properly explained as the assessee had proved the genuineness of the transaction, creditworthiness and identity of the creditor. However, regarding the balance amount of Rs. 14 lakhs, the Tribunal held that the source of the said amount was full of doubts and the explanation provided by the assessee could not be accepted. Accordingly the addition of Rs. 14 lakhs was upheld while deleting the addition of Rs. 3 lakhs vide order dated May 11, 2017. 7

Aggrieved, the present appeal has been preferred. 8

Though a number of questions have been proposed by the appellant as substantial questions of law, we find that the following question covers the controversy in question, which is as under : 9

"Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in upholding the addition in respect of unsecured loan of Rs. 14,00,000 under section 68 of the Act, in spite of the fact that the initial onus laid down on the appellant was duly discharged ?"

10 The submissions made have been considered.

11 Regarding Smt. Savitri Thakur, it is seen that she had issued cheque payment of Rs. 14 lakhs dated July 21, 2009 to the appellant. Prior to the issuance of the cheque, this amount was credited into the bank account of Smt. Savitri Thakur maintained in the State Bank of India, Rae Baraeli Branch. There were three transfers of Rs. 5 lakhs, Rs. 5 lakhs and Rs. 4 lakhs into the above account of Smt. Savitri Thakur before the issue of cheques by her to the assessee. Smt. Savitri Thakur claimed that these amounts were received by her as gifts from one Shri Rajendra Bahadur Singh and Smt. Sarojini Thakur. Shri Rajendra Bahadur Singh is the brother of Smt. Savitri Thakur and Smt. Sarojini Thakur is the sister of Smt. Savitri Thakur. Shri Rajendra Bahadur Singh had gifted Rs. 5 lakhs to Smt. Savitri Thakur and Smt. Sarojini Thakur had gifted Rs. 5 lakhs and Rs. 4 lakhs to Smt. Savitri Thakur. The result of verification and remarks by the Department in respect of Shri Rajendra Bahadur Singh is as under :

"The donor had retired in 2003 and claims to earn tuition income of Rs. 1.5 lakhs per annum and this money has been claimed to have been hoarded and kept in cash by him over several years and he claims that out of this accumulation he deposited a sum of Rs.5,00,000 in cash in his bank account with State Bank of India, Rae Baraeli on July 20, 2009 and it was transferred to Savitri Thakur on July 20, 2009. The donor has not filed any income-tax return."

11.1. Similarly in respect of Smt. Sarojini Thakur, the result of verification and remarks by the Department is as under :

"This donor has ostensibly retired from service in 2007 and she has deposited cash of Rs. 9,00,000 in her bank with State Bank of India, Rae Baraeli on July 18, 2009 before issuing two cheques to Savitri Thakur. She has not filed any return of income admittedly from the assessment year 2008-09. She also claims to receive agricultural income of Rs. 1.5 lakhs per annum which is claimed to be kept in cash with her since several years."

12 At this stage, it would be apposite to advert to section 68 of the Act, relevant portion of which reads as under :

"68. *Cash credits.*—Where any sum is found credited in the books of an assessee maintained from any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income - tax as the income of the assessee of that previous year."

12.1. From a reading of section 68, as extracted above, it is seen that if an amount is credited in the books of an assessee maintained from any previous year and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax, as the income of the assessee of the relevant previous year.

Section 68 of the Act has received considerable attention of the courts. It **13** has been held that it is necessary for an assessee to prove prima facie the transaction which results in a cash credit in his books of account. Such proof would include proof of identity of the creditor, capacity of such creditor to advance the money and lastly, genuineness of the transaction. Thus, in order to establish receipt of credit in cash, as per requirement of section 68, the assessee has to explain or satisfy three conditions, namely : (i) identity of the creditor ; (ii) genuineness of the transaction ; and (iii) creditworthiness of the creditor.

In *Principal CIT* v. *Veedhata Tower Pvt. Ltd.* [2018] 403 ITR 415 (Bom) **14** this court has held that the assessee is only required to explain the source of the credit. There is no requirement under the law to explain the source of the source. In the instant case, there is no dispute as to the identity of the creditor. There is also no dispute about the genuineness of the transaction. That apart, the creditor has explained as to how the credit was given to the assessee. Thus the assessee had discharged the onus which was on him as per the requirement of section 68 of the Act. What the Assessing Officer held was that the sources of the source were suspect, i.e., he suspected the two sources, Shri Rajendra Bahadur Singh and Smt. Sarojini Thakur of the source of Smt. Savitri Thakur.

In view of discharge of burden by the assessee, the burden shifted to the **15** Revenue ; but Revenue could not prove or bring any material to impeach the source of the credit. Though Mr. Walve, learned standing counsel, has pointed out that the creditor had no regular source of income to justify the advancement of the credit to the assessee, we are of the view that the assessee had discharged the onus which was on him to explain the three requirements, as noted above. It was not required for the assessee to explain the sources of the source. In other words, he was not required to

explain the sources of the money provided by the creditor Smt. Savitri Thakur, i. e., Shri Rajendra Bahadur Singh and Smt. Sarojini Thakur.

16 Considering the above, we are of the view that the Tribunal was not justified in sustaining the addition of Rs. 14 lakhs to the total income of the assessee as undisclosed cash credit under section 68 of the Act.

17 Consequently, the finding of the Tribunal to the above extent is set aside. The question framed is answered in favour of the assessee and against the Revenue.

18 The appeal is accordingly allowed but with no order as to cost.

[2020] 423 ITR 536 (Bom)

[IN THE BOMBAY HIGH COURT]

PRINCIPAL COMMISSIONER OF INCOME-TAX

v.

AKER POWERGAS PVT. LTD.

UJJAL BHUYAN and **MILIND N. JADHAV** JJ.

January 20, 2020.

SS ▶ ITA 1961, s 37
AY ▶ 2009-10
HF ▶ Assessee

BUSINESS EXPENDITURE—CAPITAL OR REVENUE EXPENDITURE—COMPUTER SOFTWARE EXPENSES—FINDING THAT PAYMENT WAS FOR ACTUAL USE OF SOFTWARE AND NOT FOR ACQUISITION OF SOFTWARE—EXPENSES INCURRED CANNOT BE TREATED AS CAPITAL IN NATURE—JUSTIFIED—INCOME-TAX ACT, 1961, S. 37.

BUSINESS EXPENDITURE—CAPITAL OR REVENUE EXPENDITURE—LEGAL EXPENSES INCURRED IN CONNECTION WITH SALE OF CAPITAL ASSETS—EXPENSES REVENUE IN NATURE—INCOME-TAX ACT, 1961, S. 37.

The Tribunal treated computer software expenses to be revenue in nature, on the ground that the amount was paid on the basis of actual use of the software and not for acquisition of the software. The Tribunal also allowed legal expenses incurred in connection with the sale of capital asset under section 37 of the Income-tax Act, 1961 holding that the expenses were in connection with structuring of the transaction and related aspects and were incurred in the course of the business and for its operations, though the specific issue on which advice was sought pertained to the sale transaction, taking the view that merely because the transaction in question related to a capital asset, the

legal expenses incurred therefor would not ipso facto become capital expenditure. On appeal :

Held, *dismissing the appeal, (i) that the Tribunal was justified in treating the computer software expenses to be revenue in nature.*

(ii) That there was no error or infirmity in the view taken by the Tribunal. No question of law arose.

Cases referred to :

Amway India Enterprises *v.* Deputy CIT [2008] 301 ITR (A.T.) 1 (Delhi) [SB] (para 4)

CIT *v.* Bush Boake Allen (India) Ltd. [1982] 135 ITR 306 (Mad) (paras 8, 9)

CIT *v.* Kisenchand Chellaram (India) (P.) Ltd. [1981] 130 ITR 385 (Mad) (para 8)

India Cements Ltd. *v.* CIT [1966] 60 ITR 52 (SC) (paras 8, 9)

Income Tax Appeal (IT) No. 1276 of 2017.

Suresh Kumar for the appellant.

Girish Dave instructed by *Sameer Dalal* for the respondent.

JUDGMENT

Heard learned counsel for the parties. 1

This is an appeal under section 260A of the Income-tax Act, 1961 (briefly "the Act" hereinafter) assailing the order of the Income-tax Appellate Tribunal, Mumbai "K" Bench, Mumbai (briefly "the Tribunal" hereinafter) dated April 6, 2016 in Income Tax Appeal Nos. 1766/Mum/2014 and 1355/Mum/2014 for the assessment year 2009-10. 2

The appeal has been filed on the following three questions stated to be substantial questions of law :- 3

> "(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in treating computer software expenses of Rs. 5,82,62,091 to be revenue in nature without examining the agreement between Aker Norway and the assessee and the terms regarding the usage of the software ?
>
> (b) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in treating computer software expenses of Rs. 5,82,62,091 to be revenue in nature without appreciating the fact that the usage of software is for more than two years being enduring in nature and also that the licence fees are not used up during the year but over a period of 1 to 3 years ?

(c) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in allowing expenses of Rs. 8,30,000 incurred in connection with the sale of capital assets without appreciating the fact that the said expenses are in the nature of advisory fees incurred during the course of business, for proposed sale of land, sold in the subsequent year, which contributed to the increase in the capital ?"

4 In so far as question Nos. (a) and (b) are concerned, the issue is as to whether the expenses of Rs. 5,82,62,091 incurred in the use of computer software is revenue expenditure or capital expenditure. This aspect was gone into by the Tribunal in the following manner :

"18. In ground No. 5, the assessee has raised the following grievance :

5. *Disallowance of software expenses*

5.1 The learned Additional Commissioner of Income-tax/Dispute Resolution Panel erred in disallowing the computer software expenses of Rs. 5,82,62,091, which are revenue expenses, by treating the same as capital in nature.

5.2 The learned Additional Commissioner of Income-tax erred in observing that since the usage of software is for more than two years the software expenses are to be regarded as an intangible capital asset, without appreciating the fact that the software payments were for actual usage for a period of less than one year.

5.3 Without prejudice to the above, the learned Additional Commissioner of Income-tax erred in allowing depreciation at an incorrect rate of 25 per cent., instead of 60 per cent. for computer software allowable as per the Income-tax Rules, 1962.

19. So far as this ground of appeal is concerned, the relevant material facts are as follows. During the course of assessment proceedings, the Assessing Officer noticed that the assessee has claimed a deduction of Rs 5,82,62,091 as expenditure on the software. The Assessing Officer was of the view that this software was used in certain projects, running for a period of 1-3 years, it should be treated as a capital expenditure. The Assessing Officer extensively quoted from the Special Bench decision in the case of *Amway India Enterprises* v. *Deputy CIT* [2008] 301 ITR (A.T.) 1 (Delhi) [SB] ; [2008] 11 ITD 112 (Delhi) [SB] to justify this conclusion. The assessee did raise an objection before the Dispute Resolution Panel but without any success. In a very brief order, and based on rather vague and sweeping generalizations,

learned Dispute Resolution Panel confirmed the disallowance. While doing so, the Dispute Resolution Panel observed as follows : We find that on the facts of the case as stated in the assessment order, the Assessing Officer has correctly held this amount to be capital in nature and has allowed depreciation thereon. We are of the view that the Assessing Officer has correctly treated the software expenditure as capital in nature, as it gave enduring benefit. It may be noted that from the assessment year 2003-04, 'computer software' has been specially included in the depreciation table, on which depreciation is to be allowed. Hence, this objection of the assessee is rejected.

20. The assessee is not satisfied and is in appeal before us.

21. We have heard the rival contentions, perused the material on record and duly considered the facts of the case in the light of the applicable legal position.

22. There is no dispute about the genuineness of the expenses and the dispute before us is confined to the question whether it should be treated as revenue expenditure or as capital expenditure. We have noted that out of the total expense of Rs 5,88,62,091, an amount of Rs 5,29,32,320 is paid to the Aker Norway for actual use of the software. Since the amount is paid on the basis of actual use of the software, and not for acquisition of the software, there cannot be any occasion for treating the same as capital expenditure. As regards the remaining amount also, as evident from the copies of the invoices before us, the payment is for the licence fees on annual basis, and not for the entire project period. The fact that the licence is used in a project which has a life span of over one year does not mean that the benefit from the licence fees was more than one year. In our considered view, in the light of these facts evident from the material on record, it is unambiguous that the authorities below have wrongly held the software payment to be capital expenditure in nature. We, therefore, uphold the grievance of the assessee and direct the Assessing Officer to treat the software expenses as revenue expenditure in nature."

Thus, it is seen that the Tribunal has held that the only dispute before it 5
was whether the aforesaid amount should be treated as revenue expenditure or as capital expenditure. It has been held that since the amount is paid on the basis of actual use of the software and not for acquisition of the software, there was no question of treating the said expenses as capital expenditure. Therefore, the Tribunal held that the authorities below had wrongly held the software payment to be capital expenditure in nature and

accordingly upheld the stand taken by the assessee directing the Assessing Officer to treat the software expenses as revenue expenditure.

6 While holding so, the Tribunal considered the views given by the Dispute Resolution Panel (DRP) as well as of the Special Bench decision of the Tribunal in the case of *Amway India Enterprises* v. *Deputy CIT* (supra).

7 On due consideration, we are of the view that there is no error or infirmity in the conclusions reached by the Tribunal and no question of law arises therefrom, much less any substantial question of law.

8 In so far as question No.(c) as extracted above is concerned, the Tribunal held as under :

> "27. On a perusal of the details of the expenses, as placed on page 743 of the paper book, we find that the expenses pertain to legal expenses in connection with structuring of the transaction and related aspects. These expenses were incurred in the course of the business and for its operations, though the specific issue on which advice was sought pertained to the sale transaction. Merely because the transaction in question is a capital asset, the legal expenses will not also become capital expenditure. As we deal with this aspect of the matter, we are reminded of very well articulated views of the hon'ble Madras High Court, in the case of *CIT* v. *Bush Boake Allen India Ltd.* [1982] 135 ITR 306 (Mad), wherein their Lordships had observed as follows (page 310 of 135 ITR) :
>
> 'We think that the only merit of this argument is the apparent logical simplicity of it. But abstract logic has seldom conditioned the evolution of principles in tax law, as in other laws. Recent judgments of courts have tended to regard the nature and allowability of legal expenses not as derivative expense taking the colour from the transactions to which they relate, but as items which are entitled to be judged in their own character. This line of approach may be said to have been firmly established as part of the law relating to the allowance of expenditure, by the decision which the Supreme Court rendered in *India Cements Ltd.* v. *CIT* [1966] 60 ITR 52 (SC). In that case, a company went in for a substantial loan of Rs. 40 lakhs from a financial house for major expansion of its undertaking. The loan was secured by a charge on the company's fixed assets. The amount was advanced by the financial house on certain terms as to interest. For putting through this transaction the company had to incur vakil's fees for drafting the mortgage bond, other legal expenses, charges for stamps, registration charges, for obtaining the certified copy of the mortgage deed, charges for preparing an indemnity bond and the

like. The expenses incurred for legal charges amounted to Rs. 84,633. The question in the relevant assessment of the company was whether the expenses can be allowed as revenue items. The stand taken by the Income-tax Department was that since the sum of Rs. 40 lakhs was obtained as a loan for the expansion of the company's business, the expense by way of legal fees, stamps and the like must also be similarly regarded as on the capital account, not allowable in the computation of the company's business profits. This contention, however, was negatived by the Supreme Court. They referred to an express provision in the Income-tax Act under which interest on capital borrowed for, the purpose of the assessee's business was allowable as an item of deduction in the computation of profits under the head 'Business'. On the same analogy they held that any legal expenses incurred by the assessee for borrowing money, irrespective of whether the borrowing went in for a revenue purpose or for a capital purpose, must be necessarily regarded as an item of revenue outgoing. In coming to that conclusion the Supreme Court stated the principle thus (page 58 of 60 ITR) :

"On the facts of this case, the money secured by the loan was the thing for the use of which this expenditure was made. In principle, apart from any statutory provisions, we see no distinction between interest in respect of a loan and an expenditure incurred for obtaining the loan."

7. This decision of the Supreme Court has been followed in innumerable decisions of the courts since then. As an example may be cited a decision of a Bench of this court in *CIT* v. *Kisenchand Chellaram (India) (P.) Ltd.* [1981] 130 ITR 385 (Mad) ; [1980] 16 CTR (Mad) 248. That case too related to the claim of an assessee-company for the allowance of legal charges representing the fees paid to the Registrar of Companies for increasing the company's capital. The argument addressed before the court on behalf of the Income-tax Department in that case was that the legal expenditure contributed to the increase in the capital of the company and, therefore, it could not be allowed as a revenue item. This court rejected that contention, following the decision of the Supreme Court in *India Cements Ltd.* v. *CIT* [1966] 60 ITR 52 (SC). The court held that the money was spent only for the purpose of the business and there was no capital element in the expenditure. They took the view that merely because the fees paid to the Registrar of Companies related to a raising of the

company's capital, the amount could not be classified as capital expenditure.'

28. In view of the above discussions, as also bearing in mind the entirety of the case, we uphold this grievance of the assessee as well. Ground No. 6 is thus allowed."

9 Thus, the Tribunal has taken the view that merely because the transaction in question is a capital asset, the legal expenses incurred for the same will not ipso facto become capital expenditure. While taking the above view, the Tribunal referred to a decision of the Madras High Court in the case of *CIT* v. *Bush Boake Allen India Ltd.* [1982] 135 ITR 306 (Mad) in which decision the Madras High Court followed the decision of the Supreme Court in *India Cements Ltd.* v. *CIT* [1966] 60 ITR 52 (SC).

10 On due consideration, we are of the view that there is no error or infirmity in the view taken by the Tribunal and no question of law arises therefrom.

11 Consequently, this appeal filed at the instance of the Revenue is dismissed. However, there shall be no order as to costs.

[2020] 423 ITR 542 (Guj)

[IN THE GUJARAT HIGH COURT]

PRASAD MULTI SERVICES PRIVATE LTD.

v.

DEPUTY COMMISSIONER OF INCOME-TAX

J. B. PARDIWALA and **A. C. RAO** JJ.

July 16, 2019.

SS ▸ ITA 1961, s 32
AY ▸ 2011-12
HF ▸ Assessee

DEPRECIATION—RATE OF DEPRECIATION—ASSESSEE HIRING OUT CONSTRUCTION EQUIPMENT—ASSESSEE GRANTED DEPRECIATION AT THE RATE OF 30 PER CENT. IN PRIOR YEARS—DEPRECATION CANNOT BE REDUCED TO 15 PER CENT. IN ASSESSMENT YEAR 2011-12—INCOME-TAX ACT, 1961, S. 32.

RES JUDICATA—PRINCIPLE NOT STRICTLY APPLICABLE IN INCOME-TAX ASSESSMENT BUT CONSISTENCY ESSENTIAL.

Although the doctrine of res judicata does not strictly apply to income-tax proceedings, yet in order to maintain consistency, the Revenue cannot be

permitted to rake up stale issues again merely because the scope of appeal is wider than the scope of reference.

The assessee was engaged in the business of hiring, operation and maintenance of construction equipment. It claimed depreciation at the rate of 30 per cent. on various types of cranes, viz., telescopic cranes, rail for tower cranes, tower cranes, mobile tower cranes, crawler cranes, tower crane masts and hydra cranes for the assessment year 2011-12. The Assessing Officer took the view that hiring out construction equipment was an ancillary activity of the assessee and there was every possibility that the cranes were used for the assessee's own construction business. In other words, the Assessing Officer took the view that the cranes did not fall within the ambit of motor bus, motor lorries and motor taxis because the cranes were not registered with the Regional Transport Office. In such circumstances, the Assessing Officer made a disallowance restricting the depreciation to 15 per cent. On appeal the assessee pointed out to the Commissioner (Appeals) that in the earlier years depreciation had been allowed by the Assessing Officer at 30 per cent. The Commissioner (Appeals) took the view that only the hydra cranes can be termed as "motor cranes" and accordingly allowed depreciation at the rate of 30 per cent. The Commissioner (Appeals), however, confirmed the disallowance on all other types of cranes. This was confirmed by the Tribunal. On appeal :

Held, *that a similar issue had cropped up in the assessment year 2007-08, and after due consideration of all the relevant aspects of the matter, the Assessing Officer had granted depreciation at the rate of 30 per cent. The very same cranes were involved in the present tax appeal which were the subject matter of consideration in the assessment year 2007-08. Registration under the provisions of the Motor Vehicles Act was not a sine qua non for claiming depreciation. There was evidence on record to indicate that the assessee was involved in the business of hiring cranes. It might be using the cranes for personal construction business too, but that would not disentitle the assessee to claim higher depreciation once it is was shown that the assessee was in the business of hiring the cranes. The assessee was entitled to depreciation at the rate of 30 per cent. on the various types of cranes under section 32.*

Cases referred to :

Berger Paints India Ltd. *v.* CIT [2004] 266 ITR 99 (SC) (para 30)

CIT *v.* Alpana Talkies [1983] 139 ITR 1055 (Bom) (para 38)

CIT *v.* Dilip Singh Sardarsingh Bagga [1993] 201 ITR 995 (Bom) (para 38)

CIT *v.* Excel Industries Ltd. [2013] 358 ITR 295 (SC) (paras 15, 32)

CIT *v.* Narendra Doshi [2002] 254 ITR 606 (SC) (para 30)

CIT *v.* Neo Poly Pack P. Ltd. [2000] 245 ITR 492 (Delhi) (para 26)

CIT *v.* Nidish Transport Corporation [1990] 185 ITR 669 (Ker) (para 38)

CIT (Deputy) *v.* Pradip N. Desai (HUF) [2012] 341 ITR 277 (Guj) (paras 22, 40)

CIT *v.* Salkia Transport Associates [1983] 143 ITR 39 (Cal) (paras 38, 39)

CIT *v.* Shivsagar Estate [2002] 257 ITR 59 (SC) (para 30)

CIT *v.* Steelcrete (P.) Ltd [1983] 142 ITR 45 (Cal) (para 38)

CIT (Addl.) *v.* U. P. State Agro Industrial Corporation Ltd. [1981] 127 ITR 97 (All) (para 38)

CWT *v.* Allied Finance (P.) Ltd. [2007] 289 ITR 318 (Delhi) (para 26)

DIT (Exemption) *v.* Apparel Export Promotion Council (No. 1) [2000] 244 ITR 734 (Delhi) (para 26)

Gujco Carriers *v.* CIT [2002] 256 ITR 50 (Guj) (paras 11, 18)

Hoystead *v.* Commissioner of Taxation [1926] AC 155 (PC) (paras 25, 32)

I.C.D.S. Ltd. *v.* CIT [2013] 350 ITR 527 (SC) (para 15)

K. L. Johar and Co. *v.* Deputy Commercial Tax Officer [1965] 16 STC 213 (SC) (para 39)

Parashuram Pottery Works Co. Ltd. *v.* ITO [1977] 106 ITR 1 (SC) (paras 25, 28, 32)

Radhasoami Satsang *v.* CIT [1992] 193 ITR 321 (SC) (paras 25, 32)

R. B. Jodha Mal Kuthiala *v.* CIT [1971] 82 ITR 570 (SC) (para 38)

T.M.M Sankaralinga Nadar and Bros. *v.* CIT [1929] 4 ITC 226 (Mad) (para 25)

Union of India *v.* Kaumudini Narayan Dalal [2001] 249 ITR 219 (SC) (para 30)

R/Tax Appeal No. 78 of 2019.

Tushar Hemani, Senior Advocate, *Ms. Vaibhavi K. Parikh* for the appellant.

Mrs. Mauna M. Bhatt for the respondent.

JUDGMENT[1]

The judgment of the court was delivered by

1 J. B. PARDIWALA J.—This tax appeal under section 260A of the Income-tax Act, 1961, is at the instance of an assessee and is directed against the

1. Oral judgment.

order passed by the Income-tax Appellate Tribunal, Ahmedabad D-Bench, Ahmedabad, dated August 13, 2018 in I. T. A. No. 960/AHD/2015 for the assessment year 2011-12.

This tax appeal came to be admitted on the following substantial question of law : **2**

> "Whether, in the facts and circumstances of the case, the Income-tax Appellate Tribunal was right in confirming the order of the respondent in limiting allowance of depreciation to 15 per cent. as against the claim at the rate of 30 per cent. on various types of cranes used in hiring business under section 32 of the Income-tax Act, 1961 ?"

The appellant-assessee had filed its return of income on September 29, 2011, declaring the total income of Rs. 80,64,260. The return was processed under section 143(1) of the Act. The case was selected for scrutiny. Accordingly, a notice under section 143(2) of the Act came to be issued on September 28, 2012 and further notice under section 143(2) read with section 129 of the Act was issued on November 15, 2013. **3**

It appears from the materials on record that the appellant is engaged in the business of hiring, operation and maintenance of construction equipment **4**

The appellant claims depreciation at the rate of 30 per cent. on various types of cranes, viz., telescopic cranes, rail for tower cranes, tower cranes, mobile tower cranes, crawler cranes, tower crane masts and hydra cranes. **5**

The appellant was served with a show-cause notice, calling upon him to show cause as to why depreciation at the rate of 30 per cent. should be allowed, having regard to the fact that the cranes referred to above do not fall in the category of motor bus, motor lorries and motor taxis used in the business of running them on hire. **6**

The Assessing Officer took the view that hiring out construction equipment is an ancillary activity of the appellant and there is every possibility that the cranes are used for the appellant's own construction business. To put it in other words, the Assessing Officer took the view that the cranes referred to above do not fall within the ambit of motor bus, motor lorries and motor taxis. One reason for taking such view is that the cranes are not registered with the Regional Transport Office. In such circumstances, the Assessing Officer made a disallowance of Rs. 97,52,455 by restricting depreciation to 15 per cent. on other plant and machinery. **7**

The appellant, being dissatisfied with the order passed by the Assessing Officer, preferred an appeal before the Commissioner of Income-tax (Appeals). **8**

9 The appellant submitted before the Commissioner of Income-tax (Appeals) that the equipment were used on hire. It was pointed out that the appellant is engaged only in hiring equipment which is indicative from the profit and loss accounts. It was also pointed out that the appellant does not use the cranes for any other activity except hire. It was also pointed out to the Commissioner of Income-tax (Appeals) that in the earlier years depreciation had been allowed by the Assessing Officer to the extent of 30 per cent.

10 It appears that the Commissioner of Income-tax (Appeals) took into consideration that the primary activity of the appellant is construction and hiring out of the construction equipment is an ancillary activity. The Commissioner of Income-tax (Appeals) took the view that only the hydra cranes can be termed as "motor cranes" and accordingly allowed depreciation at the rate of 30 per cent. The Commissioner of Income-tax (Appeals), however, confirmed the disallowance on all other types of cranes.

11 Being dissatisfied with the order passed by the Commissioner of Income-tax (Appeals), the appellant preferred an appeal before the Income-tax Appellate Tribunal. The Appellate Tribunal dismissed the appeal preferred by the appellant herein, holding as under :

> "We have heard the rival contentions and perused the material on record carefully. As per profit and loss account for the year March 31, 2011 the assessee has shown income from machine hiring during the year under consideration. Out of the total income of Rs. 17,17,92,943, the assessee has shown hiring income of Rs. 2,10,04,957 from air-compressor, cranes, DG set, Geni, hydra crane, boorn placer, transit mixer. In its submission before the Assessing Officer and Commissioner of Income-tax (Appeals), the assessee has mainly referred to hydra cranes. The assessee has only furnished Registration Certificate Books in respect of hydra crane. But the assessee has failed to furnish any relevant material and supporting evidence to justify its claim of depreciation at higher rate in respect of telescoping crane, rail for tower crane, tower crane, mobile tower crane, crawler crane and tower crane masts. The assessee has placed reliance on the decision of the Income-tax Appellate Tribunal in the case of *Bothra Shipping Services* however we observe that the facts of the case of the assessee are clearly distinguishable from the facts of the above cited case of Kolkata Income-tax Appellate Tribunal. In the case of *Bothra Shipping Services* the issue in the appeal was pertaining to crane mounted vehicle, JCB and 400 wheel loaders which were registered as heavy or medium motor vehicle by the Regional Transport Office and were

used in the business of hiring them out to others within the ambit of the expression motor lorries. However, in the case of the assessee it has used different kinds of cranes which are not mounted on the vehicle. We have noticed that the hon'ble jurisdictional High Court of Gujarat in the case of *Gujco Carriers* v. *CIT* [2002] 256 ITR 50 (Guj) ; [2002] 122 Taxman 206 (Guj) held that motor vehicle like fire truck, fork lift truck and crane truck which are designed for special services fall within the category of other trucks also called motor lorries. Further in the case of *Gujco Carrier* the motor crane was registered as a heavy motor vehicle and was an integral part of motor vehicles on which it was mounted and it was registered as heavy motor vehicles and that crane was used for lifting and moving goods. Mobile crane was also registered with the Regional Transport Office as heavy motor vehicle which was mounted on a truck. It was held in the above cited case that lorry or truck would mean not only any motor vehicle designed to carry freight or goods but also to perform said services like fire fighting, therefore, a truck adopted or designed to carry a crane is mounted for such services on lifting load, moving it side by side, rotating it or moving it horizontally. Similarly the Central Board of Direct Taxes Instruction No. 617 refer to fork lifting truck of higher rate of depreciation. On the perusal of the findings of the jurisdictional High Court in the case of *Gujco Carrier* it is clear that types of cranes with the assessee are completely different from categories mentioned in the decision of the hon'ble jurisdictional High Court in the case of *Gujco Carrier* and in the Instruction No. 617 of the Central Board of Direct Taxes. After perusal of the above decision of the Jurisdictional hon'ble High Court we observe that all the 7 categories of cranes on which higher rate of depreciation were claimed were not integral part of truck crane as elaborated above in the judicial findings except the hydra crane being mounted on the truck on which the learned Commissioner of Income-tax (Appeals) has correctly allowed the higher rate of depreciation."

Being dissatisfied with the order passed by the Appellate Tribunal, the **12** appellant is here before this court with the present appeal.

Submissions on behalf of the assessee

Mr. Tushar Hemani, the learned counsel appearing for the appellant, **13** vehemently submitted that similar issue had cropped up in the assessment year 2007-08, and in the course of the assessment, the Assessing Officer had issued a notice dated December 11, 2009, calling upon the assessee to show cause as to why depreciation on cranes used in the business of

running the same on hire should not be restricted to 15 per cent. instead of 30 per cent.

14 According to Mr. Hemani, his client had given an exhaustive reply to such show-cause notice. Mr. Hemani pointed out that being satisfied with such reply, depreciation at the rate of 30 per cent. on the cranes in question was granted by the Assessing Officer while framing the assessment under section 143(3) of the Act vide order dated December 24, 2009. Mr. Hemani would submit that once the claim of depreciation at higher rate (being 30 per cent.) came to be accepted by the Assessing Officer in the past while framing the assessment under section 143(3) of the Act, then keeping in mind the principle of consistency, it was not open to the Department to once again raise the very same issue and deny depreciation at the rate of 30 per cent. on the cranes during the year under consideration.

15 Mr. Hemani, in support of his submissions, has placed strong reliance on a decision of the Supreme Court in the case of *CIT* v. *Excel Industries Ltd.* [2013] 358 ITR 295 (SC). Mr. Hemani submitted that even otherwise all the Revenue authorities committed a serious error in taking the view that the appellant is entitled to claim depreciation only at the rate of 15 per cent. and not at the rate of 30 per cent. It is submitted that the assessee is in the business of hiring as is evident from its finance. Mr. Hemani pointed out documentary evidence in support of his submissions to show that the major revenue is generated from letting out cranes and equipment used in the construction industry. In this regard, reliance is placed on a decision of the Supreme Court in the case of *I.C.D.S. Ltd.* v. *CIT* [2013] 350 ITR 527 (SC).

16 Mr. Hemani submitted that the depreciation at the rate of 30 per cent. could not have been denied solely on the assumption that the cranes might have been used in the assessee's own business of construction. It is submitted that there is no mandate under the Act that the underlying asset, i.e., cranes, should be used exclusively for the hiring business.

17 It is also submitted that the Revenue authorities have wrongly concluded that the "cranes" do not fall within the ambit of "motor bus, motor lorries or motor taxis" so as to enable the assessee to claim depreciation at the rate of 30 per cent.

18 Mr. Hemani pointed out that even the Central Board of Direct Taxes, vide Instruction No. 617 dated September 13, 1973, had clarified that "Forklift Crane", which is admittedly not a motor vehicle would still be entitled for higher rate of depreciation of 30 per cent. Mr. Hemani, by placing strong reliance on a decision of this court in the case of *Gujco Carriers* v. *CIT* [2002] 256 ITR 50 (Guj), submitted that form of mobile crane would

fall within the ambit of motor lorries appearing in appendix-I to the Income-tax Rules and, therefore, are eligible for depreciation at higher rate of 30 per cent. Mr. Hemani further submitted that the Revenue authorities committed a serious error in taking the view that registration with the Regional Transport Office is a sine qua non for claiming depreciation. According to Mr. Hemani, if that would have been the intention of the Legislature, then the same would have been provided specifically as a pre-condition for claiming depreciation.

19 It is submitted that the definition of the term "Commercial Vehicle" contains reference to various vehicles and its meaning must be taken as and assigned in section 2 of the Motor Vehicles Act, 1988. It is pointed out that "Motor Lorries" have specifically not been included while defining the term "Commercial Vehicle", which implies that the "Motor Lorries" need not be compulsorily registered under the Act, 1988. "Cranes" fall within the ambit of "Motor Lorries" and, therefore, they need not be registered under the Act, 1988 for the purpose of claiming depreciation at the higher rate.

20 Lastly, Mr. Hemani pointed out that the "Telescopic Crane", "Crawler Crane" and "Hydra Crane" are registered with the Regional Transport Office, and in such circumstances, the reasonings assigned by the Assessing Officer would not hold good for the purposes of claiming depreciation on such cranes.

Submissions on behalf of the Revenue

21 Ms. Mauna Bhatt, the learned senior standing counsel appearing for the Department, has vehemently opposed this appeal. According to Ms. Bhatt, no error, not to speak of any error of law, could be said to have been committed by the Revenue authorities in passing the impugned orders. According to Ms. Bhatt, a finding of fact has been recorded by all the three Revenue authorities that the assessee is not into the business of hiring. The assessee is using the cranes for the purpose of his own business of construction. In such circumstances, according to Ms. Bhatt, there is no question of granting depreciation at the rate of 30 per cent.

22 In support of her submission, reliance has been placed on a decision of this court in the case of *Deputy CIT* v. *Pradip N. Desai (HUF)* reported in [2012] 341 ITR 277 (Guj) ; [2012] 21 taxmann.com 151 (Guj).

23 Ms. Bhatt submitted that it is true that the very same issue was considered in the assessment year 2007-08 for the very same cranes and depreciation was allowed at the rate of 30 per cent. According to Ms. Bhatt, the same was a mistake, and in such circumstances, "the principle of consistency" as explained by the Supreme Court in the case of *Excel Industries*

(supra) would not be applicable. Ms. Bhatt also submitted that in the absence of any registration of the cranes with the Regional Transport Office the assessee is not entitled to claim depreciation at the rate of 30 per cent. .

Analysis

24 It is not in dispute that similar issue had cropped up in the assessment year 2007-08, and after due consideration of all the relevant aspects of the matter, the Assessing Officer had granted depreciation at the rate of 30 per cent. The very same cranes are involved in the present tax appeal which were the subject matter of consideration in the assessment year 2007-08. However, according to the Revenue, it was a mistake committed by the Assessing Officer at the relevant point of time and such a mistake can always be corrected at a later stage.

25 This is where the principle of rule of consistency comes into play. What is the rule of consistency ? It has been explained by the Supreme Court in the case of *Radhasoami Satsang* v. *CIT* reported in [1992] 193 ITR 321 (SC), and the following passage should be noticed (page 328 of 193 ITR) :

> "One of the contentions which the learned senior counsel, for the assessee-appellant raised at the hearing was that in the absence of any change in the circumstances, the Revenue should have felt bound by the previous decisions and no attempt should have been made to reopen the question. He relied upon some authorities in support of his stand. A Full Bench of the Madras High Court considered this question in *T.M.M. Sankaralinga Nadar and Bros.* v. *CIT* [1929] 4 ITC 226 (Mad) [FB]. After dealing with the contention, the Full Bench expressed the following opinion (page 242 of 4 ITC) :
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> 'The principle to be deduced from these two cases is that where the question relating to assessment does not vary with the income every year but depends on the nature of the property or any other question on which the rights of the parties to be taxed are based, e.g., whether a certain property is trust property or not, it has nothing to do with the fluctuations in the income ; such questions if decided by a court on a reference made to it would be res judicata in that the same question cannot be subsequently agitated.'
>
> One of the decisions referred to by the Full Bench was the case of *Hoystead* v. *Commissioner of Taxation* [1926] AC 155 (PC). Speaking for the Judicial Committee Lord Shaw stated (page 165) :
>
> 'Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be proper apprehension by the

court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principal of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle – namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken.'

These observation were made in a case where taxation was in issue.

This court in *Parashuram Pottery Works Co. Ltd.* v. *ITO* [1977] 106 ITR 1 (SC) at page 10 stated :

'At the same time, we have to bear in mind that the policy of law is 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.'

Assessments are certainly quasi-judicial and these observations equally apply.

We are aware of the fact that strictly speaking res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year, but where a fundamental aspect permeating through the different assessment years has been found as a fact, one way or the other, and the parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

On these reasonings, in the absence of any material change justifying the Revenue to take a different view of the matter and if there was no change, it was in support of the assessee we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income-tax in the earlier proceedings, a different and contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative, namely, that the Tribunal was justified in holding that the income derived by the

Radhasoami Satsang was entitled to exemption under sections 11 and 12 of the Income-tax Act of 1961."

26 The aforesaid principle has been applied by the Delhi High Court in the following judgments :

(1) *DIT (Exemption)* v. *Apparel Export Promotion Council (No. 1)* [2000] 244 ITR 734 (Delhi) ;

(2) *CIT* v. *Neo Poly Pack P. Ltd.* [2000] 245 ITR 492 (Delhi) ; and

(3) *CWT* v. *Allied Finance (P.) Ltd.* [2007] 289 ITR 318 (Delhi).

27 In the first of the above judgments, it was held that although the doctrine of res judicata did not strictly apply to the income-tax proceedings, yet in order to maintain consistency, the Revenue cannot be permitted to rake up stale issues all over again merely because the scope of appeal is wider than the scope of reference. In this case, the assessee had been granted exemption under section 11 for a long period of years and without there being any change in the objects or activities of the assessee, the income-tax authorities sought to deny the exemption in a later year. In the case of *Neo Poly Pack* (supra), it was held that although the doctrine of res judicata is not applicable to the income-tax proceedings since each assessment year is independent of the other, yet where an issue has been considered and decided consistently in a number of earlier years in a particular manner the same view should continue to prevail in the subsequent years unless there is some material change in the facts. In the case of *Allied Finance (P.) Ltd.* (supra), the Tribunal had decided an issue in favour of the assessee by two orders and those two orders were followed by the Tribunal in the subsequent appeals. The Department had accepted the correctness of the basic two orders and did not file any appeal against them. It, however, challenged the subsequent orders of the Tribunal, and while refusing to entertain the appeal, the Delhi High Court held that there was no reason to discard the principle of consistency which requires that when the Revenue has accepted a particular view by not filing an appeal that view should be adhered to, unless there is a just cause for departure. The High Court deprecated the practice of pick and choose.

28 The basis of the rule of consistency seems to us, with respect, to be the classic observations of His Lordship Justice H. R. Khanna speaking for the Supreme Court in the case of *Parashuram Pottery Works Co. Ltd.* v. *ITO* [1977] 106 ITR 1 (SC). It was held that (page 10 of 106 of ITR) :

> ". . . we have to bear in mind that the policy of law is 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."

29 It is significant to note that the aforesaid observations were noticed by the Supreme Court in the case of *Radhasoami Satsang* (supra) and it was held that they equally apply to the assessments which are certainly quasi judicial.

30 In the case of *Berger Paints India Ltd.* v. *CIT* [2004] 266 ITR 99 (SC), it was again held by the Supreme Court that if the Revenue has not challenged the correctness of the law laid down by the High Court and has accepted it in the case of one assessee, then it is not open to the Revenue to challenge its correctness in the case of other assessee without just cause. Similar observations have been made by the Supreme Court in the following cases :

(1) *Union of India* v. *Kaumudini Narayan Dalal* [2001] 249 ITR 219 (SC) ;

(2) *CIT* v. *Narendra Doshi* [2002] 254 ITR 606 (SC) ; and

(3) *CIT* v. *Shivsagar Estate* [2002] 257 ITR 59 (SC).

31 The above judgements of the Supreme Court show the anxiety to prevent the income-tax authorities from taking different stand in the case of different assessees in respect of the same issue or taking different stands in the case of the same assessee for different assessment years in respect of the same issue.

32 The Supreme Court in the case of *CIT* v. *Excel Industries Ltd.* [2013] 358 ITR 295 (SC) observed as under (page 303 of ITR) :

"Secondly, as noted by the Tribunal, a consistent view has been taken in favour of the assessee on the questions raised, starting with the assessment year 1992-93, that the benefits under the advance licences or under the duty entitlement pass book do not represent the real income of the assessee. Consequently, there is no reason for us to take a different view unless there are very convincing reasons, none of which have been pointed out by the learned counsel for the Revenue.

In *Radhasoami Satsang* v. *CIT* [1992] 193 ITR 321 (SC) this court did not think it appropriate to allow the reconsideration of an issue for a subsequent assessment year if the same 'fundamental aspect' permeates in different assessment years. In arriving at this conclusion, this court referred to an interesting passage from *Hoystead* v. *Commissioner of Taxation* [1926] AC 155 (PC) wherein it was said (page 328 of 193 ITR) :

'Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted and there is abundant authority reiterating that principle. Thirdly, the same principle—namely, that of a setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken.'

Reference was also made to *Parashuram Pottery Works Co. Ltd.* v. *ITO* [1977] 106 ITR 1 (SC) and then it was held (page 329 of 193 ITR) :

'We are aware of the fact that strictly speaking res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

On these reasonings in the absence of any material change justifying the Revenue to take a different view of the matter—and if there was no change it was in support of the assessee—we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income-tax in the earlier proceedings, a different and contradictory stand should have been taken.

It appears from the record that in several assessment years, the Revenue accepted the order of the Tribunal in favour of the assessee and did not pursue the matter any further but in respect of some assessment years the matter was taken up in appeal before the Bombay High Court but without any success. That being so, the Revenue cannot be allowed to flip-flop on the issue and it ought let the matter rest rather than spend the taxpayers' money in pursuing litigation for the sake of it.

Thirdly, the real question concerning us is the year in which the assessee is required to pay tax. There is no dispute that in the

subsequent accounting year, the assessee did make imports and did derive benefits under the advance licence and the duty entitlement pass book and paid tax thereon. Therefore, it is not as if the Revenue has been deprived of any tax. We are told that the rate of tax remained the same in the present assessment year as well as in the subsequent assessment year. Therefore, the dispute raised by the Revenue is entirely academic or at best may have a minor tax effect. There was, therefore, no need for the Revenue to continue with this litigation when it was quite clear that not only was it fruitless (on merits) but also that it may not have added anything much to the public coffers."

33 Thus, in view of the above, in our opinion, the disallowance is not sustainable. The Revenue has tried to dismiss the entire issue in the name of a mistake but it does not appear to be a mistake. We are saying so, because even independent of the principle of consistency, the assessee has a good case on merits.

34 We fail to understand as to on what basis the Revenue authorities have come to the conclusion that the assessee is not in the business of hiring and that the main business of the assessee is construction. According to the Revenue authorities, the cranes are used by the assessee for his own business of construction. There is thumping documentary evidence on record to indicate that the assessee is very much in the business of hiring. The depreciation at the higher rate could not have been declined merely on the assumption that the cranes might have been used by the assessee for his own business of construction. In fact, it would be an error to take the view that for the purpose of claiming depreciation at the rate of 30 per cent. the assessee is obliged to establish that the cranes are used exclusively for the hiring business and that they are not used for any other purpose.

35 We may refer to a decision of this court in the case of *Gujco Carriers* (supra), on which the assessee has placed strong reliance. The issue before this court in *Gujco Carriers* (supra) was that the assessee had purchased a mobile crane and claimed depreciation at 40 per cent. thereon stating that it was being used in the business of running it on hire and so it will fall under entry No. IIIE(1A) of Part I of appendix I to the Income-tax Rules, 1962. This court, after due consideration of all the relevant aspects of the matter, ultimately held that the mobile crane of the assessee which was registered as a heavy motor vehicle would clearly fall within the expression "Motor Lorries" in entry No.IIIE(1A) of the Table in appendix I under rule 5 of the said Rules, since it was used by the assessee in its business of running the crane on hire. This court, ultimately, ruled that the assessee was

entitled to depreciation at the rate of 40 per cent. on the crane mounted on a motor-truck.

36 This court, in the case of *Gujco Carriers* (supra), had the occasion to consider the question with regard to the rate of depreciation and the meaning of "Motor Lorry". We may quote the relevant observations made by this court thus (page 56 of 256 ITR) :

> "The controversy centres around the question whether mobile crane registered as a heavy motor vehicle under the Motor Vehicles Act and the rules made thereunder with the Regional Transport Office would fall within the expression 'motor lorries' contained in item No. IIIE(1A) of appendix I of the said Rules. The Tribunal has confirmed the orders of the income-tax authorities holding that since 'cranes' are not mentioned as an independent item in appendix I, depreciation at the rate of 40 per cent. was not admissible to cranes, and that only the rate of 10 per cent. was admissible being the general rate applicable to machinery. The Tribunal rejected the plea of the assessee that the crane was an integral part of the motor lorry on which it was mounted and was worked by the same machine which provided traction to the lorry, on the ground that this required ascertainment of facts and fresh investigation. The Tribunal also rejected the assessee's contention that benefit of depreciation at 30 per cent. should be given to it since it was given to 'fork lift trucks' under Instructions No. 617, issued on September 13, 1973, by the Central Board of Direct Taxes, classifying 'fork lift trucks' under item No. III(ii)D(9) of appendix I.
>
> Under the heading 'Machinery and plant' of item No. III of appendix I, Part I of the table of rates at which depreciation is admissible, read with rule 5 of the Income-tax Rules, various items of machinery and plant are specified with the rates at which depreciation is to be allowed mentioned against them.
>
> The assessee claimed depreciation at 40 per cent. on its crane under item No. IIIE(1A) of appendix I, which reads as follows :
>
> 'E. (1A) Motor buses, motor lorries and motor taxis used in a business running them on hire.'
>
> In the alternative, the assessee claimed depreciation before the Tribunal on the basis of the Central Board of Direct Taxes Instruction No. 617, dated September 13, 1973, which has been reproduced in the order of the Tribunal, as under :

'132. Fork lift trucks-Rate of depreciation prescribed in Part I of appendix I to the Income-tax Rules.

Fork lift trucks would be classified under item No. III(ii)-D(9) of appendix I to the Income-tax Rules, 1962, and would be entitled to depreciation at the rate of 30 per cent.'

Item No. III(ii)-D(9) which is referred to in the aforesaid Instruction No. 617 which relates to fork lift trucks, reads as under :

'Motor buses and motor lorries other than those used in a business of running them on hire.'

In the year 1973, entry D(9) read as under :

'Motor buses, motor lorries, motor taxis, motor tractors.'

The origin of the word 'lorry' is uncertain. 'Lorry' means, (i) 'a large strong motor vehicle for transporting goods, etc.', (ii) 'a long flat low wagon, or', (iii) 'a truck used on railways or tramways', as per the *Concise Oxford Dictionary*. As per *Webster's II New River Side University Dictionary*, the word 'lorry', in the meaning relevant to the present context, would mean, 'a motor truck'. As per the *Encyclopaedia Britannica*, truck is 'also called lorry'. Thus, the expression 'motor lorries' in entry No. IIIE(1A) of appendix I would mean 'motor trucks'.

'Truck' is introduced in the following terms in the *Encyclopaedia Britannica* :

' "Truck" also called lorry any motor vehicle designed to carry freight or goods or to perform special services such as fire fighting. The truck was derived from horse-driven wagon technology, and some of the pioneer manufacturers came from the wagon business. Because of their speed and flexibility, trucks have come to carry a quarter of the intercity freight in the United States, and they enjoy an almost total monopoly in intracity freight delivery.

In 1896 Gottlieb Daimler of Germany built the first motor truck. It was equipped with a four-horse power engine and a belt drive with two speeds forward and one in reverse. In 1898 the Winton Company of the United States produced a gasoline-powered delivery wagon with a single-cylinder six-horsepower engine.

In World War I motor trucks were widely used, and in World War II they largely replaced horse-drawn equipment. A notable vehicle was the four-wheel drive, quarter-ton-capacity, short-wheelbase jeep, capable of performing a variety of military tasks.'

Lorry or truck would, therefore, mean not only any motor vehicle designed to carry freight or goods but also to perform special services like fire fighting. Fire engine also called fire truck is a self-propelled mobile piece of equipment used in fire fighting. There can be other special services to be performed by motor vehicles designed for such services. Thus, a lorry, i.e., truck adapted or designed to carry a crane is meant for special services of lifting load, moving it side by side, rotating it or moving it horizontally. Most industrial trucks permit mechanized pick-up and deposit of the loads, eliminating manual work in lifting as well as transporting. The crane truck is a portable boom crane mounted on an industrial truck. It may be used with hooks, grabs, and slings for bundled or coiled material. Industrial trucks which would also come within the expression 'motor lorries' are described as follows in the *Encyclopaedia Britannica* :

'Industrial truck. Carrier designed to transport materials within a factory area with maximum flexibility in making moves. Most industrial trucks permit mechanised pickup and deposit of the loads, eliminating manual work in lifting as well as transporting. Depending on their means of locomotion, industrial trucks may be classified as hand trucks or power trucks.

Hand trucks with two wheels permit most of the load to be carried on the wheels, but some of the load must be assumed by the operator to balance the truck during movement. Common two-wheel hand trucks include the barrel, box, drum, hopper, refrigerator, paper-roll, and tote-box trucks. Four-wheel hand trucks are found in many more varieties, including dollies, high and low-bed flat trucks, carts, rack carriers, wagons, and various hand-lift trucks having mechanical or hydraulic lifting mechanisms for raising and lowering a load.

Power trucks are propelled by batteries and an electric motor or by an internal-combustion engine with either a mechanical drive or a generator and electric motor drive. Propane and diesel engines are used in place of gasoline engines on some types. The non-lift platform truck is used simply for hauling, but other power trucks are provided with mechanisms, usually hydraulic, for lifting the loads. Fork lift trucks are quipped with a fork like mechanism on the front end designed to pick up loads on specially designed platforms, called pallets, elevate the load to the desired height, transport it, and deposit it at the desired location and height. Ram trucks have a single protruding ram for handling coiled material. The crane truck is a portable

boom crane mounted on an industrial truck ; it may be used with hooks, grabs, and slings for bundled or coiled material. The straddle truck resembles a gantry crane on four pneumatic-tired wheels ; the operator rides above the inverted U-frame, within which the load-lumber, bar steel, or pipe is carried on elevating bolsters. Other common types include high and low lift platform trucks, motorised pedestrian led, side-clamp, tractor, and side-loading trucks.'

It will, thus, be clear that motor vehicles like fire trucks, fork lift trucks and crane trucks which are designed for special services fall within the category of 'motor trucks' (also called 'motor lorries').

The word 'crane' when used for an inanimate object means a machine for moving heavy objects usually by suspending them from a projecting arm or beam. Crane is any of a diverse group of machines that not only lift heavy objects but also shift them horizontally. Movable cranes are mounted on railway cars, motor trucks or chassis equipped with caterpillar treads and the hoisting machinery is mounted so as to counterpoise part of the load on the boom and thereby, preventing the entire crane from overturning while carrying the load. The fork lift truck, widely used for moving goods between warehouse storages and shipping vehicles, 'is a highly manoeuvrable crane adaptable to handling drums, crates, or loaded skids or pallets.' (see *Encyclopaedia Britannica* under the heading 'Crane').

Thus, a 'fork lift truck' is also a type of crane. The expression 'truck crane' is well known in the truck industry. 'The truck crane is a unit consisting of a crane house and boom mounted on a truck chassis . . . Originally assembled by contractors from crawler cranes and truck parts, the truck crane for years had been manufactured and sold as a unit. Although the truck crane is difficult to move on soft or slippery ground, it is highly mobile on a firm footing and is easily moved over roads and highways. (see *Crane Hoist-McGraw Hill-Encyclopaedia of Science and Technology*).

A crane is usually typed according to its undercarriage. Some of the cranes whose undercarriage is not a truck are, 'crawler cranes' mounted on continuous tracks, the 'rail or locomotive crane' on special chassis with flanged wheels for use on railway tracks and 'floating crane' on a barge or scow. Therefore, the search for the item 'cranes' in the entries in appendix I without keeping in mind the nature of equipment, was based on an erroneous premise. A crane mounted on a truck is a truck crane which is a well known machinery which can

easily move over roads and highways and is not a stationary equipment.

Truck crane is described under the heading 'Crane' in *Encyclopaedia Britannica*, as under :

'A commonly used type of small movable crane is the truck crane, which is a crane mounted on a heavy, modified truck. Such cranes frequently use unsupported telescoping booms ; these are made up of collapsible sections that can be extended outward like the sections of an old nautical telescope or spyglass. The extension of the boom is usually managed hydraulically. Truck cranes make up in mobility and ease of transport what they lack in hoisting capacity.'

Thus, a mobile crane mounted on a truck constitutes a single unit known as a 'truck crane' which is adapted for use upon roads for special services. The truck on which the crane is mounted is constructed and adapted specially to carry the crane.

'Goods carriage' as defined in section 2(14) of the Motor Vehicles Act, 1988, means any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods. This definition is not confined only to carriage of freight which is narrower than the expression 'carriage of goods'. In the instant case, the truck is adapted for use solely for carriage of the crane mounted on it. The mounted crane is attached to the truck which carries it. The test of carrying goods such as potatoes and tomatoes that require loading and unloading in the context of carriage of freight when transported, as was suggested on behalf of the Revenue, will not be decisive. Unloading, in the context of truck crane where the crane remains mounted and attached to the truck when carried and even at the destination where it is put to use is not a relevant factor at all. Though not required to be loaded or unloaded like other goods transported in carriage of freight, the crane remains fixed, mounted on the truck which has been adapted for use solely for its carriage and such truck crane is used for special service of lifting and moving heavy objects. This is why such a mobile crane is registered as a heavy motor vehicle which is a heavy goods vehicle as defined in section 2(16) of the Motor Vehicles Act.

The approach of the Tribunal and the authorities below it that cranes are not mentioned specifically as an independent item falling in the categories for which higher depreciation allowance at the rate of 40 per cent. when used for hire and at 30 per cent. when not so

used has been provided as against 10 per cent. of machinery in general, and therefore, they should be treated as falling in the general category of machinery, is an over-simplification of the matter. The approach of the Tribunal that the plea taken by the assessee that crane was an integral part of the motor vehicle on which it is mounted required ascertainment of facts and fresh investigation, amounts to imposing a burden on a person to prove something of which a court or Tribunal can take judicial notice. For example, if a witness deposes that he had seen a horse, the court need not insist upon him for a proof of the anatomy of a horse and can take a judicial notice of the horse as an animal. The courts and Tribunals are not required to act dumb or ignorant of the facts of which judicial notice can be taken. Thus, just as a court can presume what a horse is, it can as well know what a crane is, and also that crane is an integral part of a truck-crane which is registered as a heavy motor vehicle. Lack of effort and knowledge sufficient for taking such judicial notice should not be a burden on the citizens in judicial proceedings. As provided by section 56 of the Evidence Act, no fact of which the court will take judicial notice, need be proved. This equally applies to the Tribunals which are not in fact strictly bound by the rules of evidence.

The mobile crane of the assessee which admittedly was registered as a heavy motor vehicle, would, for the above reasons, clearly fall within the expression 'motor lorries' (which means motor trucks) in entry No. IIIE(1A) of the table in appendix I under rule 5 of the said Rules, since it was used by the assessee in its business of running the crane on hire."

37 We are not impressed by the vociferous submissions canvassed on behalf of the Revenue that the Regional Transport Office registration under the provisions of the Motor Vehicles Act is a sine qua non for claiming depreciation. To put it in other words, the contention of the Revenue is that, unless the vehicle is registered in the name of the assessee under the Motor Vehicles Act, the assessee cannot be said to be its owner, and as such, he would not be entitled to depreciation allowance in respect thereof. The Revenue authorities have also proceeded on the same footing while declining depreciation at the rate of 30 per cent.

38 In the aforesaid context, we may refer to and rely upon a decision of the Bombay High Court in the case of *CIT* v. *Dilip Singh Sardarsingh Bagga* reported in [1993] 201 ITR 995 (Bom), wherein the following view has been taken (page 998 of 201 ITR) :

"The word 'owner', as observed by the Supreme Court in *R. B. Jodha Mal Kuthiala* v. *CIT* [1971] 82 ITR 570 (SC) (at page 578) has different meanings in different contexts and in certain circumstances even a lessee may be considered as the owner of the property leased to him. It was also held to be so by the Bombay High Court in *CIT* v. *Alpana Talkies* [1983] 139 ITR 1055 (Bom). It was a case of a lease of a theatre for exhibiting films. Under the lease agreement, the lessee was to keep the theatre in good condition and make all repairs and the premises were to be surrendered with the fittings and fixtures and additions and alterations on the expiry of the lease period. The assessee demolished the theatre and constructed a new one during the period January-July, 1962. In respect of the assessment years 1964-65 to 1969-70, the assessee claimed depreciation in respect of the theatre building, furniture and fixtures, plant, etc. The claim was rejected by the Income-tax Officer on the ground that the lessor had not divested himself of the ownership of the land and the building. The Appellate Assistant Commissioner and the Tribunal decided in favour of the assessee and held that the assessee was entitled to depreciation. On a reference, this court (at page 1058) held :

'What is relevant for the purposes of the present case is that during the period of the lease the assessee was held to be the owner of the building. The Tribunal, in our view, was justified in holding that the assessee was the owner of the building, fixtures and fittings of Alpana talkies within the meaning of section 32 of the Income-tax Act. Consequently, the assessee would be entitled to depreciation under section 32 of the Income-tax Act, 1961, on the above items.'

The expression 'owned by the assessee' also came up for interpretation before the Allahabad High Court in *Addl. CIT* v. *U.P. State Agro Industrial Corporation Ltd.* [1981] 127 ITR 97 (All). In this case, depreciation was claimed by the U. P. State Agro Industrial Corporation Ltd., in respect of a building which stood in the name of the State of U. P. The claim was sought to be rejected on the ground that no sale deed had been executed by the State Government in favour of the assessee. The contention of the assessee was that even though the U. P. Government had not transferred the immovable property by a registered deed, the property for all practical purposes belonged to it. It was the beneficial and equitable owner of the property and was entitled to claim depreciation on it. It was held (at page 102) :

'. . . . the expression 'building owned by the assessee' in section 32 of the Income-tax Act, 1961, has not been used in the sense of the

property, complete title in which vests in the assessee. The assessee will be considered to be an owner of the building under section 32 if he is in a position to exercise the rights of the owner not on behalf of the person in whom the title vests but in his own rights.'

Dealing with the contention of the Revenue regarding non-execution of a registered sale deed by the State Government as contemplated by section 54 of the Transfer of Property Act, 1882, and the effect thereof on the ownership of the purchaser for the purpose of claiming depreciation, it was observed that 'even though in the absence of execution of a registered sale deed the ultimate title in the property had not vested in the assessee, it became the owner thereof in the sense in which the expression has been used in section 32 of the Income-tax Act.'

In this connection, reference may be made to the decision of the Calcutta High Court in *CIT* v. *Steelcrete (P.) Ltd* [1983] 142 ITR 45 (Cal). This too was a case of rejection of a claim to depreciation and development rebate under sections 32 and 33 of the Income-tax Act. The controversy was whether the assets in question were 'owned by the assessee and used for the purpose of business'. There was no real dispute in regard to the user of the assets for the purpose of the business. The sole question for determination was whether the machinery in question could be considered to be owned by the assessee for the purpose of section 32 of the Act. Relying upon the observations of the Supreme Court in *R. B. Jodha Mal Kuthiala* v. *CIT* [1971] 82 ITR 570 (SC), the High Court observed that though the machinery in respect of which the depreciation was claimed stood in the name of the Government of India, for all real intents and purposes and also for purposes of section 32 of the Income-tax Act, 1961, it was intended that the property and the goods should pass to the assessee at the relevant time. Read in this context, it was held that the assessee owned the machinery in question and was entitled to depreciation.

Reference may also be made to another decision of the Calcutta High Court in *CIT* v. *Salkia Transport Associates* [1983] 143 ITR 39 (Cal). The dispute in this case was somewhat similar to the dispute in the case before us. Here also depreciation was claimed by the assessee in respect of motor vehicles claimed to be owned by it though not registered under the Motor Vehicles Act in its name. The Calcutta High Court held that the provisions of the Motor Vehicles Act, 1939, do not prevent a person from becoming the owner of the motor vehicles without registration. Registration is not an essential prerequisite

for the acquisition of ownership of the motor vehicle but is an obligation cast upon an owner of the vehicle for the purpose of running the vehicles in any public place. Hence it was immaterial whether the buses were registered in the assessee's name or the original owner's name. On the facts of the case, it was held that the assessee was the owner of the vehicles though the same were not registered in its name under the Motor Vehicles Act and that it was entitled to depreciation in respect thereof.

To the same effect is the decision of the Kerala High Court in the case of *CIT* v. *Nidish Transport Corporation* [1990] 185 ITR 669 (Ker). In this case also the sole question for determination was whether the assessees were entitled to depreciation on certain vehicles used by them in their business though the vehicles purchased by the assessees had not been transferred in their names in the certificate of registration. The contention of the Revenue in this case also was that till the transfer of ownership is effected in the certificate of registration, the assessees could not be considered to be owners. Repelling this contention of the Revenue, it was held that the motor vehicle being a movable property the transfer of ownership thereof is governed by the Sale of Goods Act and not by the Motor Vehicles Act. As between the transferor and the transferee, the sale is complete even before the transfer is effected in the registration certificate. The failure to report the same to the Registering Authority may entail levy of penalty but it does not affect the passing of the title in the vehicle. It was, therefore, held that the assessees who purchased the vehicles were owners of the vehicles and were entitled to depreciation under section 32 of the Act if the same has been used for the purpose of the business.

The various decisions including the decisions of the Calcutta High Court and the Kerala High Court which relate to the transfer of motor vehicles referred to above leave no scope for doubt that the transfer of ownership of a vehicle is not dependent upon the transfer of ownership being recorded under the Motor Vehicles Act. Section 31 of the Motor Vehicles Act, 1939 (corresponding to section 50 of the Motor Vehicles Act, 1988), so far as relevant, reads :

'31. (1) Where the ownership of any motor vehicle registered under this Chapter is transferred,—

(a) the transferor shall,—

(i) within fourteen days of the transfer, report the fact of transfer to the registering authority within whose jurisdiction the transfer

is to be effected and shall simultaneously send a copy of the said report to the transferee ;

(ii) within forty-five days of the transfer forward to the registering authority referred to in sub-clause (i) _

(A) a no objection certificate obtained under section 29A ; or

(B) in a case where no such certificate has been obtained,—

(I) a receipt obtained under sub-section (2) of section 29A ; or

(II) a postal acknowledgment received by the transferor if he has sent an application in this behalf by registered post acknowledgment due to the registering authority referred to in section 29A,

together with a declaration that he has not received any communication from such authority refusing to grant such certificate or requiring him to comply with any direction subject to which such certificate may be granted ;

(b) the transferee shall, within thirty days of the transfer, report the transfer to the registering authority within whose jurisdiction he resides, and shall forward the certificate of registration to that registering authority together with the prescribed fee and a copy of the report received by him from the transferor in order that particulars of the transfer of ownership may be entered in the certificate of registration.'

From a plain reading of this section, it is clear that this section does not deal with transfer of the ownership of any motor vehicle nor does it impose any restriction on transfer of such ownership. It simply obligates the transferor and the transferee to report within the specified time from the date of transfer the fact of transfer to the registering authority. This section, in fact, presupposes transfer of ownership of a motor vehicle. It is only after the actual transfer is effected that the obligation contemplated by this section comes into operation. Moreover, non-compliance with the requirement of this section does not in any way affect or invalidate the transfer of ownership of the vehicle-it only makes the transferor or the transferee liable to prosecution or penalty. Under the circumstances, reliance on section 32 of the Motor Vehicles Act, 1939, for determining the ownership of a vehicle is completely misplaced. This section has no bearing on the validity of the transfer of a motor vehicle which has to be decided in each case having regard to the facts and circumstances thereof."

A Division Bench of the Calcutta High Court, in the case of *CIT* v. *Salkia Transport Associates* [1983] 143 ITR 39 (Cal), speaking through Sabyasachi **39**

Mukharji, J. (as His Lordship then was), observed as under (page 45 of 143 ITR) :

"The argument that the assessee was not the registered owner of the vehicles under the Motor Vehicles Act is also of no consequence. It is well settled that an assessee will not be entitled to depreciation allowance if he is not the owner of the buildings, machinery, plant or furniture unless he is the owner of the same. Sub-section (1A) of section 32 which came into effect from April 1, 1971, provides an exception to this rule but this sub-section is confined to buildings only and does not extend to plant, machinery or furniture. But there is no provision under the Motor Vehicles Act which requires registration of a motor vehicle in the name of a person for the purpose of acquisition of ownership of the vehicle. Section 22(1) of the Motor Vehicles Act, which requires registration of motor vehicles, is in the following terms :

'22. (1) No person shall drive any motor vehicle and no owner of a motor vehicle shall cause or permit the vehicle to be driven in any public place or in any other place for the purpose of carrying passengers or goods unless the vehicle is registered in accordance with this Chapter and the certificate of registration of the vehicle has not been suspended or cancelled and the vehicle carries a registration mark displayed in the prescribed manner.'

The provision of this section does not prevent a person from becoming an owner of a motor vehicle without registration. On the contrary, the section makes it obligatory for an owner of a motor vehicle to get the vehicle registered and to display the certificate of registration before the vehicle is driven in any public place. Registration is not an essential prerequisite for acquisition of ownership of a motor vehicle but is an obligation cast upon the owner of a vehicle for the purpose of running the vehicle in any public place. Therefore, in our opinion, whether the buses were registered in the assessee's name or not is not very material for the purpose of this case. This may be a factor that has to be taken into consideration. But, when, under the agreement, the new buses that were acquired by the assessee in replacement of the old buses became the property of the assessee-firm, there is no reason to hold that the assessee was not the owner of the buses because the buses were not registered in the name of the assessee.

Section 22(1) of the Motor Vehicles Act does not lay down that a person cannot be the owner of a motor vehicle unless the motor vehicle is registered in his name.

The Supreme Court had also an occasion to consider this question in the case of *K. L. Johar and Co.* v. *Deputy Commercial Tax Officer* [1965] 16 STC 213 (SC) and observed as follows (page 223) :

'So far as the dealer is concerned the whole price is paid by the appellant. The agreement also shows that the appellant is the owner of the vehicle and the intending purchaser is merely a hirer thereunder. The vehicle has to be registered in the name of the appellant, though the fact of registration by itself in one name or another may not be determinative of the ownership of the vehicle.'

The question of ownership is essentially a question of fact. In this case the agreement clearly provides that the new vehicles acquired in replacement of the old and worn out vehicles will be the property of the assessee. That the assessee has purchased five new buses is not disputed. The only argument is that the vehicles were not registered in the name of the assessee under the Motor Vehicles Act. But that is one of the factors that has to be taken into consideration for deciding the question of ownership of the buses. It cannot be said as a matter of law that unless the buses are registered in the name of the assessee, the assessee cannot be regarded as the owner of the buses. On the contrary, the essential prerequisite for registration under section 22(1) of the Motor Vehicles Act is ownership of a motor vehicle. Unless a person is the owner of a motor vehicle he is not entitled to get it registered in his name under section 22(1) of the Motor Vehicles Act. The Tribunal in this case has come to the conclusion on a review of the facts and also of the agreement that the assessee was the owner of the five new buses and as such was entitled to claim depreciation allowance on these buses. The Tribunal has not committed any error of law in coming to this conclusion. The requirement of section 32 of the Income-tax Act is that the vehicles must be 'owned by the assessee'. This section does not require that the assessee must be a registered owner of the vehicles in order to claim depreciation allowance in respect of them. We are of the view that, in the facts of this case, the new buses were owned by the assessee within the meaning of section 32 of the Income-tax Act and the assessee was entitled to claim depreciation allowance on these vehicles."

At this stage, we may also look into the decision of this court in the case **40**
of *Deputy CIT* v. *Pradip N. Desai (HUF)* reported in [2012] 341 ITR 277 (Guj), wherein this court took the view that if the assessee is not involved in the business of hiring the vehicle on rent, then he is not entitled to claim higher depreciation under clause (2)(ii) of Entry-III of appendix-I. There

need not be any debate on the proposition of law as explained by this court in the said judgment. However, as discussed above, there is thumping evidence on record to indicate that the assessee is involved in the business of hiring the cranes. He might be using the cranes for his personal construction business too, but that does not disentitle him to claim higher depreciation once it is shown that the assessee is in the business of hiring the cranes.

41 In the overall view of the matter, we have reached the conclusion that the Tribunal committed an error in dismissing the appeal.

42 In the result, this appeal succeeds and is hereby allowed. The impugned order passed by the Income-tax Appellate Tribunal dated August 13, 2018 in the I.T.A. No.960/AHD/2015 for the assessment year 2011-12 is hereby quashed and set aside. The substantial question of law is answered in favour of the assessee and against the Revenue.

[2020] 423 ITR 568 (Mad)

[IN THE MADRAS HIGH COURT]

DR. BHARAT MEHTA AND ANOTHER

v.

DEPUTY COMMISSIONER OF INCOME-TAX AND OTHERS

R. SURESH KUMAR J.

December 31, 2019.

SS ▸ ITA 1961, s 132(1)(iib)
AY ▸ Block period 1-4-1990 to 31-3-2000, 1-4-2000 to 24-1-2001
HF ▸ Department

SEARCH AND SEIZURE—BLOCK ASSESSMENT—LIMITATION—COMMENCEMENT OF LIMITATION—LAW APPLICABLE—EFFECT OF INSERTION OF CLAUSE (iib) IN SECTION 132(1)—TIME TAKEN TO OBTAIN INFORMATION STORED IN ELECTRONIC RECORDS TO BE TAKEN INTO ACCOUNT—SEARCH STARTED IN JANUARY 2001—ASSESSEE NOT GIVING ACCESS TO RECORDS STORED IN COMPUTER TILL JUNE 2001—BLOCK ASSESSMENT IN JUNE 2003—NOT BARRED BY LIMITATION—INCOME-TAX ACT, 1961, S. 132(1)(iib).

Clause (iib) was inserted in section 132(1) of the Income-tax Act, 1961 with effect from June 1, 2001. It requires any person who is found to be in possession or control of any books of account or other documents maintained in the form of electronic record as defined in clause (t) of sub-section (1) of

section 2 of the Information Technology Act, 2000 to afford the authorised officer the necessary facility to inspect such books of account or other documents. Therefore unless and until the necessary facility to inspect such books of account or other documents maintained in the form of electronic record is made available to the Revenue, it cannot be said that the search was completed. Instead, it should only be construed that the search continues.

Held, *that throughout the searches undertaken by the Revenue from January 2001 till June 2001, the password of the computer of the assessee to have access to the documents loaded or fed in the computer had not been divulged by the assessee and this fact had not been denied by the assessee. If that were so, it could not be said that the Revenue without having access to the electronic documents should have completed the search on the very first day of the search, January 25, 2001 itself. The Revenue's continuous search operation on various dates from January 25, 2001 till June 12, 2001 could very well be construed as an authorised search operation, and therefore the panchnama issued on June 12, 2001 should be deemed to be the last authorisation within the meaning of* Explanation 2 *to section 158BE. Therefore, the block assessment order dated June 30, 2003 was within the limitation of two years under section 158BE(1)(b) commencing from July 1, 2001 since the end of the month in which the last of authorisation for search under section 132 was to be reckoned only as June 30, 2001.*

Cases referred to :

Balakrishnan Nair (C.) (Dr.) *v.* CIT [1999] 237 ITR 70 (Ker) (para 37)

CIT (Deputy) *v.* Rakesh Sarin [2014] 362 ITR 619 (Mad) (paras 21, 40)

Rakesh Kumar Jain (A.) *v.* Joint CIT [2012] 254 CTC 576 (Mad) ; [2012] 80 DTR 257 (Mad) ; [2013] 214 Taxman 39 (Mad) (paras 12, 37, 40)

Ramaiah Reddy (C.) *v.* Asst. CIT (IMV) [2011] 339 ITR 210 (Karn) (paras 12, 36, 40)

W. P. No. 20999 of 2003 and W. P. M. P. No. 26089 of 2003.

M. P. Senthil Kumar, for the petitioners.

A. P. Srinivas, for the respondents.

JUDGMENT

R. SURESH KUMAR J.—This writ petition has been filed seeking for a writ of certiorari to call for the records in No. PA/GI No. AADPH7768C, dated June 30, 2003 and quash the same. 1

The necessary facts which are required to be noticed for the disposal of this writ petition are as follows : 2

"(i) The petitioner (Dr. Bharat Mehta), who died during the pendency of the writ petition, in whose place his legal representative, one Mehul Mehta has been substituted as P2, hence the term petitioner denotes only the original petitioner, i.e., P1-Dr. Bharat Mehta (for the sake of convenience), who was a medical practitioner and also he was doing some business along with some of his family members. The petitioner was the income-tax assessee from 1978-79 onwards. He was residing at No. 4/181, Kodambakkam High Road, Chennai-34 and he was having a clinic at No. 87, N. S. C. Bose Road, Chennai along with his father Dr. M. J. Mehta.

(ii) The said residential premises, i.e., No. 4/181, Kodambakkam High Road, Chennai-34 seems to be the joint family property, where some family business also is being undertaken by the family members including the petitioner and his brother one Hemant Mehta.

(iii) While so, in the year 2001, i.e., in January 2001, on January 25, 2001, the premises of the petitioner was searched for the block period from April 1, 1990 to March 31, 2000 and April 1, 2000 to January 24, 2001 under the warrant/authorisation issued in this regard, by the team of the respondents-Revenue and on January 25, 2001, a panchanama was recorded, where according to the petitioner, the search was concluded on January 25, 2001, however, on that day, under section 132(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act'), a prohibitory order was issued by the Revenue.

(iv) Simultaneously the other premises, i.e., at No. 23, Noor Veeraswamy Street, Chennai-34 also was searched on the same day, i.e., on January 25, 2001. Thereafter pursuant to the prohibitory order issued by the Revenue, subsequent searches had taken place on various dates during January, February, March, April, May and June 2001 and last such search operations was completed on June 12, 2001 and on that date also, a panchanama was drawn.

(v) Subsequent to the said search operations and seizure made under section 132 of the Act, a notice under section 158BC of the Act was issued on October 5, 2001 by the Revenue and pursuant to which, the petitioner filed a return for the block period from April 1, 1990 to January 24, 2001 on October 23, 2001. Thereafter there had been number of correspondences between the petitioner and the Revenue and ultimately the block assessment order for the said block period from April 1, 1990 to March 31, 2000 and from April 1, 2000 to January 24, 2001 was issued by the Revenue on June 30, 2003, computing the tax, surcharge and interest payable on the undisclosed

income by the petitioner to the extent of Rs. 5,23,08,245. In the said block assessment order, the Revenue also initiated penalty proceedings as per the proviso to section 158BFA(2) of the Act.

(vi) Though an appeal remedy is available to the petitioner to assail the said block assessment order, the petitioner has chosen to file this writ petition on the ground that, the very block assessment order itself is barred by limitation under the provision, i.e., section 158BE(1)(b) and also on the ground that there was no notice under section 143(2) of the Act issued and even if it was issued, that was also barred by limitation and there had been no prior approval of the Joint Commissioner of Income-tax which ought to have been obtained under section 158BG of the Act and there had been a violation of principles of natural justice. Therefore on these grounds, instead of filing a regular appeal, the petitioner filed the present writ petition, challenging the block assessment order, which is impugned herein, dated June 30, 2003 issued by the Revenue, to quash the same as prayed therein. That is how this writ petition has come up before this court.

(vii) During the pendency of the writ petition, the original writ petitioner, Dr. Bharat Mehta deceased and in whose place the legal representative of the deceased, Dr. Bharat Mehta, one Mr. Mehul Mehta has been substituted by the orders of this court, dated September 12, 2017 and who contested this case."

Mr. M. P. Senthil Kumar, learned counsel appearing for the petitioner 3
has raised the following grounds in order to assail the impugned block assessment order :

"(a) The block assessment order under section 158BC read with section 158BD is barred by limitation as per section 158BE(1)(b).

(b) The notice under section 143(2) which is mandatorily to be issued even in respect of section 158BC proceedings, had not been issued and assuming if it is issued belatedly, that is also barred by limitation.

(c) Under section 158BG, prior approval was to be obtained to proceed, from Joint Commissioner of Income-tax, which was not obtained and the learned counsel also raised the ground that, there has been no opportunity given to the petitioner during the entire proceedings, which ended in the impugned block assessment order, thereby the Revenue violated the principles of natural justice."

4 By raising the aforesaid grounds, the learned counsel tried to assail the impugned block assessment order. In support of his contention, the learned counsel for the petitioner would contend that, totally two premises of the petitioner was searched and documents were seized and according to the Revenue, the said search was conducted in both the premises on January 25, 2001 pursuant to the authorisation given on January 25, 2001 itself and the search was over on that day and in the panchanama issued on that day by the Revenue, they have clearly mentioned that, the search was concluded.

5 When that being the position, thereafter, the question of issuing prohibitory order under section 132(3) of the Act does not arise, however, prohibitory order was issued and on the strength of the prohibitory order, after a long gap, several times search and seizure operations had taken place at the premises of the petitioner and according to the Revenue, it was a continuous search and which was over only on June 12, 2001, therefore the said date, namely June 12, 2001 shall be reckoned as the date for commencing the limitation period, within the meaning of section 158BE(1)(b) of the Act, thereby the impugned order, i.e., block assessment order, dated June 30, 2003 is within the limitation period of two years, thereby the impugned order is not hit by the limitation under section 158BE(1)(b).

6 However the learned counsel for the petitioner would contend that, once the search was over on January 25, 2001 itself pursuant to the authorisation given in this regard and there has been no further authorisation given by the Revenue to continue the search, the very issuance of prohibitory order under section 132(3) itself was unwarranted and therefore on that strength, there could be no further search on the very same authorisation. Therefore for the purpose of computing the limitation under section 158BE(1)(b), the authorisation dated January 25, 2001 and the panchanama dated January 25, 2001 shall alone be treated as the starting point of the limitation and if that is taken into account, the two years period from the end of the month in which the last of the authorisation of search under section 132 was issued would be over by January 31, 2003 and therefore the impugned block assessment order dated June 30, 2003 is certainly beyond the two years limitation period, thereby it is barred by limitation under section 158BE(1)(b).

7 The learned counsel would further submit that, in respect of block assessment under section 158BC, the Assessing Officer shall proceed to determine the undisclosed income of the block period in the manner laid down in section 158BB and the provisions of sections 142 and 143(2) and (3) so far as may be applied, which means that, whenever section 158BC

proceedings is initiated to proceed to determine the undisclosed income of block period, the provisions which includes section 143 of the Act would apply, therefore, a notice under section 143(2) should have been issued, which has either not been issued or if it is issued, which is beyond the limitation.

The learned counsel would further submit that, under section 158BG, **8** the order of assessment for the block period shall be passed by an Assessing Officer not below the rank of Assistant Commissioner or Deputy Commissioner or Assistant Director or Deputy Director as the case may be, however such order shall not be passed without the previous approval of the Principal Commissioner or Principal Director or Director in case of search initiated under section 132.

Here in the case in hand, since it is after January 1, 1997, section 158BG **9** proviso (b) shall apply, under which, the Joint Commissioner or the Joint Director, as the case may be has to give approval.

The learned counsel in this context would submit that, no such approval **10** seems to have been obtained by the Revenue and such approval order has not been served or produced to the petitioner.

The learned counsel for the petitioner would further submit that, **11** throughout the assessment proceedings, no proper opportunity, as has been contemplated under various provisions of the Income-tax Act, have been given to the petitioner and therefore, the very principles of natural justice has been glaringly violated by the Revenue and therefore on that ground itself, the impugned block assessment order has to be interfered with, he contended.

In support of these contentions, the learned counsel for the petitioner **12** has relied upon various judgments, among them, he heavily relied upon the following judgments :

1. *A. Rakesh Kumar Jain* v. *Joint CIT* [2012] 254 CTC 576 ; [2012] 80 DTR 257 ;

2. *C. Ramaiah Reddy* v. *Asst. CIT (IMV)* [2011] 339 ITR 210 (Karn) ; [2011] 244 CTR (Karn) 126.

Per contra, Mr. A. P. Srinivas, learned standing counsel appearing for **13** the Revenue, by relying upon the averments made in the counter-affidavit filed by the Revenue would contend that, the petitioner was subjected to a search under section 132 of the Act on January 25, 2001. The search was carried out in the places of the petitioner and his family members, who run a family business, namely a company called M/s. Emcorp Finance Ltd., on the basis of separate warrants of authorisation issued in each case by the

Director of Income-tax (Investigation), Chennai. At the time of commencement of the search operation, the warrant of authorisation in the name of the petitioner was produced to him and he has affixed his signature thereon for having seen the same.

14 He would further submit that, in so far as the conclusion of the search on January 25, 2001 and therefore there was no necessity to issue a prohibitory order is concerned, in so far as the premises at No. 4/181, Kodambakkam High Road, Chennai-34 is concerned, the search was inconclusive and it was not concluded, therefore prohibitory order was issued. He would further submit that, the search was initiated on January 25, 2001 at No. 4/181, Kodambakkam High Road and it continued on January 30, 2001, February 2, 2001, February 8, 2001, February 20, 2001, February 23, 2001, March 14, 2001, April 4, 2001, May 22, 2001 and finally on June 12, 2001. Only on June 12, 2001, the search was finally concluded and on that date also, panchanama had been drawn and each and every time when the search was conducted on the aforesaid dates, separate panchanama were drawn and prohibitory orders were issued.

15 In so far as the long continuation of search starting from January 25, 2001 and ends up on June 12, 2001, the learned standing counsel for the Revenue would contend that, during the search, certain electronic devices were found, where lot of documents were uploaded or saved by the assessee/petitioner and when the same was questioned, the petitioner, till the last search, was not co-operating with the Revenue to disclose the password to have access with those documents, therefore for these kind of purposes, the search operation was continued in the premises at No. 4/181, Kodambakkam High Road, Chennai-34 and it ended only on June 12, 2001, where the Revenue was able to access with the software documents stored in the computer and thereafter only the search operation was completed and the Revenue proceeded to further.

16 The learned standing counsel would also submit that, the search at No. 23, Noor Veeraswamy Street, Chennai-34 was commenced at 1 p.m. on January 25, 2001 and concluded at 1.45 p.m. on the same date and therefore in so far as the said search is concerned at that premises, it was concluded on the same day itself. However in so far as the search at No. 4/181, Kodambakkam High Road, Chennai-600 034 is concerned, it commenced at about 1 p.m. on January 25, 2001 and concluded on 09.50 p.m. on January 25, 2001, that means, the search was inconclusive on January 25, 2001 and therefore based on the panchanama, prohibitory orders were issued in respect of that premises.

He would further submit that, ultimately on October 5, 2001, notice **17**
under section 158BC was issued to the petitioner to file the return of his undisclosed income for the block period in Form 2B and pursuant to which, the petitioner also filed the requisite return in Form 2B on October 23, 2001.

The learned standing counsel on the point of notice under section 143(2) **18**
of the Act, has submitted that, the said notice under section 143(2) of the Act was issued on June 6, 2003 and served by way of affixture on June 10, 2003. The attempt to serve the notice to the assessee/petitioner was unsuccessful on the first three successive occasions, as there was nobody willing to receive the same, therefore the Revenue had no option except to serve it by way of affixture. In this context, the detailed averment made by the Revenue in the counter-affidavit has been relied upon by the learned standing counsel.

The learned standing counsel would therefore submit that, the limitation **19**
for the purpose of section 158BE(1)(b) would not commence from February 1, 2001 and it would commence only from July 1, 2001, since the last search was conducted only on June 12, 2001 and the month of last such search ends only on June 30, 2001, therefore the impugned assessment order which was issued on June 30, 2003 is saved within the limitation period of section 158BE(1)(b).

The learned standing counsel would also submit that, prior approval of **20**
the Joint Commissioner of Income-tax was obtained under section 158BG and throughout the proceedings till the end of the assessment order, several times notices were issued and several correspondences had been made by the petitioner and the procedure contemplated under various provisions of the Act had been scrupulously followed by giving opportunity as has been contemplated under the provisions of the Act to the petitioner. Therefore the allegation made against the Revenue by the petitioner that, there has been violation of the principles of natural justice is only an allegation for the sake of making it to approach this court by filing writ petition under article 226 of the Constitution of India, since the petitioner is very well aware that, there is a statutory alternative efficacious appellate remedy, which admittedly the petitioner has not availed of and has approached straight away this court by invoking the extraordinary jurisdiction of this court under article 226 of the Constitution and only for the sake of approaching this court by invoking the writ jurisdiction, the said allegation of violation of the principles of natural justice has been made.

On the side of the citations referred to by the learned counsel for the **21**
petitioner, the learned standing counsel for the Revenue would submit

that, the two judgments, namely *Rakesh Kumar Jain* as well as *Ramaiah Reddy* cases (cited supra) cannot be made applicable to the facts of the present case, instead, a Division Bench of this court order made in *Deputy CIT* v. *Rakesh Sarin* [2014] 362 ITR 619 (Mad) ; [2014] 222 Taxman 84 (Mad) would apply to the facts of the present case, where the earlier two decisions, namely, *Rakesh Kumar Jain* and *Ramaiah Reddy* cases (cited supra) had been considered. Therefore on the strength of the aforesaid two decisions, the petitioner-assessee cannot make out a case to state that, the limitation under section 158BE(1)(b) would commence from the end of the month of the last panchanama, which according to the petitioner was January 25, 2001 and not from June 2001, as the Revenue claimed the last panchanama was June 12, 2001 and therefore the said decisions cited by the petitioner's side, according to the learned standing counsel for the Revenue, would no way enhance the winability of the petitioner's case. Therefore the learned standing counsel would submit that, the impugned block assessment order is sustainable and the very invocation of the provisions of article 226 by the petitioner without taking the route of the appellate remedy would itself be fatal to the case of the petitioner and therefore the writ petition is liable to be dismissed, he contended.

22 I have given my anxious consideration to the rival submissions made by the learned respective counsel appearing for the petitioner as well as the Revenue and have perused the materials placed before this court.

23 The Revenue though raised an objection that, the writ petition cannot be entertained as it is not maintainable in view of the appellate remedy available under the Act to the petitioner, however, since the writ petition is of the year 2003, where the point of alleged violation of the principles of natural justice as well as the limitation point under section 158BE(1)(b) and also the alleged non-issuance of notice under section 143(2) of the Act since had been raised, probably on these grounds, the writ petition would have been admitted already and therefore at this length of time, during the final hearing, this court is not impressed with the said ground raised by the Revenue to dismiss the writ petition on the ground of availability of appellate remedy. Therefore this court feel that, the writ petition can be entertained in view of the grounds raised by the petitioner.

24 The ground that, there has been no approval from the Joint Commissioner of Income-tax as contemplated under section 158BG is concerned, it has been specifically averred in the counter-affidavit filed by the respondent that, as per the notification, dated April 16, 2003, the Commissioner of Income-Tax, Central-I, Chennai, had transferred the case to the Deputy Commissioner of Income-tax, Central Circle I(5), Chennai and to the

Deputy Commissioner of Income-tax, Central Circle I-(3) Chennai, with effect from April 16, 2003. Though no specific averment has been made that, the initial approval was given by the Joint Commissioner of Income-tax under section 158BG, it is the vehement contention on the part of the Revenue that, only pursuant to the approval given by the Joint Commissioner of Income-tax, the search in the premises of the assessee/petitioner was made, of course on specific authorisation. Taking into account of these factors, since it is an allegation and the denial and the Revenue has maintained that section 158BG has been complied with, this court accepts the same.

In so far as the allegation that, there was no notice under section 143(2) **25** served on the petitioner is concerned, the specific averment made in the counter-affidavit reads thus :

> "33. The notice under section 158BC was issued in this case on October 5, 2001 requiring the petitioner to file a return of his undisclosed income for the block period in Form 2B. In this connection, the allegation that the block period was not specified in the said notice is not correct in so far as in the notice itself it is made known that the 'block period' is as mentioned in section 158B(a) of the Income-tax Act. Further, the petitioner filed the requisite return in Form 2B on October 23, 2001. I state that the notice under section 143(2) of the Income-tax Act was issued on June 6, 2003 and served (by affixture) on June 10, 2003.
>
> 34. The allegation that no valid notice under section 143(2) was issued to the petitioner is factually incorrect. The notice was issued on June 6, 2003. The attempts to serve the notice was not successful on the first three successive occasions since there was nobody willing to receive the same. Accordingly, it had to be served by affixture on the fourth occasion. The allegation regarding harassment of any sort with ulterior motive is totally baseless and it is only a fiction to justify the filing of writ petition.
>
> 35. I submit that the allegation that a notice under section 143(2) was not issued and that a notice under section 142(1) only was issued is not correct since the notices under sections 143(2) and 142(1) were issued on the same date (June 6, 2003) and also served on the same date (June 10, 2003). In the above assessment order, the Assessing Officer was mentioning the reason why the notice under section 142(1) was issued 'only on June 6, 2003' whereas the petitioner attempts to read the word 'only' in connection with the words 'notice under section 142(1)' to present as if only the notice under section

142(1) was issued. This is not correct and the petitioner is well aware of the same. The allegation that no notice under section 143(2) was issued and that the petitioner represented his case before the first respondent only on the basis of oral requirement is factually incorrect.

36. The allegation that adequate opportunity was not given to the petitioner before the completion of the block assessment is factually incorrect since the case was discussed with the petitioner and his representatives on as many as six occasions. Further, written submissions filed by the petitioner were also duly considered."

26 In view of the said factual matrix as has been averred in the counter-affidavit, which is not denied by the petitioner/assessee, the said ground raised by the petitioner that, no notice under section 143(2) was issued, cannot be accepted.

27 Now the main issue, as raised by the petitioner , as to whether the block assessment proceedings, i.e., the assessment order under section 158BC read with section 158BD is barred by limitation under section 158BE(1)(b) or not, can be gone into.

28 In this context, the contention of the petitioner is that, on January 25, 2001, first search was made in both the premises and on that date, a panchanama was drawn, where it has been specifically mentioned that, "search concluded", however on the very same date, the prohibitory order under section 132(3) of the Act was issued by the Revenue which is unwarranted. Therefore on the strength of the said prohibitory order continuous search was made on various dates till June 2001 and therefore by taking advantage of those subsequent searches, which are unauthorised, the Revenue cannot claim that, the last panchanama was drawn only on June 12, 2001 and therefore the limitation for the purpose of section 158BE(1)(b) would commence only after the end of the month where the last such panchanama was drawn, i.e., June 30, 2001 and therefore the impugned order, since was passed on June 30, 2003, is within the limitation, cannot be accepted, is concerned, as has been pointed out by the learned standing counsel for the Revenue, the search was conducted on January 25, 2001 in two premises, one is at 23, Noor Veeraswamy Street, Chennai-34 and another one is at No. 4/181, Kodambakkam High Road, Chennai-34.

29 I have perused the copy of the panchanamas issued in respect of both premises, dated January 25, 2001 and a copy of which also had been filed by the petitioner in the typedset of papers which discloses that, in so far as the panchanama in respect of No. 23, Noor Veeraswamy Street, Chennai-34 is concerned, it has been specifically written in the panchanama by the Revenue that "search concluded".

However in respect of panchanama issued on the same date, i.e., on January 25, 2001 in respect of the premises at No. 4/181, Kodambakkam High Road, Chennai-34, the panchanama specifically mentions that "search continues" and on that date, prohibitory order was issued only in respect of No. 4/181, Kodambakkam High Road, Chennai-34 premises and not in respect of No. 23, Noor Veeraswamy Street, Chennai-34. **30**

Even on subsequent dates also, i.e., in the months of February to June, each time when the panchanamas were drawn as a proof for having searched the premises at No. 4/181, Kodambakkam High Road, Chennai-34 is concerned, according to the Revenue, the search continued, therefore every time, prohibitory order under section 132(3) of the Income-tax Act was issued and lastly the search was completed on June 12, 2001. Therefore the panchanama drawn on June 12, 2001 is the culmination of continuation of panchanamas in respect of the same premises, i.e., No. 4/181, Kodambakkam High Road, Chennai-34 and therefore that should alone be treated as a last panchanama drawn by the Revenue in respect of the said premises. **31**

With these factual matrix, the relevant provisions of the Act can be looked into. **32**

Section 158BE, which contemplate the limitation, reads thus : **33**

> "158BE. *Time limit for completion of block assessment*.—(1) The order under section 158BC shall be passed—
>
> (a) within one year from the end of the month in which the last of the authorisations for search under section 132 or for requisition under section 132A, as the case may be, was executed in cases where a search is initiated or books of account or other documents or any assets are requisitioned after the 30th day of June, 1995, but before the 1st day of January, 1997 ;
>
> (b) within two years from the end of the month in which the last of the authorisations for search under section 132 or for requisition under section 132A, as the case may be, was executed in cases where a search is initiated or books of account or other documents or any assets are requisitioned on or after the 1st day of January, 1997."

Explanation 2 to section 158BE is very relevant, that is also extracted hereunder for easy reference : **34**

> "*Explanation 2*.—For the removal of doubts, it is hereby declared that the authorisation referred to in sub-section (1) shall be deemed to have been executed—

(a) in the case of search, on the conclusion of search as recorded in the last panchanama drawn in relation to any person in whose case the warrant of authorisation has been issued ;

(b) in the case of requisition under section 132A, on the actual receipt of the books of account or other documents or assets by the Authorised Officer."

35 For any assessment under section 158BC, there must be a search under section 132 and if a search is conducted under section 132, on the conclusion of such search, as recorded in the last panchanama drawn, it shall be deemed to have been executed as authorisation for the purpose of limitation as contemplated under section 158BE(1)(a) and (b) and in this case, 158BE(1)(b) would apply since it is a case after January 1, 1997.

36 This provision of section 158BE with *Explanation 2* has been widely discussed and interpreted by the Karnataka High Court in *C. Ramaiah Reddy* v. *Asst. CIT (IMV)* [2011] 339 ITR 210 (Karn) ; [2011] 244 CTR (Karn) 126. In order to appreciate the same, the relevant portion of *Ramaiah Reddy's* case of Karnataka High Court is extracted hereunder (page 266 of 339 ITR) :

"The panchnama referred to in *Explanation 2* to the said section specifically refers to search under section 132 and section 132 specifically refers to authorisation to enter and search and it has no reference to entering and searching the premises which are the subject-matter of prohibitory order or restraint order. No authorisation is required to enter the premises and inspect the materials which are the subject-matter of prohibitory order or restraint order. The said order itself acts as an authorisation to enter the premises and inspect the materials which are the subject-matter of those orders and it also empower them to seize any incriminating material. However, after entering the premises of such person, he has to confine his actions only for inspection of the subject-matter of prohibitory order or restraint order. He cannot search the premises over again. Any material seized after such inspection would be the undisclosed income for the purpose of the block assessment in pursuance of search under section 132(1) of the Act. The panchnama evidencing such inspection and seizure would be the last panchnama in respect of the said premises. But for the purpose of limitation under section 158BE, it would not be the last panchnama drawn in proof of conclusion of search, as defined in *Explanation 2* to section 158BE. For the purpose of limitation, there can be only one search and one panchnama.

The law expressly provides for more than one authorisation. A search authorisation could specify only one building/place/vessel/vehicle/aircraft. This is clear from the use of the building, etc., in the singular sense. Section 132(1) uses building/place/vessel/vehicle/aircraft in singular sense. Further, clause (a) in Form 45 uses the word, 'to enter and search, the said building/place/vessel/vehicle/aircraft'. When there are multiple places to search and such places are far off, it is impractical to have a single authorisation. Different persons will be carrying out search and each one of them is required to be authorised through the search authorisation. In other words, search authorisation should authorise a particular official for executing the search. Therefore, when there are different places to be searched, separate search authorisation should be drawn with reference to each place of search. The said authorisations may be issued on different dates in which case, the last of such authorisations is to be looked into for the purpose of limitation. However, it is possible that there may be more than one authorisation on the same day. Then the question is which is the last of such authorisations for the purpose of limitation. When all the authorisations are executed there will be one panchnama in respect of each such authorisation. The authorisations may be executed on different dates also. Then the doubt would arise regarding which authorisation to be looked into for the purpose of limitation as all of them are last authorisation. It is for removal of that doubts that the *Explanation* is inserted. For the purpose of computing the limitation, it is the one year from the end of the month in which the last of the authorisations was executed. If there are more than one authorisation issued on the same day, then the last panchnama drawn in relation to the warrant of authorisation issued on the same day. As the period commences from the end of the month of the execution of the authorisation, the law has provided for the authorised officer to visit the premises for the purpose of inspection regarding the material which is the subject-matter of prohibitory order or the restraint order, even after search. However, the said exercise has to be done expeditiously, as the period of limitation starts from the date of search was concluded as evidenced by the panchnama, as otherwise the very object with which these provisions was introduced would be defeated.

Circular No. 772, dated December 23, 1998, issued by Central Board of Direct Taxes explains this position as under ([1999] 235 ITR (St.) 35) :

'According to section 158BE, limitation of 2 years has to be counted from the end of the month in which last of the authorisations was executed. Use of the word 'authorisations' implies issue of more than one authorisation. Supposingly two authorisations are issued one after the other and the last authorisation is executed first while the authorisation issued earlier is executed later on. In such case, limitation should be counted from the date of issue of the execution of the last authorisation, though it is executed earlier and not from the execution of the earlier authorisation which is executed later. This anomalous situation is intended to be removed by insertion of *Explanation 2* below section 158BE with effect from July 1, 1995, by the Finance (No. 2) Act, 1998. This *Explanation* reads as follows :

"*Explanation* 2.—For the removal of doubts, it is hereby declared that the authorisation referred to in sub-section (1) shall be deemed to have been executed,—

(a) in the case of search, on the conclusion of search as recorded in the last panchnama drawn in relation to any person in whose case the warrant of authorisation has been issued ;

(b) in the case of requisition under section 132A, on the actual receipt of the books of account or other documents or assets by the authorised officer."

According to this *Explanation*, limitation is to be counted with reference to the last panchnama drawn on execution of a warrant of authorisation as referred to in section 158BE. The main attribute of the panchnama is stated to be that it should record the conclusion of search.'

The law does not contemplate the authorised officer to set out in any of the panchnama that he has finally concluded the search. If for any reason the authorised officer wants to search the premises again, it could be done by obtaining a fresh authorisation. There is no prohibition in respect of the same premises. It is open to the empowered authority to issue authorisation but when the authorisation is issued once, the authorised officer cannot go on visiting the premises under the guise of search. Therefore, it is clear once in pursuance of an authorisation issued the search commences, it comes to an end with the drawing of a panchnama. When the authorised officer enters the premises, normally, the panchnama is written when he comes out of the premises after completing the job entrusted to him. Even if after such search he visits the premises again, for investigation or inspection of the subject-matter of restraint order or prohibitory order, if a

panchnama is written, that would not be the panchnama which has to be looked into for the purpose of computing the period of limitation. But, such a panchnama would only record what transpires on a re-visit to the premises and the incriminating material seized would become part of the search conducted in pursuance of the authorisation and would become the subject-matter of block assessment proceedings. But, such a panchnama would not extend the period of limitation. It is because the limitation is prescribed under the statute. If proceedings are not initiated within the time prescribed, the remedy is lost. The assessee would acquire a valuable right. Such a right cannot be at the mercy of the officials, who do not discharge their duties in accordance with law. The procedure prescribed under section 132 of the Act is elaborate and exhaustive. The said substantive provision expressly provides for search and seizure. In the entire provision there is no indication of that search once commenced can be postponed. What can be postponed is only seizure of the articles. Therefore, once search commences it has to come to an end with the search party leaving the premises whether any seizure is made or not. The limitation for completion of block assessment is expressly provided under section 158BE which clearly declares that it is the execution of the last of authorisation which is to be taken into consideration. The word 'seizure' is conspicuously missing in the said section. The same cannot be read into the section for the purpose of limitation. Then it amounts to rewriting the section by the court, which is impermissible in law.

The aforesaid Circular No. 772, dated December 23, 1998 (see [1999] 235 ITR (St.) 35) refers to this dilemma faced by the Department.

'127. *Execution of last of the authorisation or requisition*

The word "execute" is defined in *Black's Law Dictionary*, fifth edition, page 509 as follows :

"to complete ; to make ; to sign ; to perform ; to do ; to carry out according to its terms ; to follow up ; to fulfil the command or purpose of ; to perform all necessary formalities ; to make and sign a contract ; to sign and deliver a notes."

The word "execution" is defined at page 510 of the said Law Dictionary as follows :

"Carry out some act or course of conduct to its completion. *Northwest Steel Rolling Mills* v. *Commissioner of Internal Revenue*, C.C.A. Wash., 110 F.2d 286, 290 : completion of an act : putting into force :

completion fulfilment : perfecting of anything or carrying it into operation and effect. 'Execution' a process in action to carry into effect the directions in a decree or judgment—*Foust* v. *Foust*, 47 Cal. 2d 121, 302 p.2d 11, 13."

In the light of the above definition of the words "execute" and "execution", one may argue that until and unless the final act is performed, the warrant of authorisation should not be treated as executed and the mere initiation of the search followed by an interregnum consequent upon restraint order or for any other reason may not be treated as "execution" of the warrant. But this interpretation would be hypertechnical and it needs detailed discussion as is done in the following paras.

The question arises as to whether execution of a warrant of authorisation or requisition refers to the conclusion of the proceedings under section 132 and/or 132A or it refers only to the execution of the warrant even though as a result of such execution the proceedings under section 132 or 132A are yet to he completed. The latter situation will include a case in which a restraint order under section 132(3) is passed. In such a case, it can be said that though the warrant of authorisation has been executed, proceedings under section 132(3) are pending. Since the word 'execute', also means 'to complete', one has to wait for conclusion of the proceedings under section 132(3) for the purpose of computation of limitation under section 158BE(1) and the period of one year has to be computed from the end of the month in which the proceeding under section 132(3) are concluded. If there are more than one warrant limitation will be counted from the execution of the last one.

A contrary view is as much possible if one were to consider the spirit of the scheme which envisages expeditious disposal of the search cases and it would be reasonable to interpret that execution of warrant is not tantamount to completion of proceedings under section 132 or 132A the period during which the proceedings under section 132(3) remained pending has to be excluded for the purpose of counting limitation of one or two years under section 158BE. Otherwise, it may lead to absurd results as it may take several years before restraint under section 132(3) is lifted and it may thus extend the period of one or two years by all those years during which proceedings under section 132(3) remained pending it may be agreed against this view that section 132(8A) takes care that there is no extension of proceedings under section 132(3) and that the view cannot be taken without doing violence to the language of the Act.'

Therefore, the *Explanation* added to remove a doubt cannot be construed as a provision providing a longer period of limitation than the one prescribed in the main section. When under the scheme of the section there is no indication of a second search on the basis of the same authorisation issued under the said provision, the legislative intention is clear and plain and the interpretation to be placed by the courts should be in harmony with such an intention. Therefore, one authorisation is to be issued in respect of one premises in pursuance of which there can be only one search and such a search is concluded, when the searching party comes out of the premises, which is evidenced by drawing up a panchnama. When there are multiple places to search and when multiple authorisations are issued, on different dates or on the same date or in respect of the same premises more than one authorisation is issued on different dates, the last panchnama drawn in proof of conclusion of search in respect of the authorisation is to be taken into consideration for the purpose of limitation for block assessment."

The said position of *C.Ramaiah Reddy's* case was in fact accepted by a **37**
Division Bench of this court in the case of *A. Rakesh Kumar Jain* v. *Joint CIT* reported in [2012] 254 CTC 576 (Mad) ; [2012] 80 DTR 257 (Mad) and in order to understand the said decision, the relevant portion of the said judgment is extracted hereunder :

"11. Before going into the merits of the contention, sub-section (1) of section 158BE reads as under :

'158BE. *Time limit for completion of block assessment.*—(1) The order under section 158BC shall be passed—

(a) within one year from the end of the month in which the last of the authorisations for search under section 132 or for requisition under section 132A as the case may be, was executed in cases where a search is initiated or books of account or other documents or any assets are requisitioned after the June 30, 1995, but before the 1st day of January, 1997 ;

(b) within two years from the end of the month in which the last of the authorisations for search under section 132 or for requisition under section 132A, as the case may be, was executed in cases where a search is initiated or books of account or other documents, or any assets are requisitioned on or after the 1st day of January, 1997.'

A reading of the above section shows that it consciously takes note of the cases of more than one authorisation for search issued. In such cases, the *Explanation* provided for the deemed conclusion to the

execution of the warrant as extended to the last of the panchanamas in relation to the person, in whose case authorisation was issued. But, could the *Explanation* be extended to a case of single authorisation issued but with panchanamas of more than one drawn ?

12. We do not subscribe to the view of the Revenue based on the *Explanation* that several of the authorisations drawn and executed on different dates and the several panchanamas drawn would have bearing to a case of single authorisation for search, but showing several panchanamas. In this connection, reasoning of the Karnataka High Court in the case of *C. Ramaiah Reddy* (cited supra) in paragraph 77 would be of relevance.

The panchnama referred to in *Explanation 2* to the said section specifically refers to search under section 132 and section 132 specifically refers to authorisation to enter and search and it has no reference to entering and searching the premises which are the subject-matter of prohibitory order or restraint order. No authorisation is required to enter the premises and inspect the materials which are the subject-matter of prohibitory order or restraint order. The said order itself acts as an authorisation to enter the premises and inspect the materials which are the subject-matter of those orders and it also empower them to seize any incriminating material. However, after entering the premises of such person, he has to confine his actions only for inspection of the subject-matter of prohibitory order or restraint order. He cannot search the premises over again. Any material seized after such inspection would be the undisclosed income for the purpose of the block assessment in pursuance of search under section 132(1) of the Act. The panchnama evidencing such inspection and seizure would be the last panchnama in respect of the said premises. But for the purpose of limitation under section 158BE, it would not be the last Panchnama drawn in proof of conclusion of search, as defined in *Explanation 2* to section 158BE. For the purpose of limitation, there can be only one search and one panchnama.

13. As reasoned out therein, there could be only one authorisation and a panchanama drawn as regards the conduct of the search, i.e., once when the search party concluded the search and leaves the premises after carrying with them the seized material, the authorisation for the search is fully implemented upon and execution completed. There afterwards, if the Department has to enter the premises again, as by way of search, certainly, one requires fresh authorisation ; however, as stated by the Karnataka High Court, no

such authorisation is required to enter the premises to inspect the materials, which are the subject-matter of prohibitory order or restraint order. The said order itself acts as an authorisation to enter the premises and inspect the materials, which are the subject-matter of those orders. However, after entering the premises of such person, he has to confine his actions only for inspection of the subject-matter of prohibitory order or restraint order. He cannot search the premises over again. Any material seized after such inspection would be the undisclosed income for the purpose of the block assessment in pursuance of search under section 132(1) of the Act. Thus, the panchanama evidencing such inspection and seizure would be the last panchanama in respect of the said premises. But for the purpose of limitation under section 158BE, it would not be the last panchanama drawn in proof of conclusion of search, as defined in *Explanation 2* to section 158BE. For the purpose of limitation, there can be only one search and one panchnama as reasoned out by the Karnataka High Court.

14. Referring to the Kerala High Court decision in the case of *Dr. C. Balakrishnan Nair* v. *CIT* [1999] 237 ITR 70 (Ker), the Karnataka High Court held that there is no provision in the Criminal Procedure Code or in the Income-tax Act therein, for postponing the search for such a long period. It is worthwhile to extract the decision of the Karnataka High Court, which in clear terms brings out the concept of search and validity of the authorisation issued for the search.

'Similarly, in circumstances not covered under those provisions, it is open for him to pass a prohibitory order under sub-section (3) not amounting to seizure which order will be in force for a period of 60 days after securing the possession of the materials, articles etc., in the aforesaid manner. Action under section 132(3) of the Income-tax Act can be resorted to only if there is any practical difficulty in seizing the item which is liable to be seized. When there is no such practical difficulty the officer is left with no other alternative but to seize the item, if he is of the view that it represented undisclosed income. Power under section 132(1)(iii) of the Income-tax Act thus cannot be exercised, so as to circumvent the provisions of section 132(1)(iii) read with section 132(1)(v) of the Income-tax Act. It is open for the authorised officer to visit the place for the purpose of investigation securing further particulars. Under the scheme, the law provides for such procedure. But not when he visits the premises for further investigation for the materials already secured. It does not amount to search as the

materials to be looked into and investigated is already known and is the subject-matter of a prohibitory order or a restraint order. Though it is not seizure or deemed seizure, it amounts to deemed possession. What is in your possession is to be looked into to find out, is there any incriminating material. It does not amount to search as understood under section 132 of the Act. It is only because of paucity of time he has gone back and wants to come back and look into the matter leisurely. There is no provision in the Criminal Procedure Code or in the Income-tax Act or the Rules for postponing the search for a long period. Then, the concept of search as understood either under the provisions of the Criminal Procedure Code or the Act which are made applicable expressly, would lose its meaning.'

15. As already seen, merely because, more than one panchanama is drawn in the given case on one authorisation, one cannot construe that the subsequent and the last of the panchanama issued as one flowing out of the search as a last of the panchanama referable to *Explanation 2* to section 158BE. Once the warrant of authorisation has been issued and the premises is searched and the search party leaves the premises, there is the end of the search and what could be postponed is only seizure of the articles and issuance of prohibitory order ; however, limitation for the completion of the block assessment begins on the conclusion of the search and issuance of panchanama and in case of single authorisation, the moment such party leaves the premises by drawing of the panchanama noting conclusion of the search, the limitation period begins.

16. Going by the facts herein, viz., as to the search completed on December 13, 2001 withdrawing of the panchanama and the search party leaving the premises, the mere fact that the panchanama contains the observation that 'search continues' per se would not enable the search party to keep the search in a suspended animation to carry on the search in future date to contend that the limitation has to be worked out on the last panchanama drawn i.e., February 15, 2002, thus calculating the limitation from February 15, 2002. We have no hesitation in accepting the case of the assessee that the limitation ends on December 31, 2003. The contention of the Revenue that the limitation has to be taken as February 29, 2004 does not go with the provisions of the Act. In such circumstances, the tax case appeal is allowed. Accordingly, we set aside the order of the Income-tax Appellate Tribunal. No costs."

38 These two decisions have been heavily relied upon by the learned counsel appearing for the petitioner-assessee and he would contend that, there must be one authorisation and one panchanama for one search in one premises and once the search is over, thereafter if at all any prohibitory order under section 132(3) is issued, such prohibitory order can only be used as an authorisation for the Revenue to re-enter the premises only for the purpose of seizure of the documents and materials and not for continuation of search. In other words, once authorisation is issued and search was conducted and the team of search left the premises after the drawal of panchanama, then the search operation is over and thereafter the only business left to the Revenue team to come back to the premises is for the purpose of seizure of the documents under the strength of prohibitory order since the prohibitory order issued in this regard would itself act as an authorisation for reentry to the premises for the purpose of seizure and not for the purpose of further continuation of search by the Revenue team without a further authorisation.

39 Only in this context, the Karnataka High Court in *Ramaiah Reddy* (cited supra) followed by a Division Bench of this court in *Rakesh Kumar Jain* (cited supra), held that, only in case of more than one authorisation what shall be the last authorisation or pursuant to what shall be the last panchanama of the last authorisation shall be treated as the last authorisation for the purpose of starting point of the limitation under section 158BE(1)(b) and in case of one authorisation with multiple panchanamas, it cannot be said that, the last such panchanama drawn by the Revenue under one authorisation would be the starting point of the limitation as that has not been intended in *Explanation 2* referred to above. This was exactly held by the aforesaid two decisions.

40 However, Mr. A. P. Srinivas, learned standing counsel appearing for the Revenue has relied upon *Deputy CIT* v. *Rakesh Sarin* reported in [2014] 362 ITR 619 (Mad) ; [2014] 222 Taxman 84 (Mad), which is a decision subsequently made by a Division Bench of this court after *Ramaiah Reddy* and *Rakesh Kumar Jain* cases. In this judgment, the Division Bench has held as follows (page 627 of 362 ITR) :

> "As is evident from the reading of the provision to section 158BE of the Act, in the case of search conducted after January 1, 1996, it was declared that limitation for passing the order under section 158BE of the Act is given as 2 years from the end of the month in which last of the authorisation was executed. *Explanation 2* clarifies 'the authorisation referred to in sub-section (1) shall be deemed to have been executed (a) in the case of search, on the conclusion of search as

recorded in the last panchanama drawn in relation to any person in whose case the warrant of authorisation has been issued.' Therefore, for finding out the limitation, all that is required to be seen is as to what is the last panchanama drawn in relation to the assessee, in whose case, warrant of authorisation was issued.

It is seen from the facts stated that the authorisation was issued by the Department on March 26, 2003 under section 132 of the Act to search the residential and office premises of the assessee. In terms of the said authorisation, the premises was searched on March 27, 2003 and March 28, 2003. In the panchanama drawn on March 27, 2003 and March 28, 2003, copies of which have been filed in the typed set of papers, it is seen that the officer has recorded as 'search continues' (temporarily concluded). Thereafter, we find that another authorisation was issued on August 27, 2003 under section 132 of the Act to search the bank, in which the assessee held his account and lockers. Pursuant to such authorisation, a panchanama was drawn on August 28, 2003, wherein, search was commenced on August 28, 2003 at 11.15 a.m., and concluded on August 29, 2003 at 12.05 p.m. In terms of the panchanama, the search concluded on August 29, 2003. In an unreported decision in Tax Case (Appeal) No. 1240 of 2006, by order dated September 25, 2012 (*A. Rakesh Kumar Jain* v. *Joint CIT* [2013] 214 Taxman 39), this court considered the similar question on limitation under section 158BE of the Act.

A reading of the decision of the Karnataka High Court in the case of *C. Ramaiah Reddy v. Asst. CIT (IMV)* [2011] 339 ITR 210 (Karn), wherein, heavy reliance was placed by the assessee clearly point out that the limitation in the case, where, the prohibitory order was issued following the search and panchanama was drawn, the same could be worked out not with reference to the date of the prohibitory order, but with reference to the panchanama drawn in proof of conclusion of search, as defined in *Explanation 2* to section 158BE of the Act. Applying the said decision of the Karnataka High Court reported in *C. Ramaiah Reddy* (supra), this court decided a similar question in the unreported decision in Tax Case (Appeal) No. 1240 of 2006 dated September 25, 2012 (*A. Rakesh Kumar Jain* (supra)). In such circumstances, we do not find that there is any justification to accept the plea of the assessee to confirm the order of learned single judge.

Learned counsel appearing for the assessee pointed out that in any extent, there is only one search, therefore, limitation has to be worked out taking the search conducted on March 27, 2003 as the date where

the last panchanama was drawn ; if the Revenue had any case, whatever be the annexures to the contents of the panchanama in the second search, it is open for the Revenue to make such of the assessment based on the materials covered in the course of second search. In the circumstances, the assessment fails in this case.

We do not accept the abovesaid line of submission of learned counsel for the assessee. As already pointed out in the preceding paragraphs, in cases where there is more than one authorisation, the starting point of limitation is to be computed from the last of the authorisation which as per *Explanation 2* to sub-section (2) of section 158BE of the Act is deemed to have been executed on the conclusion of the search as recorded in the last panchanama drawn. Thus going by *Explanation 2* added by the Finance (No.2) Act, 1998 with retrospective effect from July 1, 1995, the contention of the assessee cannot be accepted. Thus, with every panchanama drawn, the search team leaving the premises, the search conducted on March 28, 2003 came to an end as far as that authorisation was concerned. However the second search was admittedly on a fresh authorisation. Thus, in respect of search conducted on March 27, 2003 and March 28, 2003, panchanama was drawn with observation 'search continues', thus, considering the fact that the second search was to be carried on the different premises and materials to be seized, in fitness of things, fresh authorisation was issued by the Department on August 27, 2003 and as such under section 158BE of the Act, limitation has to be worked out from that date, i.e., the end of the month of August 28, 2003 and not with reference to the first search, i.e., March 27, 2003 and March 28, 2003.

In the background of this, we do not accept the plea of the assessee to uphold the order of learned single judge that the assessment is barred by limitation. Consequently, the writ appeal is allowed, the order of learned single judge is set aside. Thus, the Revenue succeeds on the aspect of limitation as regards the assessment made in this case."

This judgment has been heavily relied upon by the learned standing **41**
counsel for the Revenue and who would submit that, the Division Bench of this court in *Rakesh Sarin's* case (cited supra), where one of the member of the Division Bench of this court was the member of the earlier Division Bench of this court who authored the *Rakesh Kumar Jain's* case (cited supra), itself has distinguished the *Rakesh Kumar Jain's* case depending upon the facts of the case. Therefore the learned standing counsel for the Revenue would vehemently contend that, it is not the hard and fast rule

that, the interpretation given to *Explanation 2* to section 158BE would be fit for all circumstances and all cases falling under the category of section 158BE(1)(b).

42 I have gone through all these three judgments, i.e., one Division Bench of the Karnataka High Court and two Division Benches of this court.

43 The said interpretation given in respect of *Explanation 2* referred to above of section 158BE, as has been rightly contended by the learned standing counsel appearing for the Revenue, cannot be applied in respect of all cases in all circumstances and situations falling under section 158BE(1)(b).

44 In the case in hand, though the authorisation and first search was made on January 25, 2001 and the first panchanama was drawn on January 25, 2001 for two separate premises of the petitioner, for which two separate authorisation had been made, in respect of one premises, i.e., at No.23, Noor Veeraswamy Street, Chennai-34, the Revenue concluded the search on the very first day itself and this is evident from the panchanama issued in that premises, dated January 25, 2001. Therefore on the said premises, there was no prohibitory order and no further search was made.

45 However in so far as the second premises, i.e., at No. 4/181, Kodambakkam High Road, Chennai-34 is concerned, where also the search was conducted on January 25, 2001 first time, in the panchanama dated January 25, 2001, the Revenue has made it clear that, "the search continues", therefore they issued the prohibitory order.

46 In this context, by relying upon the interpretation given in the two Division Bench judgments referred to above in *Ramaiah Reddy* and *Rajesh Kumar Jain* cases, the learned counsel appearing for the petitioner would insist that, merely because prohibitory order was issued, under that pretext, the time for search cannot be extended under the same authorisation by drawing several panchanamas on several dates and therefore the subsequent search taken place in the second premises of the petitioner without any specific authorisation was unauthorised, therefore, for the purpose of limitation, the one and only panchanama, dated January 25, 2001 alone shall be taken into consideration.

47 However the factual matrix of this case would reveal that, though the search was made by the Revenue team on January 25, 2001, the search was inconclusive at No. 4/181, Kodambakkam High Road, Chennai-34, therefore on the panchanama, dated January 25, 2001, it was recorded as "search continues", and prohibitory order was issued. Even thereafter, on several occasions when the search continued, it could not be completed or concluded for the peculiar and specific reason in the present case that,

number of documents required by the Revenue had been uploaded in the electronic system, i.e., computer and those documents could not be accessed by the Revenue. In this context, the word "search" as has been employed, could be understood with a connotation as contemplated under the provisions of the Code of Criminal Procedure 1973, relating to search and seizure.

In this context section 132 of the Act deals with search and seizure, **48**
wherein section 132(1)(iib) reads thus :

> "(iib) require any person who is found to be in possession or control of any books of account or other documents maintained in the form of electronic record as defined in clause (t) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000), to afford the authorised officer the necessary facility to inspect such books of account or other documents."

This clause (iib) was inserted by the Finance Act, 2002 with effect from **49**
June 1, 2002. Having in mind of this clause (iib), if we look at the hurdle faced by the Revenue in the present case when they undertook the search operation in the second premises of the petitioner, the Revenue has disclosed those aspect in the counter-affidavit, which are relevant to be taken note of. Hence the relevant portion of the counter to that effect are extracted hereunder :

> "I state that from the records, on January 30, 2001 some books and documents were seized after verification. Prohibitory orders were placed as the search could not be completed. The volume of books and documents to be seen were huge. They related to various assessees of the group and to various years. The search operations were conducted on the basis of valid warrant of authorisation issued by the DIT (Inv), Chennai. The search operations continued till June 25, 2001 precisely because of the reason that the petitioner did not provide the password in respect of files contained in the computers and also voluminous books of account found during the course of proceedings. The prohibitory order were issued on various occasions in view of the non-completion of the search on the respective dates but not for the purpose of harassing the petitioner. As such there is no truth in the allegation that search proceedings were invalid.
>
> I state that because more time was required to go through the contents of the computers and the books, in order to verify their contents, it was necessary to place prohibitory orders and to continue the search. There was no intention of harassing the petitioner. All the rooms which were prohibited also contained computer(s) which

contained password protected files. The petitioner did not divulge the password throughout the continuation of the search proceedings. This can be seen from the sworn statements recorded from the petitioner. In the absence of the passwords, access to the password protected files were denied and verification work could not be done speedily. They had to be ultimately seized. This utter non-co-operation on the part of the petitioner only delayed the conclusion of the search proceedings. There was no intention of harassing the petitioner as alleged by the petitioner."

50 Therefore, it is a factual matrix that, throughout the series of searches undertaken by the Revenue from January 2001 till June 2001, the password of the computer of the petitioner/assessee to have access with the documents loaded or fed in, in the computer, had not been divulged by the petitioner and these factors have not been denied by the petitioner. If that being so, it cannot be said that, the Revenue without having access to the electronic documents should have completed their search on the very first day of the search, dated January 25, 2001 itself.

51 Only in order to meet these kind of situations, the aforesaid clause (iib), extracted above, was inserted by the Legislature from June 1, 2002, therefore unless and until the necessary facility, to inspect such books of account or other documents maintained in the form of electronic record, is made available to the Revenue, it cannot be said that, the search was completed, instead, it should only be construed that, the search continues.

52 Here in the case in hand, exactly this situation was confronted by the Revenue and that is the reason why they continued the search on several days and ultimately only in June 2001, the Revenue seems to have been able to get the password or facility to have access to the electronic documents of the petitioner/assessee and thereafter only they concluded the search and further proceedings continued.

53 Therefore, no doubt, in general, the interpretation given in the two Division Bench judgments, namely, *Ramaiah Reddy* and *Rakesh Kumar Jain* (cited supra), with respect, is to be followed. However, the said interpretation cannot be fit in, in the facts of the present case, in view of the provision, namely clause (iib) of section 132(1). Therefore within the said provision of (iib) referred to above, it can only be construed that, the search operation commences at the second premises of the petitioner on January 25, 2001, continued till June 12, 2001, therefore each time separate panchanamas were drawn and prohibitory orders were issued with the endorsement that, "search continues". However it has been misquoted by the petitioner that, even though the panchanama, dated January 25, 2001

discloses with an endorsement of the Revenue that, the "search concluded", subsequent issuance of prohibitory order and on that strength, subsequent searches made till June 12, 2001 was unauthorised. However the fact remains that, in the second premises the search continued and in view of the specific provisions referred to above in section 132(1)(iib), which, even though came into effect only from June 1, 2002, the continuous search went up to June 12, 2001 can very well be said to be authorised and therefore the Revenue cannot be found fault with by compelling them to calculate the limitation within the meaning of section 158BE(1)(b) from February 1, 2001 by taking into account the panchanama, dated January 25, 2001 as the last panchanama and by not taking the June 12, 2001 panchanama as the last panchanama.

54 Therefore independently, on the basis of section 132(1)(iib), the Revenue's continuous search operation taken place on various dates from January 25, 2001 till June 12, 2001 can very well be construed as an authorised search operation, therefore the panchanama issued on June 12, 2001 shall be deemed to be the last authorisation within the meaning of *Explanation 2* to section 158BE.

55 If that being the position, the impugned block assessment order, dated June 30, 2003 is within the limitation of two years under section 158BE(1)(b) commencing from July 1, 2001 since the end of the month in which the last of authorisation for search under section 132 was to be reckoned only as June 30, 2001.

56 In view of these peculiar facts and circumstances of the case and in view of the discussion made above, the ground raised by the petitioner in the context of section 158BE(1)(b) to state that, the impugned order is barred by limitation, is unsustainable.

57 For all these reasons stated above and for the legal position discussed above, this court is of the considered view that, the impugned block assessment order, dated June 30, 2003 cannot be said to be defective for want of limitation, within the meaning of section 158BE(1)(b) of the Act and also the other reasons and grounds urged by the petitioner since cannot be said to be the advancing factor of the petitioner's case, this court feel that, the impugned order can very well be sustained, that means, on the grounds urged by the petitioner, it cannot be successfully assailed.

Resultantly, the writ petition fails, hence, it is dismissed. However there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

[2020] 423 ITR 596 (Guj)

[IN THE GUJARAT HIGH COURT]

COMMISSIONER OF INCOME-TAX (EXEMPTIONS)

v.

UNITED WAY OF BARODA

J. B. PARDIWALA and **BHARGAV D. KARIA** JJ.

February 25, 2020.

SS ▸ ITA 1961, ss 2(15), 11
AY ▸ 2014-15
HF ▸ Assessee

CHARITABLE INSTITUTION—EXEMPTION—DENIAL OF EXEMPTION—ACTIVITY FOR PROFIT—EFFECT OF PROVISO TO SECTION 2(15)—CONCURRENT FINDING OF APPELLATE AUTHORITIES THAT THE ASSESSEE WAS CHARITABLE INSTITUTION—EVENT ORGANISED TO RAISE MONEY—AMOUNT EARNED ENTITLED TO EXEMPTION—INCOME-TAX ACT, 1961, SS. 2(15), 11.

Once the activity of the assessee falls within the ambit of trade, commerce or business, it no longer remains a charitable activity and the assessee is not entitled to claim any exemption under sections 11 and 12 of the Income-tax Act, 1961. The expression "trade", "commerce" and "business" as occurring in the first proviso to section 2(15) must be read in the context of the intent and purport of section 2(15) and cannot be interpreted to mean any activity which is carried on in an organised manner. The purpose and the dominant object for which an institution carries on its activities is material to determine whether or not it is business. The object of introducing the first proviso is to exclude organisations which carry on regular business from the scope of "charitable purpose". An activity would be considered "business" if it is undertaken with a profit motive, but in some cases, this may not be determinative. Normally, the profit motive test should be satisfied, but in a given case the activity may be regarded as a business even when the profit motive cannot be established. In such cases, there should be evidence and material to show that the activity has continued on sound and recognised business principles and pursued with reasonable continuity. There should be facts and other circumstances which justify and show that the activity undertaken is in fact in the nature of business.

Held, *that the main object of the assessee could not be said to be organising the event of Garba. The assessee had been supporting 120 non-Government organisations. The assessee was into health and human services for the*

purpose of improving the quality of life in society. All its objects were charitable. The activities like organising the event of Garba including the sale of tickets and issue of passes, etc., cannot be termed as business. The two authorities had taken the view that the profit making was not the driving force or the objective of the assessee. The assessee was entitled to exemption under sections 11 and 12.

Cases referred to :

CIT *v.* Naroda Enviro Projects Ltd. [2019] 419 ITR 482 (Guj) (para 7)

DIT (Exemptions) *v.* Gujarat Cricket Association [2019] 419 ITR 561 (Guj) (para 7)

Entertainment Society of Goa *v.* CIT [2013] 23 ITR (Trib) 635 (Panaji) (para 9)

India Trade Promotion Organisation *v.* DGIT (Exemptions) [2015] 371 ITR 333 (Delhi) (para 5)

Jalandhar Development Authority *v.* CIT [2009] 124 TTJ 598 (Asr) (para 9)

N. N. Desai Charitable Trust *v.* CIT [2000] 246 ITR 452 (Guj) (para 4)

R/Tax Appeal No. 95 of 2020.

Mrs. Mauna M. Bhatt for the appellant.

Mrs. Swati Soparkar for the respondent.

JUDGMENT[1]

The judgment of the court was delivered by

J. B. Pardiwala J.—This tax appeal under section 260A of the Income-tax Act, 1961 (for short "the Act, 1961") is at the instance of the Revenue and is directed against the order passed by the Income-tax Appellate Tribunal, Ahmedabad, Bench "A" dated June 25, 2019 in the I. T. A. No. 2658/Ahd/2017 for the assessment year 2014-15. 1

The facts, giving rise to this tax appeal, may be summarized as under ; 2

2.1 The assessee is a charitable institution registered under section 12A of the Act, 1961. The assessee filed its return of income declaring total income as nil after claiming an exemption under section 11 of the Act, 1961 of Rs. 6,18,37,514. However, after the assessment, the total income was determined at Rs. 4,53,97,808. The Assessing Officer came to the conclusion that the assessee had received total income of Rs. 5,48,04,054 which included Rs. 4,37,61,637 as income received from organising the event of Garba during the Navratri festival. According to the Assessing Officer, the assessee sold passes and gave food stalls on rent, etc., which constitutes

1. Oral judgment.

79.85 per cent. of its total income. The assessee, during the year, had declared the gross receipts of Rs. 5,27,40,432 and showed surplus of Rs. 26,27,243. The assessee thereby claimed Rs. 4,42,59,665 as the income from charitable purpose. The Assessing Officer held that the activities of the assessee as per the amended provision of section 2(15) of the Act could not be said to be advancement of any other object of general public utility and, therefore, the assessee was not liable to claim the benefit under sections 11 and 12 respectively of the Act, more particularly, in view of section 13(8) of the Act. The Assessing Officer, having regard to the gross receipts of Rs. 5,48,04,054 made addition of Rs. 58,90,500 on account of the interest on FSF fund and Rs. 1,67,90,118 on account of anonymous donation.

2.2 The assessee, being dissatisfied with the assessment order, went in appeal before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals), vide its order dated September 15, 2017 allowed the appeal of the assessee taking the view that the activities of the assessee could be termed as charitable in nature and the assessee would be eligible for the benefit under sections 11 and 12 respectively of the Act, 1961.

2.3 The Revenue, being dissatisfied with the order passed by the Commissioner of Income-tax (Appeals), went in appeal before the Appellate Tribunal. The Tribunal, while dismissing the appeal of the Revenue, concurred with the findings recorded by the Commissioner of Income-tax (Appeals). In such circumstances, referred to above, the Revenue is here before this court with the present appeal.

2.4 The Revenue has proposed the following questions of law for the consideration of this court :

> "(A) Whether, on the facts and in the circumstances of the case, the hon'ble Income-tax Appellate Tribunal is justified in allowing the benefit of sections 11 and 12 when the Assessing Officer has clearly brought on record that the assessee is covered under the proviso to section 2(15) read with section 13(8) of the Act ?
>
> (B) Whether on the facts and in the circumstances of the case and in law, the hon'ble Tribunal was justified in allowing the benefit of sections 11 and 12 to the assessee by confirming the decision of the learned Commissioner of Income-tax (Appeals) without appreciating that the assessee is covered under the proviso to section 2(15) of the Act, i.e., the advancement of any other object of general public utility ?
>
> (C) Whether on the facts and in the circumstances of the case and in law, the hon'ble Tribunal was justified in allowing the expenses, assistance to voluntary agencies, public education program, expenses for community service, doubtful loan provided as application of income ?

(D) Whether on the facts and in the circumstances of the case and in law, the hon'ble Tribunal is correct in deleting the additions relying on the decision of the Co-ordinate Bench in I. T. A No. 3565/Ahd/ 2016 for the assessment year 2011-12 which has not been accepted, though further appeal was not preferred on account of the quantum of tax involved ?

(E) Whether on the facts and in the circumstances of the case and in law, the hon'ble Income-tax Appellate Tribunal is justified in giving a decision in favour of the assessee and against the Revenue, though there is no nexus between the conclusion of the facts and the primary facts upon which the conclusion is based, thereby rendering the decision, which is perverse ?

(F) Whether on the facts and circumstances of the case and in law, the findings of the hon'ble Income-tax Appellate Tribunal are contrary to the evidence on record, thereby rendering the decision, which is perverse ?"

3 Ms. Bhatt, the learned standing counsel appearing for the Revenue vehemently submitted that the Commissioner of Income-tax (Appeals) as well as the Appellate Tribunal committed a serious error in holding that the activities of the assessee fall within section 2(15) read with section 13(8) of the Act. Ms. Bhatt laid much emphasis on the fact that although the assessee is a charitable trust registered under section 12A of the Act, yet that by itself is not sufficient to bring the case within the ambit of section 2(15) of the Act. According to Ms. Bhatt, for the relevant year, the actual activities of the assessee should be taken into consideration. Ms. Bhatt laid much emphasis on the fact that from one particular event, i.e., Garba a huge income has been derived by the assessee. According to Ms. Bhatt, the case on hand squarely falls within the proviso to section 2(15) of the Act. It is argued that once the activity of the assessee falls within the ambit of trade, commerce or business, then it no longer remains a charitable activity and the assessee is not entitled to claim any exemption under sections 11 and 12 respectively of the Act. Ms. Bhatt submitted that no income has been generated for the year under consideration from the activities which are said to be charitable in nature.

4 Ms. Bhatt seeks to rely on a decision of this court in the case of *N. N. Desai Charitable Trust* v. *CIT* [2000] 246 ITR 452 (Guj).

5 Ms. Bhatt also pointed out that the decision of the Delhi High Court in the case of *India Trade Promotion Organisation* v. *DGIT (Exemptions)* [2015] 371 ITR 333 (Delhi) may support the case of the assessee, or in other words, may fortify the findings recorded by the Commissioner of

Income-tax (Appeals) and the Appellate Tribunal, but at the same time, the said decision is now under consideration before the Supreme Court. Ms. Bhatt pointed out that leave has been granted and the appeal has been admitted.

6 On the other hand, Mr. S. N. Soparkar, the learned senior counsel assisted by Mr. B. S. Soparkar, the learned counsel appearing for the assessee has vehemently opposed this appeal. Mr. Soparkar would submit that none of the questions, as proposed by the Revenue, could be termed as the substantial questions of law.

7 It is argued that all the questions, as proposed by the Revenue, are now no longer res integra in view of the two pronouncements of this High Court (i) *CIT* v. *Naroda Enviro Projects Ltd.* [2019] 419 ITR 482 (Guj) Tax Appeal No. 189 of 2019 and (ii) *DIT (Exemptions)* v. *Gujarat Cricket Association* [2019] 419 ITR 561 (Guj) Tax Appeal No. 268 of 2012. Mr. Soparkar would submit that all the relevant aspects of the matter have been duly considered by the Commissioner of Income-tax (Appeals) as well as by the Appellate Tribunal and, in such circumstances, no interference is warranted.

8 Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the questions of law as proposed by the Revenue could be termed as substantial questions of law.

9 The Assessing Officer recorded the following findings :

> "4.6 At the outset, it is to mention here that the assessee is organizing garba event on the eve of Navratri. Amongst total income of Rs. 5,48,04,054, Rs. 4,37,61,637 are generated from the said garba events. Thus, out of total income, 79.85 per cent. partakes from garba event only. As mentioned in the foregoing para, the assessee is organizing garba event on the eve of Navratri. Amongst therefore, it is beyond the pale of doubt that the, assessee's prime objective is of garba organization. The activities of the assessee are aimed at earning profit as it is carrying on activity in the nature of trade, commerce or business. Further profit making by the assessee is not mere incidental. Section 13(8) of the Act states that sections 11 and 12 benefits will not be available to the assessee if the first proviso to section 2(15) is applicable. The relevant portion of section 13(8) of the Act is reproduced as under :
>
> '(8) Nothing contained in section 11 or section 12 shall operate so as to exclude any income from the total income of the previous year of the person in receipt thereof if the provisions of the first proviso to

clause (15) of section 2 become applicable in the case of such person in the said previous year.'

4.7 The sources of income of the assessee clearly depict its commercial nature.

The income of the assessee consists of selling of passes to boys/girls and leasing of stalls etc. Further, in the compact *Oxford English Dictionary* (South Asia Edition), the business is meant as 'a person's regular occupation or trade, commercial activity'. The word commerce is meant as 'the activity of buying and selling especially on a large scale'. The trade is defined as 'buying and selling of goods or services'. Thus, on the entirety of the facts and circumstances, the assessee's case falls within all the yardsticks in the amended provisions of the Legislature. In the case, it is construed that the assessee's garba activity is commercial and do not partake the characteristics of charitable purpose within the meaning of the amended provisions of section 2(15) of the Act.

4.8 Further, the assessee had relied upon the Central Board of Direct Taxes' Circular No. 11 of 2008 dated December 19, 2008 ([2009] 308 ITR (ST.) 5). It is to mention here that the said Circular No. 11 of 2008 is superseded by Circular No. 2 of 2012 [F. No. 142/01/2012-SO(TPL)], dated May 22, 2012 ([2012] 343 ITR (St.) 157), which inter alia explains as under :

4.1 For the purposes of the Act, 'charitable purposes' has been defined in section 2(15) which, among others, include 'the advancement of any other object of general public utility'.

4.2 However, 'the advancement of any other object of general public utility' is not considered as a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity, if receipts from such activities is above the specified limit in the previous year.

4.3 Second proviso to section 2(15) of the Act has been amended to provide that the specified monetary limit in respect of receipts from such activities shall be 25 lakh rupees instead of 10 lakh rupees.'

One may argue that the assessee has been granted registration under section 12A of the Act. The registration to the assessee was granted on April 9, 2010, i.e., well before the insertion of section 13(8) of the Act by the Finance Act, 2012. Secondly, the provisions of

sections 12A and 12AA are material and relevant, for the purpose of granting registration under section 12AA of the Act. Needless to say that it is well settled legal proposition that the registration proceedings under section 12A read with section 12AA of the Act are not to be confused with the assessment proceedings wherein the provisions of sections 11, 12 and 13 of the Act are applicable.

Now let us examine whether garba activity by the appellant involves carrying on of any activity in the nature of trade, commerce, or business. It has been held by the honourable Income-tax Appellate Tribunal, Amritsar Bench in the case of *Jalandhar Development Authority* v. *CIT* [2009] 124 TTJ 598 (Asr), that the words used in the proviso 'any activity in the nature of trade, commerce, or business are of wider import that activity of trade, commerce or business. It has been held in the case of *Entertainment Society of Goa* v. *CIT* [2013] 23 ITR (Trib) 635 (Panaji) ; [2013] 34 taxmann.com 210 (Panaji-Trib.) that activity being conducted by the assessee need not be a trade, commerce, or business activity. It is sufficient that it is similar to trade, commerce, or business activity."

10 The Commissioner of Income-tax (Appeals), while allowing the appeal preferred by the assessee held as under :

"5.2 I have carefully considered the rival contention as well as the observation of the Assessing Officer. It is observed from the remand report that the appellant has itself admitted to have received the amount of Rs. 1,67,90,118 as anonymous donations under section 115BBC at Schedule-VC of the return of income filed by the appellant. As it is a voluntary declaration made by the appellant in its return of income, there was no reason why the Assessing Officer should have asked any further question during the assessment proceedings. However, during the appellate proceedings the appellant has submitted that the said amount was received as corpus donation in the form of foreign inward remittances from Stitching Fusion Study Foundation. It was by error and a clerical mistake in the return of income so filed was reflected under Schedule VC of ITR-7 as anonymous donations. It also further submitted that the said amount as corpus donation has not been declared as income of the appellant from property held by the trust in its computation of income. On the contrary the said amount is shown as a corpus donation in the balance-sheet of the appellant-trust. I have seen the computation of income as well as balance-sheet submitted by the appellant. The contention of the appellant is correct. The income received by the

appellant has been of Rs. 6,18,37,514. Nowhere in this it has offered the amount of Rs. 1,67,90,118. As the said amount is a capital receipt the appellant would be eligible for deduction under section 11(1)(d). The perusal of the balance-sheet also reflects that the appellant has reflected the said amount at Schedule-l of the balance-sheet with remark that corpus donation received during the year. The appellant should have filed the revised return of income rectifying its own mistake in the return of income. As the amount received by the appellant is a capital receipt in the form of corpus donation it cannot be considered as its income from property held by the trust. Therefore, notwithstanding the remand proceedings, I am of the considered opinion that the said amount cannot be added to the income of the appellant as I have already held that the appellant is an exempted entity. Therefore, the appellant would be eligible for all the benefits of sections 11 and 12. The grounds of appeal Nos. 4, 5, 6 and 7 are hereby allowed."

The Appellate Tribunal, while dismissing the appeal of the Revenue held as under : **11**

"4. There are thus two issues requiring our adjudication in this appeal — first, whether or not the Commissioner of Income-tax (Appeals) was justified in holding that the proviso to section 2(15) will not have any application on the facts of this case and thus the benefit of section 11 cannot be declined to the assessee ; and second, whether or not the Commissioner of Income-tax (Appeals) was justified that the expenses, like assistance to voluntary agencies, management assistance and training, public education programme, research and publications and expenses for community service, as application of income for the purposes of section 11 of the Act.

5. To adjudicate on these issues, only a few material facts need to be taken note of. The assessee before us is a society registered as a charitable institution registered under section 12AA of the Act. The assessee filed the return of income on September 26, 2011 showing nil income. During the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has shown gross receipts of Rs. 3,81,01,051, and a surplus of Rs. 39,94,650. In the computation of income, the assessee had claimed application of funds for charitable purposes to the extent of Rs. 3,81,16,559 and claimed exemption under section 11 of the Act. When the Assessing Officer probed the matter further, he found that out of total receipts of Rs. 3,81,01,051, a sum of Rs. 2,73,26,591 (i.e., 71.72 per cent. of revenues) is in respect of garba event only. The Assessing Officer also noted that the assessee

organizes one of the most popular and prestigious garba event in Baroda in a highly professional manner, that the assessee charges entry fees from the participants as also the stall owners, and that it is in the nature of a business activity. It was in this backdrop that the Assessing Officer required the assessee to justify the eligibility for exemption of income under section 11, in the light of the provisions of section 13(8) read with proviso to section 2(15). In response to this requisition, the assessee explained at length about the activities of the United Way of Baroda, which includes supporting 120 NGOs and volunteer driven activities that link, support and deliver health and human services to improve the quality of life in the society. Its mission was said to be to improve and make Baroda a better place to live in and its vision was stated to be to increase the organized capacities of people and to take care of one another. It was also pointed out that the objectives of the society include mobilizing resources from the local communities and the people having affiliation and concern for India in general, and Gujarat in particular, residing in India or abroad and to apply them for strengthening the services in education, health and human care and other social sectors existing in Baroda and State of Gujarat and assessing on a continuing basis the need for human service programs, to seek solution to human problems, to assist in the development of new or the expansion or modification of existing human services programs, and to foster co-operation among local, State and National agencies for providing service to the community. It was also pointed out that the assessee contributes by strengthening the services in education, by providing vocational training to the disabled, helping orphans, empowering women through various programs and providing mid-day meal to poor students. The details of the eye camp and thalassemia screening and detection camp conducted by the assessee were also furnished. The assessee also gave details of how the monies are spent to these ends. As regards the application of proviso to section 2(15), it was pointed out that only when the institutions are carrying out activities on commercial lines with profit motive, this provision comes into play. It was pointed out that surplus funds are purely incidental and the institution is not run on the commercial lines at all. Elaborate legal submissions were made on the scope of proviso to section 2(15) and its legislative history and background. A reference was also made to Central Board of Direct Taxes Circular No. 11 of 2008, dated December 29, 2008 in support of the proposition that the proviso to section 2(15) will not apply in

respect of activities involving relief to poor, education or medical relief, even if it incidentally involves the carrying on of commercial activities. It was then pointed out that main object of the trust is to mobilize the resources from local communities and the people having affiliation and concern for India in general, and Gujarat in particular, residing in India or abroad, and to apply them for strengthening the services in education, health and human care and the other social sectors of the underprivileged. It was thus contended that the proviso to section 2(15) will have no application in this case. The assessee also made elaborate submissions on the connotations of expressions business activities and made out a case as to how the activities of the assessee, even with respect to holding the garba event, do not constitute business activities.

7. The Assessing Officer was of the view that how the income is applied is one thing, but what is much more important is, what he termed as, gravity of generation of income. He referred to the provisions of section 2(15), as amended with effect from April 1, 2009, and observed that after the insertion of the above proviso, the advancement of any other object of general public utility shall not be a charitable purpose, if it involves carrying on of (i) any activity in the nature of trade, commerce or business ; (ii) any activity of rendering any services in relation to any trade, commerce or business, or cess or fee or any other consideration, irrespective of the nature of use or application or retention of income from such activity. He then referred to the monetary threshold limits brought about by the Finance Act, 2010, with respect to revenues generated by such activities. The Assessing Officer then referred to, and relied upon, the Memorandum Explaining the Provisions of the Finance Act, 2008. He then noted that the main activity of the assessee is to organize garba event which generates more than 71 per cent. of its revenues and such a predominant object can at best be an object of general public utility. It was then noted that the application of earnings from this activity will not end the nature of prime activity. He then referred to the provisions of section 13(8) and observed that the benefits of sections 11 and 12 will not be applicable even in a case of registered charitable institution in a situation in which the provisions of section 2(15) come into play as in this case. The Assessing Officer reiterated that sale of entry tickets and hiring out of stalls is clearly a commercial activity. The Assessing Officer thus rejected the claim of exemption under section 11. While he allowed deduction, in computation of

income, of such expenses as were incidental to earning of the income, the Assessing Officer disallowed the following expenses :

Sr. No.	*Particulars*	*Amount (Rs.)*
1	FSF doubtful loan provided	22,05,000
2	Assistance to voluntary agencies	1,08,22,700
3	Management assistance and training	1,20,317
4	Public education programme	4,68,116
5	Research and publications	37,179
6	Expenses for community services	8,98,840

13. In pursuance of these objects, even if the assessee performs some activities, which can be alleged to be on commercial lines, the charitable nature of the objects will not be vitiated as proviso to section 2(15) comes into play only in respect of any other object of general public utility and is not covered by the specific objects pointed out earlier—including relief to poor, education and medical relief. Nothing, therefore, really turns on the garba event being organized on the basis of, what can be termed as, commercial principles. That aspect of the matter is not relevant in the present case. As we have noted earlier, one of the major object of the assessee-society is mobilizing resources from the local communities and the people having affiliation and concern for India in general, and Gujarat in particular, residing in India or abroad and to apply them for strengthening the services in education, health and human care and other social sectors existing in Baroda and State of Gujarat, and there is also no dispute that considerable work in this area has been carried out in this area as evident from the material produced before the Assessing Officer, copies of which have been filed before us as well. The genuineness of this object, and furtherance of this object, cannot even be doubted. We are satisfied that the activities carried out by the assessee are in the nature of education, medical relief and help to poor which are specifically covered by section 2(15) and not by its residuary segment. The proviso to section 2(15) thus indeed has no application in the matter. As for the denial of deduction in respect of expenses like assistance to voluntary agencies, management assistance and training, public education programme, research and publications and expenses for community service, that is only consequential in nature inasmuch as the deductions were declined in computation of business income from garba event but then once the proviso to section 2(15) is held to be inapplicable on the facts of this case, these expenses are to

be treated as application of income. Learned representatives do not dispute this position."

Section 2(15) of the Act, 1961 reads thus ; **12**

"2(15) 'charitable purpose' includes relief of the poor, education, yoga, medical relief, preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest, and the advancement of any other object of general public utility :

Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity, unless—

(i) such activity is undertaken in the course of actual carrying out of such advancement of any other object of general public utility ; and

(ii) the aggregate receipts from such activity or activities during the previous year, do not exceed twenty per cent. of the total receipts, of the trust or institution undertaking such activity or activities, of that previous year ;"

Prior to the introduction of the proviso to section 2(15) of the Act, there **13** was no dispute that the assessee herein was established for charitable purposes and, therefore, its income was not to be included in the total income and was, therefore, granted the benefit of exemption. The income received by the assessee is from organising the event of garba by sale of tickets and also leasing out food and beverages outlets at the venue of the event. However, the dominant and main object of the assessee cannot be said to be organising the event of garba. The charitable activities which the assessee has been undertaking has been discussed by the Appellate Tribunal. We take notice of the fact that the assessee has been supporting 120 non-Government organisations. The assessee is into health and human services for the purpose of improving the quality of life in the society. The objectives of the society includes mobilising resources from the local communities. It organises medical camps for thalassemia affected children. It also provides vocational training to the disabled orphans, undertakes various programmes for empowering women including providing mid-day meal to the poor students. The activities like organising the event of garba including the sale of tickets and issue of passes, etc., cannot be termed as business. The two authorities have taken the view that the profit making is not the

driving force or the objective of the assessee. This is indicative of the fact that any income generated by the assessee from events like garba does not find its way into the pockets of any individual or entities. It is to be utilised fully for the purposes of the objects of the assessee. As held in many pronouncements, the expression "trade", "commerce" and "business" as occurring in the first proviso to section 2(15) of the Act must be read in the context of the intent and purport of section 2(15) of the Act and cannot be interpreted to mean any activity which is carried on in an organised manner. The purpose and the dominant object for which an institution carries on its activities is material to determine whether the same is business or not. The object of introducing the first proviso is to exclude the organizations which are carrying on regular business from the scope of "charitable purpose". An activity would be considered "business" if it is undertaken with a profit motive, but in some cases, this may not be determinative. Normally, the profit motive test should be satisfied, but in a given case the activity may be regarded as a business even when the profit motive cannot be established/proved. In such cases, there should be evidence and material to show that the activity has continued on sound and recognised business principles and pursued with reasonable continuity. There should be facts and other circumstances which justify and show that the activity undertaken is in fact in the nature of business.

14 In the overall view of the matter, more particularly, having regard to the concurrent findings recorded by the two authorities, we are of the view that we should not interfere with the order passed by the Appellate Tribunal.

15 In the result, this appeal fails and is hereby dismissed.

[2020] 423 ITR 608 (Guj)

[IN THE GUJARAT HIGH COURT]

PRINCIPAL COMMISSIONER OF INCOME-TAX

v.

SUZLON ENERGY LTD.

J. B. PARDIWALA and **BARGAV D. KARIA** JJ.

February 11, 2020.

SS ▶ ITA 1961, ss 2(24)(x), 36(1)(va)
AY ▶ 2011-12
HF ▶ Department

BUSINESS EXPENDITURE—EMPLOYEES' CONTRIBUTION TO PROVIDENT FUND AND EMPLOYEES' STATE INSURANCE—DELAY IN PAYMENT—DUTY OF

EMPLOYER UNDER SECTION 38 OF EMPLOYEES' PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952 TO PAY CONTRIBUTION DEDUCTED FROM EMPLOYEE'S WAGES "WITHIN FIFTEEN DAYS OF CLOSE OF EVERY MONTH"—ORDER OF TRIBUNAL RESTORING ISSUE OF ADDITIONS MADE ON ACCOUNT OF LATE PAYMENT OF EMPLOYEES' CONTRIBUTION TO PROVIDENT FUND AND EMPLOYEES' STATE INSURANCE—ERRONEOUS—INCOME-TAX ACT, 1961, SS. 2(24)(x), 36(1)(va)—EMPLOYEES' PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952, S. 38.

For the assessment year 2011-12, the employees' contribution towards provident fund and employees' State insurance were not deposited within the prescribed period under section 36(1)(va) read with section 2(24)(x) of the Income-tax Act, 1961. The Assessing Officer disallowed the payments. The Commissioner (Appeals) dismissed the appeal filed by the assessee. The Tribunal held that the question as to whether there was a delay or not was to be decided by the Assessing Officer, that the assessee would get relief if found admissible. The Tribunal remanded the matter to the Assessing Officer. On appeal :

Held, *allowing the appeal, that section 38 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 made it obligatory for the employer before paying the wages to deduct the employees' contribution along with the employer's own contribution as fixed by the Government. The employer is further obliged to pay it within fifteen days of the close of every month's pay, i.e., such contribution and administrative charges. The reference to fifteen days of the close of the month must be in relation to the month during which the payment of wages is to be made and corresponding liability to deduct the employee's contribution to the fund arises. The expression "within fifteen days of the close of every month" therefore, must be interpreted as having reference to the close of the month, for which, the wages were required to be paid with the corresponding duty to deduct the employees' contribution and to deposit such amount in the relevant fund. The order of the Tribunal restoring the matter to the Assessing Officer was erroneous.*

Cases referred to :

Checkmate Facility and Electronic Solutions Pvt. Ltd. *v.* Deputy CIT (Tax Appeal No. 1256 of 2018, dated 15-10-2018) (para 6)

CIT *v.* Gujarat State Road Transport Corporation [2014] 366 ITR 170 (Guj) (para 4)

CIT (Principal) *v.* Rajasthan State Beverages Corporation Ltd. [2017] 397 ITR (St.) 3 (SC) (para 4)

Kanoi Paper and Industries Ltd. *v.* Asst. CIT [2002] 75 TTJ (Cal) 448 (para 4)

Om Prakash Gargi *v.* State of Punjab [1996] 11 SCC 399 (para 4)

State of Manipur *v.* Thingujam Brojen Meetai [1996] 9 SCC 29 (para 4)

Sun Export Corporation *v.* Collector of Customs [1997] AIR 1997 SC 2658 (para 4)

R/Tax Appeal No. 860 of 2019.

Mrs. Mauna M. Bhatt for the appellant.

Tushar Hemani, Senior Advocate with *Ms. Aditi Sheth* and *Ms. Vaibhavi K. Parikh*, Advocates, for the respondent.

JUDGMENT[1]

The judgment of the court was delivered by

1 J. B. PARDIWALA J.—This tax appeal under section 260A of the Income-tax Act, 1961 (for short, "the Act, 1961") is at the instance of the Revenue and is directed against the order passed by the Income-tax Appellate Tribunal, Ahmedabad "D" Bench, Ahmedabad, dated June 25, 2019 in CO No. 77/Ahd/2017 for the assessment year 2011-12.

2 This tax appeal was ordered to be admitted on the following substantial question of law :

> "Whether the Appellate Tribunal has erred in law and on facts in setting aside the appeal of the assessee to the file of the Assessing Officer on addition of Rs. 15,20,519 made on account of late payment of the employee's contribution towards PF, ESIC, etc. ?"

3 It appears from the materials on record that the issue is with regard to the addition of Rs. 15,20,519 on account of the late payment of the employees' contribution towards provident fund, employees' State insurance corporation, etc. The additions were made on account of the employees' contribution to the provident fund/employees' State insurance corporation as the same was not deposited within the prescribed period in law. The Assessing Officer made additions by invoking the provisions of section 36(1)(va) read with section 2(24)(x) of the Act, 1961.

4 The assessee being dissatisfied with the assessing order preferred an appeal before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals) dismissed the appeal preferred by the assessee by holding that the provident fund/employees' State insurance contribution were not deposited within the prescribed time period. The

1. Oral judgment.

assessee went in appeal before the Appellate Tribunal. The Appellate Tribunal placing reliance on the decision in the case of *CIT* v. *Gujarat State Road Transport Corporation* reported in [2014] 366 ITR 170 (SC) ; [2014] 41 taxmann.com 100 (Guj) quashed and set aside the order passed by the Commissioner of Income-tax (Appeals). The Tribunal held as under :

"13. We have heard the respective parties and we have also perused the relevant materials available on record including the orders passed by the Co-ordinate Bench in the assessee's own case. It further appears from the record that the learned Commissioner of Income-tax (Appeals) while confirming the orders passed by the learned Assessing Officer relied upon the judgment passed by the jurisdictional High Court in the case of *CIT* v. *Gujarat State Road Transport Corporation* reported in [2014] 366 ITR 170 (Guj) ; [2014] 41 taxmann.com 100 (Guj) holding that the employees' contribution to the employees' provident fund (EPF) and employees' State insurance corporation (ESIC) deposited beyond the due date prescribed under section 36(i)(va) of the Income-tax Act, 1961 would not be eligible for deduction under section 43B of the Act even after being deposited before the due date of filing of the tax return.

Upon perusal of the order passed by the Co-ordinate Bench we could understand that the learned Tribunal was pleased to direct the Assessing Officer to decide whether there was any delay or not in making such payment by the assessee. It has further observed that any delay in deposit of provident fund/employees' State insurance corporation is to be disallowed in terms of the hon'ble Gujarat High Court judgment as cited above. The relevant portion of the said judgment is as follows :

'3. Learned representatives fairly agree that the aforesaid issue is squarely covered against the assessee by the hon'ble jurisdictional High Court's judgment in the case of *CIT* v. *Gujarat State Road Transport Corporation* [2014] 366 ITR 170 (Guj), wherein it is categorically held that in the case of delayed deposit of the employees' contribution to provident fund, the same will not be deductible in computing income under section 28 of the Act. The law so laid down by the hon'ble jurisdictional High Court is binding on us. The mere fact that an appeal against the said decision is pending before the hon'ble Supreme Court does not dilute the binding nature of this judicial precedent. As regards dismissal of special leave petition in the case of *Principal CIT* v. *Rajasthan State Beverages Corporation Ltd.* [2017] 397 ITR (St.) 3 (SC) ; [2017] 84 taxmann.com 185 (SC), it is

only elementary that when a special leave petition is dismissed by a non-speaking order, it does not constitute a law declared by the hon'ble Supreme Court, and as such, it is not binding under article 141 of the Constitution of India. The authority, for this proposition, is contained in a serious of judgments of the hon'ble Supreme Court, including, inter alia, in the cases of *State of Manipur* v. *Thingujam Brojen Meetai* [1996] 9 SCC 29, *Om Prakash Gargi* v. *State of Punjab* [1996] 11 SCC 399 and *Sun Export Corporation* v. *Collector of Customs* [1997] AIR 1997 SC 2658. We, therefore, see no legally sustainable merit in the case of the assessee and, respectfully following the judgment of the hon'ble jurisdictional High Court in the case of *Gujarat State Road Transport Corporation* (supra), dismiss the grievance of the assessee in principle. We may, however, add that a co-ordinate Bench of this Tribunal, in the case of *Rajjratna Metal Industries Ltd.* v. *Asst. CIT* (I. T. A. No. 940/Ahd/2015) order dated September 22, 2017, has observed as follows :

"3. The assessee's latter substantive ground challenges correctness of both the lower authorities' action disallowing/adding a sum of Rs. 3,85,810 under section 36(1)(va) read with section 2(24) of the Act on account of late payment of the employees' contribution to provident fund and employees' State insurance in question. There is no dispute that the hon'ble jurisdictional High Court's decision in *CIT* v. *Gujarat State Road Transport Corporation* [2014] 366 ITR 170 (Guj) upholds such a disallowance in principle. The assessee's case however is that the relevant due date has to be seen not from the relevant month of salary but the one pertaining to its payment. He then files a computation chart indicating it to have paid above the employees' provident fund/employees' State insurance contributions on May 22, 2009 and May 28, 2009 as against the due dates thereof following on June 20, 2009. The Revenue fails to dispute this factual position. We therefore quote this Tribunal's Co-ordinate Bench decision in *Kanoi Paper and Industries Ltd.* v. *Asst. CIT* [2002] 75 TTJ Cal 448 that the relevant date in such case is that of the month of the actual payment of wages/salaries. We therefore rely on the above Co-ordinate Bench decision and direct the Assessing Officer to delete the impugned disallowance as well."

4. In effect thus while any delayed deposit of provident fund/ employees' State insurance is to be disallowed, in terms of the hon'ble Gujarat High Court's judgment in the case of *Gujarat State Road Transport Corporation* (supra), the question as to whether there

is a delay or not may be decided by the Assessing Officer in the light of above observations by the Co-ordinate Bench. The assessee will get relief, if found admissible, on that basis.

5. In the result, the appeals of the assessee are allowed for statistical purposes'."

The Revenue being dissatisfied with the order passed by the Appellate Tribunal is here before this court with the present appeal. 5

The substantial question of law as raised by the Revenue for our consideration is no longer res integra, more particularly, in view of the decision of this court dated October 15, 2018 in the case of *Checkmate Facility and Electronic Solutions Pvt. Ltd.* v. *Deputy CIT* (Tax Appeal No. 1256 of 2018 decided on 15-10-2018). We quote the entire judgment delivered by the Co-ordinate Bench of this court as follows : 6

"1. The appellant-assessee has challenged the judgment of the Income-tax Appellate Tribunal dated March 22, 2018. The following questions are presented for our consideration :

'1. Whether on facts and in law, the Income -tax Appellate Tribunal is right in confirming disallowance of Rs. 1,16,87,091 under section 2(24)(x) read with section 36(1)(va) for delay in payment of the employees' contribution to the provident fund and employees' State insurance in spite of the fact that it was deposited before the due date of filing the return of income ?

2. Whether on facts and in law, the Income-tax Appellate Tribunal is right in confirming the disallowance of Rs. 1,16,87,091 under section 2(24)(x) read with section 36(1)(va) for delay in payment of the employees' contribution to the provident fund and employees' State insurance, when the delayed payment is considered on the basis of the date on which the salary pertains to and not the day on which the salary is paid ignoring the provisions of clause 38 of the Employees' Provident Fund Scheme, 1952 ?'

2. The issue arises in the following background. The assessee is a private limited company. For the assessment year 2013-14, the assessee had filed the return of income declaring total income of Rs. 65,65,980. The return was taken in scrutiny by the Assessing Officer. In the order of assessment passed by him under section 143(3) of the Income-tax Act, 1961 ('the Act' for short) a disallowance of the employees' contributions towards provident fund and the employees' State insurance amounting to Rs. 1,16,87,091 was made. This was on account of the fact that the assessee though had

deducted such contributions, failed to deposit the same with the statutory authorities within the due date. The Assessing Officer referred to all such deductions and the late depositing of the contributions in the order of assessment. All these deposits would indicate that the assessee had made the deposits late beyond 20th of the month following the month for which such deduction was being made. The date of 20th of each month was chosen by the Assessing Officer was made considering the normal period of 15 days for making the deposit and a further grace period of five days specified under the statute. Since the assessee was delayed in making the deposits even beyond such extended period, he applied the disallowance in terms of section 36(1)(va) of the Act.

3. The learned counsel for the appellant would not dispute that the issue of disallowance of late deposited employees' contributions of the provident fund and employees' State insurance corporation stands covered by the Division Bench judgment of this court in the case of *CIT* v. *Gujarat State Road Transport Corporation* [2014] 366 ITR 170 (Guj). He however raised a slightly different contention which did not arise for consideration before this court in the case of *Gujarat State Road Transport Corporation* (supra). He submitted that in terms of section 38 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, reference to the time limit for depositing the contributions within 15 days of close of the month must be to the month in which the salary payment is made. For example, therefore if the salary payment for the month of June is made on 5th of July, the employer would have time up to 15th of August for depositing the employee's contribution of the provident fund. Looking from this angle, there was no delay or default on the part of the present assessee.

4. In terms of section 36(1)(va) of the Act, any sum received by the assessee from any of his employees to which the provisions of section 2(24)(x) applies, would be deducted as long as such sum is credited by the assessee to the employee's account in the relevant funds on or before due date. *Explanation* to the said sub-section provides that for the purpose of the said clause, 'due date' means a date by which the assessee is required as an employer to credit an employee's contribution to the account in which the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise. Section 38 of the Employees'

Provident Funds and Miscellaneous Provisions Act, 1952, becomes relevant. Sub-section (1) thereof reads as under :

'(1) The employer shall, before paying the member his wages in respect of any period or part of period for which contributions are payable, deduct the employees' contribution from his wages which together with his own contribution as well as an administrative charge of such percentage of the pay (basic wages, dearness allowance, retaining allowance, if any, and cash value of food concessions admissible thereon) for the time being payable to the employees other than an excluded employee, as the Central Government may fix. He shall within fifteen days of the close of every month pay the same to the fund "electronic through internet banking of the State Bank of India or any other nationalised bank authorised for collection" on account of contributions and administrative charge :

Provided that the Central Provident Fund Commissioner may for reasons to be recorded in writing, allow any employer or class of employers to deposit the contributions by any other mode other than internet banking.'

5. This provision thus requires an employer before paying the employee his wages to deduct the employees' contribution along with the employer's own contribution as fixed by the Government. It is further required that he shall within fifteen days of the close of every month pay the same to the fund such contribution and administrative charges. In terms of this provision thus, after deducting the employees' contribution towards the funds, the same has to be deposited with the Government within fifteen days of the close of every month. Reference to fifteen days of the close of the month must be in relation to the month during which the payment of wages is to be made and corresponding liability to deduct the employees' contribution to the fund arises. The expression 'within fifteen days of the close of every month' therefore must be interpreted as having reference to the close of the month, for which, the wages are required to be paid with corresponding duty to deduct the employees' contribution and to deposit the same in the fund.

6. The learned counsel for the appellant is therefore not correct in contending that if such wages are paid in the following month, the liability to deposit the employees' contribution to the fund gets deferred by another month.

7. The tax appeal is therefore dismissed."

7 Thus, the dictum as laid in the aforesaid decision is that section 38 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 makes it obligatory for the employer before paying him his wages to deduct the employees' contribution along with the employer's own contribution as fixed by Government. The employer is further obliged to pay the same within fifteen days of the close of every month pay, i.e., such contribution and administrative charges. The reference to fifteen days of the close of the month must be in relation to the month during which the payment of wages is to be made and the corresponding liability to deduct the employees' contribution to the fund arises. This court held that the expression "within fifteen days of the close of every month" therefore, must be interpreted as having reference to the close of the month, for which, the wages are required to be paid with corresponding duty to deduct the employees' contribution and to deposit the same in the fund.

8 In such circumstances referred to above, the finding recorded by the Tribunal that if such wages are paid for the following month, the liability to deposit the employees' contribution to the fund gets deferred by another month is not the correct statement of law.

9 In view of the aforesaid, this appeal succeeds and is hereby allowed. The impugned order passed by the Tribunal is hereby quashed and set aside.

10 The substantial question of law is answered accordingly in favour of the Revenue and against the assessee.

[2020] 423 ITR 616 (Karn)

[IN THE KARNATAKA HIGH COURT]

DIRECTOR OF INCOME-TAX (EXEMPTIONS)

v.

KRUPANIDHI EDUCATION TRUST

DR. VINEET KOTHARI and **MRS. S. SUJATHA** JJ.

August 14, 2018.

SS ▸ ITA 1961, s 11
AY ▸ 2009-10
HF ▸ Assessee

CHARITABLE PURPOSE—COMPUTATION OF INCOME—DEPRECIATION—CHARITABLE INSTITUTION ENTITLED TO DEPRECIATION—INCOME-TAX ACT, 1961, s.11,

The income of a charitable institution is required to be computed under section 11 of the Income-tax Act, 1961, on commercial principles after providing

for allowance for normal depreciation and deduction thereof from the gross income of the institution.

CIT *v.* Rajasthan and Gujarati Charitable Foundation [2018] 402 ITR 441 (SC) *followed.*

Cases referred to :

CIT *v.* Cutchi Memon Union [1985] 155 ITR 51 (Karn) (para 2)

CIT *v.* Institute of Banking [2003] 264 ITR 110 (Bom) (paras 3, 4)

CIT *v.* Munisuvrat Jain [1994] Tax LR 1084 (Bom) (para 3)

CIT (Exemptions) *v.* Ohio University Christ College [2018] 408 ITR 352 (Karn) (para 4)

CIT *v.* Rajasthan and Gujarati Charitable Foundation [2018] 402 ITR 441 (SC) (para 3)

CIT *v.* Society of the Sisters of St. Anne [1984] 146 ITR 28 (Karn) (para 4)

CIT *v.* Trustee of H. E. H. the Nizam's Supplemental Religious Endowment Trust [1981] 127 ITR 378 (AP) (para 4)

DIT (Exemption) *v.* Framjee Cawasjee Institute [1993] 109 CTR (Bom) 463 (para 3)

Escorts Limited *v.* Union of India [1993] 199 ITR 43 (SC) (para 2)

Lissie Medical Institutions *v.* CIT [2012] 348 ITR 344 (Ker) (para 2)

I. T. A. No. 306 of 2015.

Sanmathi E.I, Advocate, for the appellant.

A. Shankar and *M. Lava*, Advocates, for the respondent.

JUDGMENT

The judgment of the court was delivered by

Dr. Vineet Kothari J.—Both the learned counsel at bar submit that the controversy raised in the present case is covered by a decision of this court. **1**

The suggested substantial questions of law in the memorandum of appeal of the Revenue are quoted hereinbelow for ready reference : **2**

> "1. Whether, on the facts and in the circumstances of the case, the hon'ble Tribunal was correct in law in not following the decision of the hon'ble Supreme Court in the case of *Escorts Limited* v. *Union of India* [1993] 199 ITR 43 (SC) wherein the hon'ble Supreme Court has categorically held when deduction under section 35(2)(iv) is allowed in respect of capital expenditure on scientific research, no depreciation is allowable under section 32 on the same asset and in the absence of

clear statutory indication to the contrary, the statute should not be read as to permit an assessee two deductions ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in not following the decision of the Kerala High Court in the case of *Lissie Medical Institutions* v. *CIT* [2012] 348 ITR 344 (Ker) in I. T. A. No. 42 of 2011 wherein the other judicial pronouncements by various high courts were held to be not applicable holding that the issue of double deduction was not before them ?

3. Whether, on the facts and in the circumstances of the case, the Tribunal was right in not appreciating the intention of the Legislature not to allow double deduction at any point of time and therefore, for bringing clarity on the issue, the law has been amended with effect from the assessment year 2015-16 ?

4. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that depreciation is allowable in cases of trust on normal commercial principles, where the assessment of trusts are covered under sections 11, 12 and 13 of the Income-tax Act, 1961 and the provisions of sections 28 to 44 of the Act are not applicable to charitable trust as only application of income during the year is allowable under section 11 of the Act and depreciation being a notional expenditure is not allowable ?

5. Whether, on the facts and in circumstances of the case, the Tribunal was correct in following the decision in the case of *CIT* v. *Cutchi Memon Union* [1985] 155 ITR 51 (Karn) wherein it is stated the distinction between the application of income and the deduction of depreciation as expenditure stating that the allowance of depreciation has nothing to do with the application of income is not appropriate and acceptable as the investment in the capital assets as well as depreciation are both claimed as application of income in determining surplus/deficit during the year ?

6. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that the normal provisions of sections 28 to 44 of the Act are applicable and depreciation is allowable to charitable trust, when in cases of trust which are covered by the provisions of sections 11, 12 and 13 only application of income during the year is allowable under section 11 of the Act and depreciation being a notional expenditure is not allowable ?"

This court in the case of *CIT* v. *Rajasthan and Gujarati Charitable Foundation* [2018] 402 ITR 441 (SC) ; [2018] 89 taxmann.com 127 (SC) with regard to allowability and depreciation in the hands of religious and charitable trust held as under : 3

"Learned counsel at the bar submitted that so far as the issue regarding claim of depreciation under section 32 of the Act is concerned, the controversy is no longer res integra, having been settled by the hon'ble Supreme Court in the case of *CIT* v. *Rajasthan and Gujarati Charitable Foundation* [2018] 402 ITR 441 (SC) ; [2018] 89 taxmann.com 127 (SC), by which the hon'ble Supreme Court has affirmed the view taken by the Bombay High Court in *CIT* v. *Institute of Banking* [2003] 264 ITR 110 (Bom) ; [2003] 131 Taxman 386 (Bom). The relevant portion of the said judgment of the Bombay High Court as quoted by the hon'ble Supreme Court and affirmed is quoted below for ready reference (page 445 of 402 ITR) :

'In the said judgment, (Bombay High Court) the contention of the Department predicated on double benefit was turned down in the following manner (page 113 of 264 ITR) :

"As stated above, the first question which requires consideration by this court is : whether depreciation was allowable on the assets, the cost of which has been fully allowed as application of income under section 11 in the past years ? In the case of *CIT* v. *Munisuvrat Jain* [1994] Tax LR 1084 (Bom) the facts were as follows : The assessee was a charitable trust. It was registered as a public charitable trust. It was also registered with the Commissioner, Pune. The assessee derived income from the temple property which was a trust property. During the course of assessment proceedings for the assessment years 1977-78, 1978-79 and 1979-80, the assessee claimed depreciation on the value of the building at the rate of 2.5 per cent. and they also claimed depreciation on furniture at the rate of 5 per cent. The question which arose before the court for determination was : whether depreciation could be denied to the assessee, as expenditure on acquisition of the assets had been treated as application of income in the year of acquisition ? It was held by the Bombay High Court that section 11 of the Income-tax Act makes a provision in respect of computation of income of the trust from properly held for charitable or religious purposes and it also provides for application and accumulation of income. On the other hand, section 28 of the Income-tax Act deals with chargeability of income from profits and gains of business

and section 29 provides that income from profits and gains of business shall be computed in accordance with section 30 to section 43C. That, section 32(1) of the Act provides for depreciation in respect of building, plant and machinery owned by the assessee and used for business purposes. It further provides for deduction subject to section 34. In that matter also, a similar argument, as in the present case, was advanced on behalf of the Revenue, namely, that depreciation can be allowed as deduction only under section 32 of the Income-tax Act and not under general principles. The court rejected this argument. It was held that normal depreciation can be considered as a legitimate deduction in computing the real income of the assessee on general principles or under section 11(1)(a) of the Income-tax Act. The court rejected the argument on behalf of the Revenue that section 32 of the Income-tax Act was the only section granting benefit of deduction on account of depreciation. It was held that income of a charitable trust derived from building, plant and machinery and furniture was liable to be computed in normal commercial manner although the trust may not be carrying on any business and the assets in respect whereof depreciation is claimed may not be business assets. In all such cases, section 32 of the Income-tax Act providing for depreciation for computation of income derived from business or profession is not applicable. However, the income of the trust is required to be computed under section 11 on commercial principles after providing for allowance for normal depreciation and deduction thereof from gross income of the trust. In view of the aforestated judgment of the Bombay High Court, we answer question No. 1 in the affirmative, i.e., in favour of the assessee and against the Department.

Question No. 2 herein is identical to the question which was raised before the Bombay High Court in the case of *DIT (Exemption)* v. *Framjee Cawasjee Institute* [1993] 109 CTR (Bom) 463. In that case, the facts were as follows : The assessee was a trust. It derived its income from depreciable assets. The assessee took into account depreciation on those assets in computing the income of the trust. The Income-tax Officer held that depreciation could not be taken into account because, full capital expenditure had been allowed in the year of acquisition of the assets. The assessee went in appeal before the Assistant Appellate Commissioner. The appeal was rejected. The Tribunal, however, took the view that when the Income-tax Officer stated that full expenditure had been allowed in the year of acquisition of the assets, what he really meant was that the amount spent on

acquiring those assets had been treated as 'application of income' of the trust in the year in which the income was spent in acquiring those assets. This did not mean that in computing income from those assets in subsequent years, depreciation in respect of those assets cannot be taken into account. This view of the Tribunal has been confirmed by the Bombay High Court in the above judgment. Hence, question No. 2 is covered by the decision of the Bombay High Court in the above judgment. Consequently, question No. 2 is answered in the affirmative, i.e., in favour of the assessee and against the Department."

After hearing learned counsel for the parties, we are of the opinion that the aforesaid view taken by the Bombay High Court correctly states the principles of law and there is no need to interfere with the same.'

Since the issue regarding claim of depreciation in the hands of the charitable trust is no longer res integra, we are of the opinion that no substantial question of law now arises in the present appeals filed by the Revenue."

With regard to carrying forward of the losses for being set off against the **4**
income of the charitable trust for the present assessment year, the controversy is covered by the judgment in *CIT (Exemptions)* v. *Ohio University Christ College* [2018] 408 ITR 352 (Karn) rendered on July 17, 2018 in ITA. No. 312 of 2016 and ITA No. 313 of 2016, in which this court held as under (page 364 of 408 ITR) :

"In so far as the second question proposed by the Revenue, quoted above is concerned also, we find that the Tribunal's findings in this regard do not give rise to any substantial question of law. The said findings are quoted below for ready reference (page 306 of 44 ITR (Trib)) :

'In the course of assessment proceedings, the Assessing Officer observed that the assessee had claimed application of income on account of expenditure of earlier years, which has been brought forward and set off in the year under consideration. The Assessing Officer disallowed the same on the ground that there is no express provision in the Act permitting the adjustment of earlier years brought forward expenses as application of income in the current year. According to the Assessing Officer, the application of income for charitable purposes must be during the relevant previous year. Since the income of the trust is exempt from tax, the question of deficit does not arise and also the trust is required to utilize 85 per cent. of the

income of the previous year for charitable purposes during the year. In this view of the matter and for the above reasons, the Assessing Officer disallowed the assessee's claim of expenditure of earlier years being brought forward and set off during the year.

On appeal, the learned Commissioner of Income-tax (Appeals) allowed the amortization of the expenditure as claimed by the assessee and deleted the disallowance made by the Assessing Officer by placing reliance on the decision of the hon'ble Karnataka High Court in the case of *CIT* v. *Society of the Sisters of St. Anne* reported in [1984] 146 ITR 28 (Karn) and CBDT Circular No. 5-P (LXX)-6 of 1968.

We have heard the rival contentions of both the learned Departmental Representatives for the Revenue and the learned authorised representative for the assessee and perused and carefully considered the material on record, including the judicial pronouncements cited. The facts of the issue before us is that the assessee had incurred certain preliminary expenditure in the year of setting up of the trust. The same is amortised by the assessee-trust over a period of 5 years from the year of incurring of expenditure. The fact of amortization was not disputed by the Assessing Officer in the assessment proceedings for the assessment year 2007-08 where the entire amount was added back claiming 1/5th of the expenditure. The unamortized expenditure has been brought forward and set off as application of income in subsequent years, including the assessment years 2008-09 and 2009-10 which are under consideration.

We find that the issue before us is directly related to the issue decided by the hon'ble Karnataka High Court in the case of *Society of the Sisters of St. Anne* (supra) cited by the assessee. In the said case, the hon'ble Karnataka High Court at paras 8 to 10 thereof has held as under : . . .

Further, the CBDT Circular No. 5-P (LXX) 6 of 1968 cited by the assessee makes it clear that income should be understood in its commercial sense ; in the case of trusts also and therefore the commercial principle enunciated by the hon'ble Karnataka High Court in the above referred case of *Society of the Sisters of St. Anne* (supra) applies to trusts as well. In view of the factual and legal matrix of this issue in the case on hand as discussed above, we concur with the decision of the learned Commissioner of Income-tax (Appeals) in cancelling the disallowance made by the Assessing Officer and in allowing the amortization of expenses. Consequently, Ground No. B

(1 to 6) of the Revenue's appeal for the assessment year 2008-09 and Ground No. C for the assessment year 2009-10 are dismissed.'

In our opinion, the matter is squarely covered by a decision of the cognate Bench of this court in the case of *CIT* v. *Society of the Sisters of St. Anne* [1984] 146 ITR 28 (Karn) ; [1984] 16 Taxman 400 (Karn), wherein the cognate Bench of this court held that even the depreciation not involving any cash outflow is also in the character of expenditure and therefore such depreciation is nothing but decrease in the value of property through wear and tear, deterioration or obsolescence and the allowance made for that purpose in the books of account were deemed to be the application of funds for the purpose of section 11 of the Act. The relevant portion of the said judgment is also quoted below for ready reference (page 32 of 146 ITR) :

'Mr. Srinivasan, however, urged that there are enough indications in section 11 to exclude the mercantile system of accounting. The learned counsel relied upon section 11(1)(a) and 11(4) in support of his contention. We do not think that there is anything in these subsections to support the contention of Mr. Srinivasan. *Explanation* to section 11(1)(a) on the contrary takes note of the income not received in a particular year. It lends support to the contention of the assessee that accounting need not be on cash basis only. Section 11(4) is not intended to explain how the accounts of the business undertaking should be maintained. It is intended only to bring to tax the excess income computed under the provisions of the Act in respect of business undertaking.

The depreciation if it is not allowed as a necessary deduction for computing the income from the charitable institutions, then there is no way to preserve the corpus of the trust for deriving the income. The Board also appears to have understood the "income" under section 11(1) in its commercial sense. The relevant portion of the Circular No. 5-P(LXX-6) of 1968, dated July 19, 1968 reads :

"Where the trust derives income from house property, interest on securities, capital gains, or other sources, the word 'income' should be understood in its commercial sense, i.e., book income, after adding back any appropriations or applications thereof towards the purpose of the trust or otherwise, and also after adding back any debits made for capital expenditure incurred for the purposes of the trust or otherwise. It should be noted, in this connection, that the amounts so added back will become chargeable to tax under section 11(3) to the extent that they represent outgoings for purposes other than

those of the trust. The amounts spent or applied for the purposes of the trust from out of the income computed in the aforesaid manner, should be not less than 75 per cent. of the latter, if the trust is to get the full benefit of the exemption under section 11(1)."

In *CIT* v. *Trustee of H. E. H. the Nizam's Supplemental Religious Endowment Trust* [1981] 127 ITR 378 (AP), the Andhra Pradesh High Court has accepted the accounts maintained in respect of the trust in conformity with the principles of accountancy for the purposes of determining the income derived from the property held in trust.'

In view of the aforesaid findings of the learned Tribunal, allowing any expenditure of the earlier year which has been brought forward and set off in the year under consideration, is a justified finding of fact based on the correct interpretation of law and the judgment relied upon by it rendered by the cognate Bench. Therefore, the same does not call for interference. A similar view was also taken by the Division Bench of the Bombay High Court in *CIT* v. *Institute of Banking* [2003] 264 ITR 110 (Bom), wherein the Division Bench of the Bombay High Court held that the income derived from the trust property has also got to be computed on commercial principles and if commercial principles are applied, then adjustment of expenses incurred by the trust for charitable and religious purposes in the earlier years against the income earned by the trust in the subsequent year will have to be regarded as application of income of the trust for charitable and religious purposes in the subsequent year. The relevant portion of the said judgment of the Bombay High Court is also quoted below for ready reference (headnote of 264 ITR 110) :

'Normal depreciation can be considered as a legitimate deduction in computing the real income of the assessee on general principles or under section 11(1)(a) of the Income-tax Act, 1961. Income of a charitable trust derived from building, plant and machinery and furniture is liable to be computed in a normal commercial manner although the trust may not be carrying on any business and the assets in respect whereof depreciation is claimed may not be business assets. In all such cases, section 32 of the Act providing for depreciation, for computation of income derived from business or profession is not applicable. However, the income of the trust is required to be computed under section 11 on commercial principles after providing for allowance for normal depreciation and deduction thereof from the gross income of the trust.

Income derived from the trust property has also got to be computed on commercial principles and if commercial principles are applied, then adjustment of expenses incurred by the trust for charitable and religious purposes in the earlier years against the income earned by the trust in the subsequent year will have to be regarded as application of income of the trust for charitable and religious purposes in the subsequent year in which adjustment had been made having regard to the benevolent provisions contained in section 11 of the Act and such adjustment will have to be excluded from the income of the trust under section 11(1)(a)'."

5 In view of the controversy covered by the above decisions of this court, we are of the opinion that the substantial questions of law as suggested by the appellant does not now arise for our further consideration in the present appeal.

6 The appeal filed by the Revenue is accordingly disposed of in terms of the aforesaid judgments of this court. No costs.

[2020] 423 ITR 625 (Raj)

[In the Rajasthan High Court — Jaipur Bench]

RAJASTHAN STATE INDUSTRIAL DEVELOPMENT AND INVESTMENT CORPORATION LTD.

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

Mohammad Rafiq and Goverdhan Bardhar JJ.

January 23, 2019.

AY ▸ 2006-07
HF ▸ Department

Stock-in-trade—Valuation—Valuation of land held as stock-in-trade—Encroached and litigated land—Cannot be valued at nil value—Tribunal remitting matter to Assessing Officer for earlier years for consideration of actual status of each piece of land and its value—Tribunal remitting issue to Assessing Officer for year in question—Proper—Income-tax Act, 1961.

The assessee was a State Government undertaking whose primary objective was to set up industrial areas, for which it acquired lands and created infrastructure facilities to enable setting up of industries by way of allotment and auction. For the assessment year 2006-07, the assessee valued its closing

stock of land at actual direct development expenditure (less grant utilised) incurred on the area in stock. Since it was of the view that disposal or realization of land under litigation and encroachment was not possible in the near future, it valued the lands under litigation and encroachment at nil value. The Assessing Officer held that with regard to the valuation of the encroached or litigated land, the value could not be taken as nil, that the assessee had changed its method of valuation in the assessment year in question and accordingly made an addition and passed an order under section 143(3). The Commissioner (Appeals) partly allowed the appeal filed by the assessee. The Tribunal held that though the land which was under encroachment and litigation could not be valued at the prevailing market price its value would be less due to the defects and deficiency of not being available to the assessee for immediate use. It referred to its earlier decision in the assessee's own case for the assessment year 2007-08 and in order to maintain the rule of consistency remitted the issue to the Assessing Officer for fresh adjudication after conducting a proper verification and enquiry. On appeal :

Held, *dismissing the appeal, that the land in litigation or encroachment which was still shown as part of the closing stock of the assessee could not be valued at nil. The value of the land had to be determined on the basis of the actual status of the land in each case and not be applying a standard parameter for each and every case of encroachment and litigation. The Tribunal on consideration of its decisions in the assessee's own cases had remitted the issue to the Assessing Officer for fresh adjudication after conducting a proper verification and enquiry on production of all the relevant facts in respect of each and every piece of land under litigation and encroachment so as to reveal the actual status of the land for the purpose of determination of value. For the subsequent assessment years from 2007-08 to 2012-13 also the Tribunal had restored the matter to the Assessing Officer for deciding the issue and the assessee had not appealed against those orders before this court or the Supreme Court. No question of law arose.*

Cases referred to :

CIT *v.* Excel Industries Ltd. [2013] 358 ITR 295 (SC) (para 13)

CIT *v.* Hindustan Housing and Land Development Trust Ltd. [1986] 161 ITR 524 (SC) (para 13)

CIT *v.* Shoorji Vallabhdas and Co. [1962] 46 ITR 144 (SC) (para 13)

CIT *v.* Wolkem India Ltd. [2009] 315 ITR 211 (Raj) (para 13)

D. B. Income Tax Appeal No. 252 of 2018.

Siddharth Ranka for the appellant.

JUDGMENT

This appeal filed by Rajasthan State Industrial Development and Investment Corporation Limited (hereinafter called as the "RIICO") is directed against the order dated May 28, 2018 passed by the Income-tax Appellate Tribunal, whereby the learned Tribunal has remitted back the matter to the Assessing Officer. 1

The facts of the case are that the assessee-appellant-RIICO is a Rajasthan State Government enterprise. The board of directors of the assessee-appellant consists of senior officers of the cadre of Indian Administrative Services and overall management and control is under the supervision of Government of Rajasthan. The assessee-appellant is regularly filing its income-tax returns under the provisions of the Income-tax Act, 1961 from time to time after getting the books of account audited as per the provisions of the Companies Act and Income-tax Act. The books are also separately audited by the office of the Comptroller and Auditor General. For the assessment year 2006-07, the assessee-appellant filed its return of income on October 27, 2006 declaring therein total income at Rs. 43,73,82,600. The return of income was subsequently revised on August 24, 2007 declaring therein total income at Rs. 43,73,82,600. The assessee-appellant's primary objective was to set up industrial areas in the State of Rajasthan such as spacial economic zone parks, information technology parks, bio-technology parks, stone parks, textile parks, agro parks, etc., for which it acquired lands and spent substantial amount towards creating infrastructural facilities so as to enable setting up of industries in such industrial parks by way of allotment or auction. The land acquired by the assessee-appellant for the purpose of creating industrial parks is stock-in-trade and the assessee-appellant carries out development activities in such industrial areas. The assessee-appellant valued its closing stock of land at actual direct development expenditure (less grant utilized) incurred on the area in stock. The management realizing that disposal/realization of land under litigation/encroachment is not possible in the near future, it was considered appropriate to value such stock of land at ZERO price. Accordingly datas were collected from various regional managers of such land. After getting the feedback, such land under litigation or encroachment was valued at Rs. nil. The following disclosure was made in the notes to account : 2

> "2.6. At few industrial areas some portion of land is under litigation and/or under encroachment aggregating to 384.23 acres valuing Rs. 1,042.85 lakhs. The value of stock of such land has been taken as nil as on March 31, 2006."

3 The relevant and sufficient disclosures and notes for adopting the said valuation policy were duly disclosed in the audit report which was duly approved by the board of directors and thereafter by shareholders in their annual general meeting.

4 Learned counsel for the appellant submits that the Comptroller and Auditor General (C and AG) also raised the query with regard to valuation of such encroached/litigated land and after considering the reply of the assessee-appellant it was satisfied and dropped the audit para for assessment year 2010-11. The return filed by the assessee-appellant for the assessment year 2006-07 was selected for scrutiny assessment and relevant notices were issued by the Assistant Commissioner of Income-tax, Circle 6, Jaipur, i.e., the Assessing Officer from time to time. The assessee-appellant appeared through its authorized representative and furnished reply from time to time on various queries raised by the Assessing Officer. The Assessing Officer passed an order dated November 25, 2008 under section 143(3) of the Act wherein various disallowances/additions were made and total income was determined therein at Rs. 61,12,82,240 as against Rs. 43,73,82,600 declared by the assessee-appellant. With regard to valuation of encroached or litigated land, the Assessing Officer held that the value of land cannot be taken at nil and further held that the assessee-appellant has changed its method of valuation during the year under consideration and accordingly an addition of Rs. 10,42,85,000 was made by the Assessing Officer. Against the impugned assessment order dated November 25, 2008, the assessee-appellant preferred first appeal before the Commissioner of Income-tax (Appeals), Jaipur (for short "the CIT(A)") wherein the assessee-appellant challenged the various disallowances/additions made by the Assessing Officer. The matter was transferred to the Commissioner of Income-tax (Appeals), Bikaner who by its order dated September 29, 2017 partly allowed the appeal of the assessee-appellant.

5 It is contended that with reference to valuation of encroached/litigated land, the Commissioner of Income-tax (Appeals) concurred with the view of the Assessing Officer and has held that the value of land cannot be taken at nil and has further upheld that the assessee-appellant has changed its method of valuation during the year under consideration. Against the order dated September 29, 2017 passed by the Commissioner of Income-tax (Appeals), the assessee-appellant preferred an appeal before the Income-tax Appellate Tribunal. The Income-tax Appellate Tribunal by impugned order dated May 28, 2018 has remitted back the matter to the Assessing Officer. Hence this appeal.

Shri Siddharth Ranka, learned counsel for the appellant-assessee has argued that the learned Income-tax Appellate Tribunal failed to appreciate that valuing the closing stock of encroached and litigated land at actual direct development expenditure up to the assessment year 2005-06 is against the principle of prudence. The settled principle of valuation of closing stock is cost or market value which is lower. Even when in the notes to accounts for the assessment year 2005-06 it is stated that at few industrial area some of the portion of land is under litigation as well as under encroachment aggregating to 263.03 acres as on March 31, 2005 and the statutory auditors in their auditors' report have themselves qualified that the stock of land under litigation is treating as saleable whereas it was not and therefore the assessee changed the method of valuation of stock of encroached and litigated land in the year under consideration. **6**

It is contended that in the assessment year under consideration, the statutory auditors in their audit report have stated that some portion of the land is under litigation as well as under encroachment aggregating to 384.23 acres as on March 31, 2005 and have further observed that stock of land under litigation/encroachment is treated as not-saleable. **7**

It is contended that the Income-tax Appellate Tribunal failed to appreciate and even refer to the details of the land which was under encroachment and litigation, highlighted before the Income-tax Appellate Tribunal. There were instances of the lands which were being used as cremation ground/temple land/tribal hostel under control of forest Department/court litigations etc., and which were not readily available to the assessee for industrial development activity and hence, the value of such land at nil is proper and justified. However, the learned Income-tax Appellate Tribunal failed to even consider the same. **8**

Learned counsel submitted that the board of directors after considering all the facts and circumstances had approved the method of valuation, which was subsequently also approved in the annual general meeting of the assessee-appellant. **9**

Learned counsel submitted that similar issue was also raised by the Comptroller and Auditor General (C and AG) who after considering the reply of the assessee-appellant was satisfied and dropped the audit para for the assessment year 2010-11. **10**

Learned counsel contended that as per Accounting Standard 2 issued by the Institute of Chartered Accountants of India, the closing stock is to be valued at cost or market value whichever is less and since in the instant matter the assessee-appellant was not having even physical possession **11**

over the land as the same was under encroachment/litigation and since the land was not saleable, the same was valued at Rs. nil.

12 Shri Siddharth Ranka, learned counsel for the appellant-assessee reiterating the arguments before the Income-tax Appellate Tribunal has argued that earlier the assessee was valuing the closing stock of land at actual direct development expenditure, however, in the notes to accounts for the assessment year 2005-06 it is stated that at few industrial areas some portion of the land is under litigation as well as under encroachment aggregating to Rs. 263.03 crores as on March 31, 2005. The statutory auditors in their audit report have observed that stock of land under litigation is treated as saleable, therefore, the observation of the statutory auditor was considered by the assessee and consequently a board resolution was passed whereas the valuation of such land has been taken at nil as on March 31, 2006. The land was not available to the assessee as on March 31, 2006, therefore, the realization value of the land at the end of the financial year was Zero and accordingly, the assessee has considered the same at nil which is justified as per the principle of prudence accounting policy.

13 It is contended that whenever the assessee retrieves the lands from encroachment, the same is offered to tax, therefore, the said method of valuing the closing stock adopted by the assessee is revenue in nature. The assessee is consistently following the said method of closing stock and therefore, the addition made by the Assessing Officer is not justified. Learned counsel produced the details of the land which was under encroachment and litigation ; and submitted that there were instances that some of the land is used as cremation ground cannot be readily available to the assessee for industrial development activity and hence, the value of such land at nil was proper and justified. Learned counsel in support of his arguments has relied on the judgment of the Supreme Court in *CIT* v. *Shoorji Vallabhdas and Co.* [1962] 46 ITR 144 (SC), *CIT* v. *Excel Industries Ltd.* [2013] 358 ITR 295 (SC), *CIT* v. *Hindustan Housing and Land Development Trust Ltd.* [1986] 161 ITR 524 (SC) and *CIT* v. *Wolkem India Ltd.* [2009] 315 ITR 211 (Raj).

14 A perusal of the impugned order of the Income-tax Appellate Tribunal shows that the learned Tribunal has observed that though the land which was under encroachment and litigation cannot be valued at the cost of prevailing market price but the value of such land would definitely be very less due to defects and deficiency of not available to the assessee for immediate use. However, the land in litigation or encroachment which is still shown as part of the closing stock of the assessee cannot be valued at nil. Further the valuation of the land has to be determined on the basis of the actual

status of the land in each case and it cannot be valued applying a standard parameter for each and every case of encroachment or litigation. Even the Tribunal in the assessee's own case for the assessment year 2007-08 in I. T. A. No. 1267 /JP/2010 and 1387/JP/2010 vide order dated June 24, 2011 has considered this issue and remitted the matter back to the file of the Assessing Officer for proper verification and adjudication. Similarly for the assessment years 2009-10 to 2012-13 the Co-ordinate Bench of this Tribunal vide order dated February 23, 2018 in I. T. A. No. 311/JP2014, 420/JP2014 and others has considered this issue in para 5. For ready reference, para 5 reads as under :

"5. We have considered the rival submissions as well as relevant material on record. At the outset we note that this Tribunal in assessee's own case for the assessment year 2007-08 vide order dated June 24, 2011 in ITA No. 1267 and 1387 of 2010 has considered this issue in para 5. 7 as under :

'5.7 During the course of hearing, the learned authorised representative was asked as to whether land which has been valued at nil as on March 31, 2007 to the extent of Rs. 145.33 lakhs was purchased during the year. We were informed that the land was not purchased in this year. We are not having the details of the litigation in respect of land for which valuation has been taken at nil from March 31, 2006 to March 31, 2007. It is true that encroachment and litigation will have an impact on the valuation. The management has taken the decision to consider the value at Nil but we are not informed as to whether the decision is based on certain expert opinion or on the basis of prudence or after considering each and every case on merits. Section 4 is a charging section and according to which income-tax is to be charged in respect of total income of the previous year. The reduction in the value of the stock is to be substantiated by the assessee that it has resulted into previous year relevant to assessment year under consideration. In case the litigation and encroachment were existing at the time when the assessee acquired the land and filed the dispute before March 31, 2006 then why such reduction was not considered when the assessee was changing the method of accounting in the assessment year 2006-07. As per charging section, tax is levied on the actual income of the previous year. It means that facts which existed during the previous year are to be considered. When the assessee makes his purchases, he enters his stock at cost price on one side of the accounts. At the close of the year, he enters the value of any unsold stock at cost on the other side of the accounts thus

cancelling - out the 12 entries relating to the same unsold stock in the accounts ; and then that it is carried forward as the opening balance in the next year's account. This cancelling out of the unsold stock from both the sides of the accounts leaves only the transactions on which there have been actual sales and gives a true and actual profit or loss on this year's dealings. The only exception is that unsold stock can be valued at the cost price or market value whichever is less. The notional loss, if any, can be claimed in the year when unsold stock has a lesser value as compared to the stock price. However, notional profit cannot be added in case market value is more than the cost. Hence, valuation of the stock is to be based on the same method for both opening and closing stock. The Assessing Officer has simply not allowed deduction of Rs. 145.33 lakhs on the ground of not accepting the change in method of valuation. However, the Assessing Officer has not considered the aspects as to whether events in respect of reduction in valuation of stock have occurred during previous year relevant to the assessment year under consideration. We are not having full facts in respect of the stock which have been valued at nil to ascertain the nature of litigation or encroachment and the period when such lands were acquired and when the assessee became aware of encroachment or litigation. Hence, the issue of addition of Rs. 145.33 lakhs is restored back to the file of the Assessing Officer. We do feel that litigation and encroachment will affect the valuation of the 13 stock and such stock cannot be valued at cost price. With this observation, the matter is restored back to the file of the Assessing Officer.'

In view of the earlier decision of this Tribunal and to maintain the rule of consistency, we are of the view that the addition made by the Assessing Officer for the year under consideration is dependent on the outcome to the addition made by the Assessing Officer on this account in the earlier year. Therefore, in the facts and circumstances of the case we set aside this issue to the record of the Assessing Officer for deciding the same afresh in 'terms of the directions as given by the Tribunal for the assessment year 2007-08'."

15 The Tribunal considering the decisions of Co-ordinate Benches of the Tribunal itself in the assessee's own case, set aside the issue to the record of the Assessing officer for fresh adjudication after conducting a proper verification and enquiry. The assessee was also directed to produce all the relevant facts in respect of each and every piece of land under litigation and

encroachment so as to reveal the actual status of the land for the purpose of determination of value.

Moreover, in the subsequent assessment year, viz., the assessment year 2007-08 in the case of the assessee, the Tribunal vide order dated June 24, 2011, restored back the matter to the Assessing Officer for deciding the issue and even in subsequent years, i.e., 2009-10, 2010-11, 2011-12, 2012-13, vide order dated February 23, 2018, the Tribunal set aside this issue to the record of the Assessing Officer for deciding the same afresh in terms of the directions as given by the Tribunal in the assessment year 2007-08 and no appeal has been filed against the aforesaid orders by the assessee before this court or before the Supreme Court. In view of the above discussion, no question of law does arise in this present appeal, which is accordingly dismissed. **16**

[2020] 423 ITR 633 (Guj)

[IN THE GUJARAT HIGH COURT]

KAPADIA MONEY CHANGERS PVT. LTD.

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

MS. HARSHA DEVANI and **BHARGAV D. KARIA** JJ.

April 30, 2019.

SS ▸ ITA 1961, ss 147, 148
AY ▸ 2011-12
HF ▸ Assessee

REASSESSMENT—VALIDITY—OBJECTION TO NOTICE MUST BE CONSIDERED—NOTICE AFTER FOUR YEARS—NO FAILURE TO DISCLOSE MATERIAL FACTS NECESSARY FOR ASSESSMENT—NON-APPLICATION OF MIND TO OBJECTIONS TO NOTICE—REASSESSMENT PROCEEDINGS—NOT VALID—INCOME-TAX ACT, 1961, SS. 147, 148.

PRECEDENT—EFFECT OF SUPREME COURT DECISION IN *GKN Driveshafts (India) Ltd.*

The Supreme Court in the case of GKN Driveshafts India Ltd. *v.* ITO [2003] 259 ITR 19 (SC), *has devised a mechanism to give an opportunity to an assessee by filing objections to be considered by the Department in its true spirit so that an assessee does not have to undergo the gamut of reassessment proceedings unnecessarily. The Supreme Court has not laid down the procedure for filing objections as a mere empty formality inasmuch as the very*

purpose of filing the objection is to see that an opportunity is given to an assessee to explain that there is no escapement of income and there is full and true disclosure by the assessee during the course of original assessment and, therefore, there is no need to reopen the assessment. The Assessing Officer is duty bound to consider and apply his mind to the objections raised.

The assessee was an authorised dealer of foreign exchange. For the assessment year 2011-12, the assessee submitted e-return of income declaring total income of Rs. 4,37,543. During the course of the assessment proceedings, the assessee submitted the audit report and financial statement. The assessee was asked to furnish the ledger copy of salary and wages expenses along with other three items. The assessee furnished the details sought for by the Assessing Officer. The Assessing Officer called upon the assessee to furnish further details which were supplied by the assessee wherein copies of various expenditure accounts were submitted. The assessment order was passed under section 143(3). After four years a notice of reassessment was issued to the assessee on the ground of discrepancy, i. e., difference between amount of salary payment recorded in the salary register and the amount of salary debited in the profit and loss account. The assessee filed objections to the reasons contending, inter alia, that the assessee had two offices, one at N and other at B, with staff at both the places and the expenditure of Rs. 7,81,100 was the total of the salary register at N and B and that the salary at the N unit was Rs. 2,78,700. It was pointed out that salary register of the B unit was not impounded. The Assessing Officer having rejected the objections, on a writ petition to quash the proceedings :

Held, *allowing the petition, that this was a classic case of total non-application of mind on behalf of the Assessing Officer while passing an order rejecting the objections filed by the assessee pursuant to the issuance of notice under section 148 of the Act. The Assessing Officer had brushed aside the justification, explanation and reconciliation furnished by the assessee in the objections to the notice. Moreover the reasons recorded by the Assessing Officer were based on incorrect facts in addition to the fact that the Assessing Officer during the course of the original assessment had scrutinised the details of salary expenditure by issuing notices under section 142(1) of the Act and by calling for information and hence, it was evident that the assessment was sought to be reopened on a mere change of opinion, which was not permissible in law. The reassessment proceedings were not valid.*

Cases referred to :

GKN Driveshafts (India) Ltd. *v.* ITO [2003] 259 ITR 19 (SC) (para 7)

Renusagar Power Co. Ltd. *v.* ITO [1979] 117 ITR 719 (All) (para 4)

Sri Krishna Pvt. Ltd. *v.* ITO [1996] 221 ITR 538 (SC) (para 4)

R/Special Civil Application No. 15290 of 2018.

Manish J. Shah for the petitioner.

Nikunt Raval with *Ms. Kalpana K. Raval* for the respondent.

JUDGMENT[1]

The judgment of the court was delivered by

BHARGAV D. KARIA J.—Rule. Mr. Nikunt Raval, learned senior standing counsel waives service of notice of rule on behalf of the respondent. 1

Having regard to the controversy involved in the present case which lies in a very narrow compass, with the consent of the learned advocates for the respective parties, the matter is taken up for final hearing. 2

The petitioner has challenged a notice dated March 28, 2018 for reopening of assessment for the assessment year 2011-12 issued by the respondent under section 148 of the Income-tax Act, 1961 ("the Act" for short). 3

The brief facts of the case are as under : 4

4.1 The petitioner is an authorised dealer of foreign exchange. For the assessment year (for short "AY") 2011-12, the petitioner submitted e-return of income declaring total income of Rs. 4,37,543. During the course of the assessment proceedings, the petitioner submitted audit report and financial statement wherein profit and loss account under the caption "Expenditure", there was a debit of Rs. 36,53,147 under the head "Administrative and other expenses", the break-up of which was at Schedule 10, wherein salary and bonus was stated to be Rs. 8,49,818. The notice dated September 27, 2012 under section 143(2) of the Act and notice dated July 31, 2013 under section 143(2) of the Act were issued by the Assessing Officer with annexure thereto inquiring about 19 items mentioned thereunder. As per item No. 16, the petitioner was asked to furnish ledger copy of salary and wage expenses along with other three items. The petitioner furnished the details sought for by the Assessing Officer. The Assessing Officer by letter dated December 4, 2013 called upon the petitioner to furnish further details which were supplied by the petitioner vide letter dated December 12, 2013, wherein copies of various expenditure accounts were submitted. The assessment order dated January 31, 2014 was passed under section 143(3) of the Act.

4.2 It is the case of the petitioner that after more than two years and nine months of framing assessment under section 143(3) of the Act, there

1. Oral judgment.

were survey proceedings under section 133A of the Act on September 14/ 15, 2016. Pursuant to said survey carried on by the Department, impugned notice dated March 28, 2018 under section 148 of the Act was issued by the respondent for reopening the assessment for the assessment year 2011-12 stating that he has reason to believe that income chargeable to tax had escaped assessment and called upon the petitioner to submit the return. The petitioner therefore, on April 10, 2018 submitted the same return which was filed under section 139 of the Act. The respondent along with letter dated June 22, 2018 supplied reasons recorded which are reproduced hereinbelow :

"1. In this case, the assessee filed its return of income on September 19, 2011 declaring total income at Rs. 4,37,543 for the assessment year 2011-12. Subsequently, the case was selected for scrutiny and assessment proceedings were concluded on January 31, 2014.

2. A survey under section 133A of the Income-tax Act was carried out in the case of the assessee-company on September 14 and 15, 2016. During the course of survey proceedings certain documents and books of account were found including salary registers for different years. During the course of survey proceedings, on verification of salary register for the financial year 2015-16, it was found that the amount of salary debited in the profit and loss account of the relevant year was much higher than the amount of salary payment recorded in the salary register.

2.1 The statement of Shri Chetanbhai A. Kapadia, director of the company, was recorded on oath during the course of survey. He was asked to give explanation and reasons in respect of the above discussed discrepancy, i.e., the difference between the amount of salary payment recorded in the salary register and the amount of salary debited in the profit and loss account. However, he failed to explain the same or to provide any reason for the said discrepancy.

3. The fact remains that the discrepancy found during the course of survey, as discussed above could not be explained by the director of the company. During the course of survey, all the salary registers found were impounded. Accordingly, the salary register for the financial year 2010-11 was also found and impounded vide serial No. 25 of the inventory of books as per Annexure A prepared during the course of survey.

4. The said salary register contains details of payment of salary for the entire year. Separate page has been opened for each month in the salary register. On verification of the said salary register, it has been

found that total amount of salary payment of Rs. 2,78,700 only has been recorded in it for the entire twelve months. At the other hand, on verification the profit and loss account of the assessee, it has been found that the assessee has debited an amount of Rs. 8,49,818 to the profit and loss account as salary and bonus (other than the directors' remunerations).

4.1 The case of the assessee for the assessment year 2011-12 has been scrutinized and assessment order under section 143(3) of the Act was passed on January 31, 2014. During the scrutiny proceedings the assessee submitted the ledger amount of salary/bonus expenses. On verification it has been found that the amount of salary expenses claimed by the assessee is of Rs. 7,81,100 (excluding bonus). As against this, evidence of payment of Rs. 2,78,700 only has been found during the course of survey.

5. Thus, it has become very clear that the assessee has debited higher amount under the head "Salary expenses" as against the actual amount of payment of salary recorded in the salary register for the financial year 2010-11 relevant to the assessment year 2011-12. To be specific, as against the amount of salary expenses of Rs. 7,81,100 debited in the profit and loss account, evidence of actual payment of Rs. 2,78,700 only has been found in the form of salary register.

6. The duty cast upon the assessee is not only to disclose the material facts fully but also truly. The word 'truly' indicates that the disclosure made must conform to the actual state of things. A statement cannot be said to be true if it does not explain things exactly as they are. The disclosure, therefore, should be honest, sincere and not fraudulent (*Renusagar Power Co. Ltd.* v. *ITO* [1979] 117 ITR 719 (All)). Further, every disclosure is not and cannot be treated as a true and full disclosure, it could be a false one or true one. Similarly, it could be full disclosure or a partial disclosure. A partial disclosure may be misleading one and not enough to meet the standard of disclosure. What is required is full and true disclosure of all material facts necessary for making the assessment for the assessment year concerned. (*Sri Krishna Pvt. Ltd.* v. *ITO* [1996] 221 ITR 538, 546 (SC)).

6.1 In this case, during the course of scrutiny proceedings and also at the time of filing return of income the assessee wilfully claimed inflated expenses, i.e., higher amount of salary expense than the actual amount. This truth has come to light on account of salary proceedings carried out by the Department. Such facts were not available at the time of passing the order under section 143(3) of the

Income-tax Act dated January 31, 2014. Had the survey proceeding not been carried out, the true facts would not have come to light.

7. Thus, it has become crystal clear that while filing the return of income and during the assessment proceedings, the assessee had presented incorrect facts by showing inflated amount of salary expenses. By doing so, the assessee has suppressed its income to the extent discussed above. The said omission is on the part of the assessee as it has wilfully presented incorrect facts. The correct details and fact have now come to light as discussed above. Thus, there is a failure on the part of the assessee in disclosing full details.

8. In view of the above facts, I have reason to believe that it is a failure on the part of the assessee, who has not disclosed fully and truly all material facts necessary for assessment of income for the assessment year 2011-12 and the income of the assessee to the extent of Rs. 5,02,400 as discussed above, has escaped assessment within the meaning of section 147 of the Income-tax Act. I am satisfied that the assessment has escaped income to the extent of Rs. 5,02,400 for the reasons mentioned above and the case of the assessee is a fit case for invoking the provisions of section 147 of the Income-tax Act and issue of notice under section 148 of the Income-tax Act.

9. Therefore, notice under section 148 of the Income-tax Act is issued to the assessee."

5 The petitioner filed the objections to the aforesaid reasons on August 16, 2018 contending inter alia that the petitioner had two offices ; one at Navsari and other at Bardoli with staff at both the places and the expenditure of Rs. 7,81,100 was the total of the salary register at Navsari and Bardoli ; salary at Navsari unit was Rs. 2,78,700. It was pointed out that salary register of Navsari unit was impounded, but the salary register of Bardoli unit was not impounded and therefore, in the objections, the petitioner stated thus :

". . . . If the reconciliation between the numbers had been sought, the assessee would have provided the same. However, a sheet it attached completely reconciling salary of Rs. 2,78,700 as per salary register of Navsari unit with Rs. 7,81,100 debited to profit and loss account with reference evidence (page Nos. 27 to 48). Copies of salary registers of Navsari and Bardoli branch are also enclosed (Annexures A and B).

The justification chart is also summarily presented below with explanation.

Particulars		*Amount (Rs.)*	*Amount (Rs.)*	*Page reference*
Navsari Unit				
Add :	As per salary register impounded by the IT Department during survey of Navsari Unit	2,78,700		Annexure A
	Salary paid to doorkeeper-cum-watch-man 1. Rameshbhai Rs. 3,900 x 12 months 2. Jayesh Rathod Rs. 3,900 x 1 month	50,700		30-41
	Stipend paid to trainee, Dipti Gohi, for two months (Rs. 3,900 x 2 months)	7,800		42
	Salary paid to Pinal C. Kapadia at Rs. 22,000 x 8 months paid by cheque No. 21483 drawn on IDBI Bank	1,76,600		43
	Total salary debited in P & L account of Navsari Unit		5,13,200	
Bardoli Unit				
Add :	As per salary register of Bardoli Unit (Not impounded by the IT Department during survey)	2,67,900		Annexure B
	Total salary debited in P & L account of Bardoli Unit		2,67,900	
	Total salary debited in P & L account by the assessee		7,81,100	

(6) Given the above, even on merits, the entire salary debited to profit and loss account of Rs. 7,81,100 has full support. What is primarily missed out at the time of reopening the assessment is salary particulars of Bardoli unit. The Department did not undertake survey at Bardoli unit, recorded statement of employees at Bardoli unit during the course of survey but failed to consider that those employees would have been paid salaries. Therefore, with the complete reconciliation given above with reference to evidence, there is no escapement of income whatsoever."

The respondent however, rejected the objections by order dated August 21, 2018 without making any attempt to appreciate the contents of the objections. The petitioner therefore, has filed captioned petition under article 226 of the Constitution of India challenging the impugned notice. 6

7 Learned advocate Mr. Manish Shah for the petitioner submitted that the impugned notice under section 148 of the Act and the order rejecting the objections are bad in law inasmuch as the condition precedent for reopening a scrutiny assessment beyond a period of four years as laid down by the proviso to section 147 of the Act is that the escapement of income from assessment must be by reason of omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. It was submitted that this condition is not fulfilled by the respondent on the facts of the case. The petitioner disclosed not only all facts pertaining to salary and wages during the course of assessment, by supplying the information when asked for by the Assessing Officer, but in fact, the respondent ought to have been convinced after reading the objections that the very foundation of the reasons recorded was the salary register of one unit, when in fact, the petitioner had two units and Rs. 7,81,100 was the sum total of the salary recorded in the salary register of two units situated at Navsari and Bardoli. It was submitted that the order rejecting the objections suffered from total non-application of mind and is contrary to the decision of the Supreme Court in the case of *GKN Driveshafts (India) Ltd.* v. *ITO* [2003] 259 ITR 19 (SC) inasmuch as the respondent did not follow the Supreme Court decision in true spirit and drop the proceedings in spite of explanation given in detail by the petitioner in the objections providing detail of the reconciliation between the reasons recorded and the facts on record to the effect that the very foundation of the reasons recorded with regard to the so-called discrepancy is not tenable, i.e., the difference between the amount of salary payment recorded in the salary register impounded and the amount of salary debited in the profit and loss account. By referring to the submissions of Shri Chetan Kapadia, director of the company during the course of survey conducted on September 14/15, 2016, it was submitted that in para 3 of the reasons recorded by the respondent, false facts are recorded to the effect that "during the course of survey, all the salary registers found were impounded. Accordingly, salary register for the financial year 2010-11, was also found and impounded vide serial No. 25 of the inventory of books as annexure A prepared during the course of survey". The petitioner in the objections filed before the respondent has clarified and reconciled that the petitioner is having two units located at Navsari and Bardoli. It was categorically pointed out that the salary register of Navsari was impounded by the search party but the salary register of Bardoli unit was not impounded and therefore, taking into consideration the only salary register of Navsari for the purpose of reopening of the assessment on the ground that as per the salary register impounded, salary paid was only Rs. 2,78,700 and in the

profit and loss account, salary debited is Rs. 7,81,100, was not correct. It was therefore, submitted that the reconciliation justification chart narrated in the objections filed would show that the entire basis for reopening is bad in law. It was therefore, submitted that the respondent while rejecting the objections raised by the petitioner has brushed aside the justification given by the petitioner by merely reproducing what is stated in the impugned notice of reopening. The respondent while rejecting the objections of the petitioner has recorded as under :

"3. The objections of the assessee have been considered and the same are not found to be tenable for the following reasons :

3.1 The reopening has been made after duly recording the reasons by the Assessing Officer. The facts suggest that the reopening of the assessment under section 147 has been done after following the due procedures of law and hence there is no illegality involved therein. Copies of impounded material and statements recorded have been supplied to the assessee-company when a request was received from its end.

3.2 In this case, an survey action under section 133A of the Income-tax Act, 1961 was carried out on September 14/15, 2018 wherefrom a salary register for the financial year 2010-11 relevant to the assessment year 2011-12 was found and impounded from the business premises of the assessee-company. As per the said salary register a payment of Rs. 2,78,700 has been recorded for whole financial year 2010-11 whereas in the books of account the same has been debited to the tune of Rs. 7,81,100 which reveals this fact that salary expenses were bogus and inflated to the tune of Rs. 5,02,400. During the course of survey proceeding, Shri Chetanbhai A. Kapadia, director of the company, was examined on oath and he failed to explain the difference of salary recorded in the salary register impounded and debited to the profit and loss account. Since the assessee failed to substantiate the claim of salary expenses during the course of survey proceedings, which leads to divulge that highly inflated salary expenses have been debited to the profit and loss account and it is a failure on the part of the assessee, therefore the Assessing Officer has reason to believe that such expenses are inflated and the assessee does not disclose true and fair income to the extent of inflated salary expenses at the time of filing of return and during the course of scrutiny assessment in the case of the assessee-company."

8 It was submitted that the respondent has not dealt with the justification given by the petitioner and, therefore, instead of dropping the proceedings, the respondent has rejected the objections.

9 On the other hand, Mr. Nikunt Raval, learned advocate for Ms. Kalpana Raval, learned senior standing counsel for the respondent supported the impugned notice relying upon the averments made in the affidavit-in-reply contending inter alia that when the opportunity was presented during the course of survey proceedings, no details/explanations were furnished and on the basis of unexplained impounded materials and facts of the case, reasons for reopening of assessment were recorded and due procedure was followed. It was further submitted that in the case of survey action under section 133A of the Act, salary register was impounded for the financial year 2010-11 which says payment on account of salary was made to the tune of Rs. 2,78,700 only whereas salary expenses were claimed to the tune of Rs. 7,81,100 as per books of account and the director of the company was examined on oath under section 131 of the Act but could not give any explanation and reasons in respect of discrepancy of actual salary expenses debited to the profit and loss account and recorded in the salary register and, therefore, the impugned notice under section 148 of the Act was issued on the basis of discrepancy arising out of impounded material. With regard to the submission of the petitioner that the objections were rejected without making attempt to appreciate the contents of objections, it was submitted that a speaking order was passed taking into consideration all the aspects raised by the petitioner in its letter dated August 16, 2018. It was therefore, submitted that in view of the discrepancy between the salary register impounded and expenses debited in profit and loss account, there is a failure on the part of the petitioner to disclose truly and fully all material facts and, therefore, the impugned notice under section 148 of the Act is legal and valid.

10 This is a classic case of total non-application of mind on behalf of the respondent while passing an order rejecting the objections filed by the petitioner pursuant to the issuance of notice under section 148 of the Act. The respondent has brushed aside the justification, explanation and reconciliation furnished by the petitioner in the objections to the effect that the impugned notice is issued only considering the salary register of Navsari unit and the salary register of Bardoli unit has not been taken into consideration. In view of reconciliation furnished by the petitioner in the objections, any prudent person would have dropped the reopening proceedings. In the facts of the case, the respondent while rejecting the objections, without considering the justification and reconciliation provided

by the petitioner, has rejected the same as empty formality. The apex court in the case of *GKN Driveshafts (India) Ltd.* (supra), has devised a mechanism to give an opportunity to an assessee by filing objections to be considered by the Department in its true spirit so that an assessee does not have to undergo the gamut of reassessment proceedings unnecessarily. In the facts of the case, a bare perusal of the reasons recorded and the justification, explanation and reconciliation provided by the petitioner in the objections would clearly lead to a conclusion that there is no escapement of income, irrespective of the aspect that claim of salary was scrutinised or not scrutinised during the course of original assessment. It appears from the order dated August 21, 2018 disposing of the objections raised by the petitioner that the respondent has adopted a pedantic robotic approach ignoring the objections raised by the assessee-petitioner in toto with only one object of rejecting the objections. The apex court has not laid down the procedure for filing objections as a mere empty formality inasmuch as the very purpose of filing the objection is to see that an opportunity is given to an assessee to explain that there is no escapement of income and there is full and true disclosure by the assessee during the course of original assessment and, therefore, there is no need to reopen the assessment. The respondent is duty-bound to consider and apply his mind to the objections raised. However, on perusal of the order dated August 21, 2018 whereby the objections raised by the petitioners are rejected, it transpires that reasons given for rejecting the objections are nothing but an eyewash as justification, explanation and reconciliation provided by the petitioner is not even referred to by the respondent. Such an approach of the respondent is required to be deprecated.

In view of the above stated undisputed facts, reasons recorded by the **11**
Assessing Officer are based on incorrect facts in addition to the fact that the Assessing Officer during the course of original assessment has scrutinised the details of salary expenditure by issuing notices under section 142(1) of the Act and by calling for information and hence, it is evident that the assessment is sought to be reopened on a mere change of opinion, which is not permissible in law. It is evident from the letter dated December 4, 2013 issued by the Assessing Officer during the course of original assessment, wherein in paragraph 2 therein, it is stated as under :

> "On verification of details furnished by you vide letter dated August 18, 2013, it is observed that :

(i) You have balance with scheduled bank in fixed deposit to the tune of Rs. 45,52,610 and you have shown interest income thereon of Rs. 2,54,746. Further, you have obtained unsecured loans from director of Rs. 23,47,277 and interest paid thereon to the tune of Rs. 3,71,138. It is noted that the said payment is covered under section 40A(2)(b) of the Act. Considering the above, you are requested to explain why the interest given on unsecured loan to directors is restricted to 6 per cent. instead of 12 per cent. paid by you as you earned interest on fixed deposits hardly at 6 per cent.

(ii) On verification of audit report, it is further observed that you have paid director remuneration of Rs. 5,78,400 to Smt. Sheetaben A. Kapadia and salary of Rs. 1,76,000 to Mrs. Pinalben C. Kapadia. The payment given to these two ladies is specified under section 40A(2)(b) of the Act. Therefore, you are requested to furnish the details of qualification and natures of work/duty performed by these two ladies and justify your claim."

12 The petitioner furnished information with regard to the payments made by way of salary of Rs. 1,76,000 paid to Pinalben C. Kapadia, spouse of director Chetan A. Kapadia in its reply dated December 16, 2013 as under :

"(a) Payment made to Pinalben C. Kapadia (Spouse of director Mr. Chetan A. Kapaida) of Rs. 1.76 lakhs

Mrs. Pinalben C. Kapadia is holding degree of Bachelor of Business Administration (BBA) with first class. She is providing her services to the company for the administration of the day-to-day business, attending customers, services of the public relationship work and others office work. She is getting only Rs. 14,666 per month. If she worked with any other entity, she would have deservedly received more than this. So it is justifiable on the payment made to Mrs. Pinalben C. Kapadia for her service to the company."

13 From the above, it is clear that during the course of original assessment, the Assessing Officer has considered the claim of the petitioner with respect to the salary expenditure and, therefore, when the petitioner filed the objections to the impugned notice which is based only upon the salary register of Navsari unit impounded during the course of survey conducted in the year 2016, the respondent ought to have dropped the reopening proceedings.

14 In view of the aforesaid facts emerging from the record, the impugned notice issued under section 148 of the Act which is based on a mere change

of opinion is without any justification and is therefore, liable to be quashed and set aside as the petitioner has disclosed all material facts fully and truly necessary for the assessment and there is no suppression of any income or omission on part of the assessee or any wilful presentation of incorrect facts by the petitioner. The reasons recorded are based on incorrect facts and therefore, there is no escapement of income in the year under consideration.

For the foregoing reasons, the petition succeeds and is allowed. The impugned notice issued under section 148 of the Act is quashed and set aside. Rule is made absolute accordingly with no order as to costs. 15

[2020] 423 ITR 645 (Delhi)

[IN THE DELHI HIGH COURT]

SKYVIEW CONSULTANTS PVT. LTD.

v.

INCOME-TAX OFFICER AND ANOTHER

S. RAVINDRA BHAT and **A. K. CHAWLA** JJ.

July 30, 2018.

SS ▸ ITA 1961, ss 147, 148
AY ▸ 2010-11
HF ▸ Assessee

REASSESSMENT—NOTICE—VALIDITY—INCOME ESCAPING ASSESSMENT—INFORMATION RECEIVED FROM INVESTIGATION WING THAT PAYMENTS MADE BY ASSESSEE TO CONTRACTOR WERE BOGUS—CANNOT BE EXTRAPOLATED TO OTHER ASSESSMENT YEARS—ENQUIRIES CONDUCTED BY ASSESSING OFFICER IN ORIGINAL ASSESSMENT—NO NEW OR TANGIBLE MATERIAL AVAILABLE—NOTICE AND REASSESSMENT PROCEEDINGS QUASHED—INCOME-TAX ACT 1961, SS. 147, 148.

The assessee was engaged in consultancy business in the segment of product promotion and sales services. For the assessment years 2007-08 and 2008-09, orders were passed to re-examine the original scrutiny assessments and assessments were made under section 263 of the Income-tax Act, 1961 and later under section 147/148 respectively. These attempts to reopen the original scrutiny assessments on the ground that claims for bogus expenditure made were unsuccessful and the final orders for the assessment year 2007-08 culminated in remand orders by the Assessing Officer in the assessee's favour. The order pursuant to the remand was accepted after the

Appellate Commissioner endorsed that view. The reassessment for the assessment year 2009-10 was through a notice which, inter alia, stated that upon receipt of a tax evasion petition, investigation was conducted which showed that for the year ending on March 31, 2009, the contract charges claimed were unduly high and that those amounts were distribution of illegal gratifications by the assessee. The Assessing Officer sought to reopen the assessment for the assessment year 2010-11 by notice under section 148. The reasons recorded were that according to the report of the Investigation Wing the modus operandi of the assessee in the assessment year 2010-11 was the same as in the assessment years 2007-08, 2008-09 and 2009-10, that in view of the additional information and documents received from the Investigation Wing and the Director General (Vigilance), and the material and documents available on record, he had reason to believe that the contractor's charges as shown in its profits and loss accounts were bogus and that income of Rs. 3,07,95,559 chargeable to tax had escaped assessment for the assessment year 2010-11, within the meaning of section 147. The objections raised by the assessee were rejected. On a writ petition :

Held, *allowing the petition, that there was no fresh evidence supporting the reassessment under section 147. Consequently, there was no tangible, specific material to justify the reassessment notice under section 148. The Department's explanation to distinguish the facts of the assessment year 2010-11, from those of the assessment year 2009-10 which was dealt with in the earlier proceeding was specious and unconvincing. The Assessing Officer had mechanically followed the Investigation Wing's recommendation for the assessment year 2008-09. The examination was of material in the light of the facts of the relevant period that the assessee had shown consultancy income of Rs. 3,31,14,2091 from its single client and had debited an amount of Rs. 3,07,95,5591 as sub-contractor charges and returned an income of Rs. 3,10,3361 only. However, though the letter from the Investigation Wing mentioned that the suspicion of bogus expenditure was later dealt with in revision and the addition was revised to only 5 per cent. disallowance, the notice recording reasons to justify the reopening of assessment for the assessment year 2010-11 wilfully omitted to note that fact. Furthermore, the Tribunal in the assessee's appeal, for the previous year, which had been reassessed had found that the Assessing Officer had called the concerned subcontractors, who had disclosed the amounts received from the assessee, in their returns. Each assessment year was to be seen differently. The note from the investigation unit mentioned a pattern of expenditure claimed over a five-year period. Three of those years were dealt with and the assessee emerged*

unscathed. The trigger for all the reassessment attempts by the Department was the same tax evasion petition, which led to previous attempts to reopen the completed assessments. According to the material on record the Assessing Officer had conducted inquiries at the time of completion of the original assessments. There was nothing to show that the entities to whom payments were made by the assessee were fictitious and taxes at source were deducted. Reassessment notice and all further proceedings were to be quashed.

Cases referred to :

AGR Investment Ltd. *v.* Addl. CIT [2011] 333 ITR 146 (Delhi) (para 11)

CIT *v.* Gupta Abhushan P. Ltd. [2009] 312 ITR 166 (Delhi) (paras 6, 11)

ITO *v.* Lakhmani Mewal Das [1976] 103 ITR 437 (SC) (para 6)

Phool Chand Bajrang Lal *v.* ITO [1993] 203 ITR 456 (SC) (para 8)

Ramkrishna Ramnath *v.* ITO [1970] 77 ITR 995 (Bom) (para 11)

Sky View Consultants P. Ltd. *v.* ITO [2017] 397 ITR 673 (Delhi) (paras 5, 11)

W. P. (C) No. 11324 of 2017 and C. M. Application No. 46251 of 2017.

Dr. Rakesh Gupta, *Sonil Agarwal*, *Ms. Monika Ghai* and *Rohit Kumar Gupta*, Advocates, for the petitioner.

Zoheb Hossain, Senior Standing Counsel with *Deepak Anand*, Junior Standing Counsel, for the respondents.

JUDGMENT

The judgment of the court was delivered by

S. RAVINDRA BHAT J.—The writ petitioner, which is engaged in consultancy business in the segment of product promotion and sales services marketed by M/s. Seagram's India Ltd. is aggrieved by the reopening of its assessment for the assessment year 2010-11 under section 148 of the Income-tax Act, 1961 (hereafter "the Act"). It seeks directions for quashing of the reassessment notice. 1

The facts briefly are that for two previous years, i.e., assessment years 2007-08 and 2008-09, orders seeking to re-examine the original scrutiny assessments were made under section 263 and later under section 147/148 of the Act, respectively. These attempts to revisit the original scrutiny assessments, (on the allegation that claims for bogus expenditures were made) were unsuccessful and the final orders for the assessment year (2007-08) culminated in the revisional and subsequent remand orders by 2

the Assessing Officer (hereafter "AO") finally in the assessee's favour. The order pursuant to the remand was, in fact, accepted after the Appellate Commissioner endorsed that view on May 8, 2014.

3 The reassessment for the assessment year 2009-10 was through a notice dated March 30, 2016 which inter alia claimed that upon receipt of a tax evasion petition (TEP), investigation was conducted which showed that for the year ending March 31, 2009, the contract charges claimed were unduly high of Rs. 24,01,79,349. The tax evasion petition also alleged that these amounts were distribution of illegal gratifications by the assessee. The reassessment notice proceeded to state as follows :

> "From the above referred tax evasion petition, and report of the Income-tax Officer (Inv) OSD-1, Unit-3, New Delhi, the modus operandi of the assessee in the assessment year 2009-10 is same as was in the assessment years 2007-08 and 2008-09. It appears that contractor's charges amounting to Rs. 2,41,79,349 claimed as expenses by the assessee in its profit and loss account pertaining to the financial year 2008-09 relevant to the assessment year 2009-10 has been used by the assessee for non-business purposes, thus concealing its true income.
>
> In this case, the Director General of Income-tax (Vigilance) vide their letter No. DIT(Vig)/NZ/2011-12 dated November 2, 2011 (placed as annexure C) after their detailed enquiry in a complaint case against the then Assessing Officer of Circle 8(i), New Delhi, has also suggested to look into the claim of the expenses, as they are in crores in one year itself, and will have a major impact on revenue, taking into the number of years involved, as the assessee is doing the same business till date.
>
> In view of the additional information/documents received from the Investigation Wing, material/documents available on record, I have reason to believe that contractor's charges shown in its profit and loss account are bogus and the assessee has willfully and knowingly concealed its particulars of income to avoid tax and that income of Rs. 2,41,79,349 chargeable to tax has escaped assessment for the assessment year 2009-10, within the meaning of section 147 of the Income-tax Act, 1961."

4 On August 17, 2017, the Revenue sought to reopen the assessment by issuing notice under section 147/148 of the Act, on March 27, 2017, but for the assessment year 2010-11. In response to the assessee's request, the Revenue furnished the reasons for reopening an assessment. This inter alia reads as follows :

"In fact investigation into the affairs of the company started on receipt of tax evasion petition bearing UIN No. 090845052X (placed as annexure B). As per the tax evasion petition received by the Investigation Wing of the Department the said company made collections from their principals, i.e., M/s. Pernod Ricard India Pvt. Ltd. The company further issued account payee cheques in the name of various sub-contractors (allegedly bogus entities) in their names and withdrew cash by self cheques from their accounts and distributed cash in defence canteens as bribes. On the basis of said tax evasion petition and other material available on record the case of the assessee for the assessment year 2007-08 was reopened under section 263 of the Income-tax Act, 1961 and for the assessment year 2008-09 proceedings under section 147 of the Income-tax Act, 1961 were completed and therein a substantive addition of Rs. 1,60,94,586 on account of disallowance of sub-contracting expenses. Further the case of the assessee-company for the assessment year 2009-10 was also reopened on the similar grounds however the matter for this year is sub judice with the hon'ble Delhi High Court are currently in progress.

On perusal of the profit and loss account for the year ending March 31, 2010 received along with above quoted letter of Income-tax Officer (Inv) OSD-1, Unit-3, New Delhi, the assessee is showing consultancy income of Rs. 3,31,14,209 and expenses on account of contractor charges amounting to Rs. 3,07,95,559 and has shown net income only at Rs. 3,10,336. It was alleged in the tax evasion petition that for the assessment years 2007-08 and 2008-09 the contractor charges being claimed by the assessee is the bribe amount distributed by the assessee.

The Income-tax Officer (Inv) OSD-1, Unit-3, New Delhi, in his findings has stated that the assessee was provided opportunity to explain the expenses and to provide the necessary details which were called for vide summons under section 131(1A) dated March 4, 2015 so that independent enquiries could be conducted from the third parties. As per his report the assessee has neither provided any justification with documentary evidence nor the details of the parties to whom the contract charges were paid.

From the above referred tax evasion petition, and report of the Income-tax Officer (Inv) OSD-1, Unit-3, New Delhi, the modus operandi of the assessee in the assessment year 2010-11 was same as was

in the assessment years 2007-08, 2008-09 and 2009-10. It appears that contractor's charges amounting to Rs. 3,07,95,559 claimed as expenses by the assessee in its profit and loss account pertaining to the financial year 2009-10 relevant to the assessment year 2010-11 has been used by the assessee for non-business purposes, thus concealing its true income.

In this case the Director General of Income-tax (Vigilance) vide their letter No. DIT(VIg)/NZ/2011-12 dated November 2, 2011 (placed as annexure C), after their detailed enquiry in a complaint case against the then Assessing Officer of Cir 8(1), New Delhi, has also suggested to look into the claim of the expenses, as they are in crores in one year itself, and will have a major impact on the revenue, taking into the number of years involved, as the assessee is doing the same business till date. Further in the letter of the office of Joint DIT (Vigilance), North Zone-II, New Delhi, has specifically given remark as under for the assessment year 2010-11 :

'Make a proposal to the concerned Commissioner of Income-tax to take up the case of M/s. Skyview Consultants Pvt. Ltd. for the assessment year 2010-11 under scrutiny and issue directions for proper examination of the change in business pattern and purchases made during the year. It may also be suggested that the reason for "nil" closing stock as on March 31, 2010 be also examined.'

In view of the additional information/documents received from the Investigation Wing and O/o DGIT (Vigilance), New Delhi, material/documents available on record I have reason to believe that contractor's charges shown in its profit and loss accounts are bogus and the assessee has willfully and knowingly concealed its particulars of income to avoid tax and that income of Rs. 3,07,95,559 chargeable to tax has escaped assessment for the assessment year 2010-11, within the meaning of section 147 of the Income-tax Act, 1961."

5 The petitioner-assessee objected to the reopening of its assessment for the assessment year 2010-11. It relied importantly upon the fact that its challenge to the opening of reassessment for the assessment year 2009-10 was sub judice and pending before this court in W. P. (C) No. 10507 of 2016 *Sky View Consultants P. Ltd.* v. *ITO* [2017] 397 ITR 673 (Delhi). It pointed out that on September 7, 2016, this court had decided the cases and had allowed the petition, ruling that information relating to one assessment year was not relevant for another assessment year. Besides quoting the decisions, it relied upon the assessee objecting to omission by

the Assessing Officer to refer to the previous orders for the assessment year 2007-08 which had gone into the same aspects to suspect expenditure. It was also stated that no changes were forthcoming and that revisiting sole issues did not constitute a valid ground for invoking the power of reassessment under section 147/148. In fact, the mechanical citing of same reasons vitiated and rendered invalid the impugned notice under section 147. The other grounds, such as failure to mention the fact that though there was mention of substantive addition of Rs. 1,60,94,586 for the assessment year 2008-09 that was subject matter of an appeal, that relevant facts were not intentionally considered. The assessee complained that reopening besides being the result of a mechanical exercise, appears to be on the basis of directions of higher authorities.

These objections were rejected, therefore, the assessee has approached **6** this court. Dr. Rakesh Gupta, the learned counsel submitted that it is settled law that the information which forms the basis for reassessment notice should have a live link or nexus to the assessment order in question. This resort to information in respect of another year was an entirely irrelevant factor. It was stressed that though section 147 states broadly that the power can be resorted to for any assessment, it is in the context of a particular assessment year that it is always sought recourse to. Citing *CIT* v. *Gupta Abhushan P. Ltd.* [2009] 312 ITR 166 (Delhi), it was submitted that not picking certain expenditures for one given year did not per se establish that such expenses were not spread over three previous years. It was emphasized that the expression "reasons to believe" have to explain only the concurred facts and do not amount to "reasons to suspect". Citing *ITO* v. *Lakhmani Mewal Das* [1976] 103 ITR 437 (SC), it was argued that the Assessing Officer should have specific information to show that particular transactions relied upon were not genuine. It was stated that merely because certain accounts of expenditure were disallowed to the extent of 5 per cent. in a given previous year per se did not constitute a valid reason for reopening of assessment. It cannot be a matter of surmise or guesswork, but has to based upon specific evidence. Reliance was placed on the assessment for the assessment year 2008-09 order made pursuant to remits after revision to say that the final order, endorsed by the Commissioner of Income-tax nowhere indicated that similar expenditure was not genuine. This constituted "material available", but was deliberately avoided by invoking power of reassessment under section 148.

In its counter-affidavit, and during oral arguments, the Revenue, **7** through its counsel, Zoheb Hossain argued that the present controversy arose because of a tax evasion petition by the Revenue contending that the

assessee was engaging in claiming bogus expenditure on account of sub-contractors in its books. It was also alleged that the amount so booked was later withdrawn in cash and used for payment of bribes. Significantly, a complaint was also received against the particular Assessing Officer who conducted the assessment proceedings for the assessment year 2007-08, wherein the bogus expenditure was allowed. It was emphasized that the application of mind by the Revenue was at two levels : (i) by the Investigation Unit on the contents of the tax evasion petition by issuing summons to the assessee and providing it an opportunity to establish the genuineness of the said expenditure ; and (ii) by the Assessing Officer in the present case who did not blindly follow the recommendation of the investigation unit but considered the facts of the relevant period. It is highlighted that in the reasons for reassessment, the Assessing Officer noted that the assessee was showing consultancy income of Rs. 3,31,14,209 from its single client, Pernod Ricard and had debited an amount of Rs. 3,07,95,559 as sub-contractor charges and returned an income of Rs. 3,10,336 only. The counsel distinguished the reasons which persuaded this court to quash reassessment proceedings for the assessment year 2009-10 urging that the reasons on which this court was constrained to pass the said order do not exist in the factual matrix for the relevant period. Learned counsel emphasized that in the present case the Assessing Officer did not blindly follow the investigation unit's recommendation or the assessment order for the assessment year 2008-09 but rather examined that material in the light of the facts of the relevant period that the assessee was showing consultancy income of Rs. 3,31,14,209 from its single client, Pernod Ricard and has debited an amount of Rs. 3,07,95,559 as sub-contractor charges and returned an income of Rs. 3,10,336 only. Therefore, the live nexus missing in the assessment year 2009-10 is present in the present case. The counsel pointed out, moreover, that the Assessing Officer who had passed the assessment order for the assessment year 2008-09 was the same person who recorded the reasons for reopening of the case for the assessment year 2010-11. After detailed enquiry and receipts of information called for under section 133(6), the assessment was concluded, on remand after revision, with a resultant addition of Rs. 1,60,94,586 on account of sub-contracting expenses. Therefore, on the date of recording the reasons the Assessing Officer had sufficient and tangible material on the file as the assessee-company was following the same pattern of business.

8 The Revenue submits that there is nothing on record which shows that summons were issued by the Income-tax Officer (Investigation) as claimed

by the assessee. The letter dated March 23, 2015, Income-tax Officer (Inv.), OSD-1, Unit-3, New Delhi mentioned that "after getting approval of the Addl. DIT(Inv.), Unit-3, summon under section 131(1A)" was issued on March 4, 2015. However, ipso facto this did not establish that such summons was issued. It is also urged that the Revenue has sufficient material to reassess the petitioner's affairs as regards the claim of bogus expenditure. Reliance is placed on the judgment of *Phool Chand Bajrang Lal* v. *ITO* [1993] 203 ITR 456 (SC).

9 The disputed reassessment notice, according to the petitioner-assessee is based upon stale material, which does not have a "live link" with the original assessment and at best only points to suspicion and conjectures with respect to bogus business expenditure, but does not point to tangible fresh material. The assessee relies on unsuccessful attempts by the Revenue, for past assessment years to reopen concluded scrutiny assessments, notably 2007-08 and 2008-09, on virtually the same grounds. It is also highlighted that these unsuccessful attempts, though a matter of record, and pointedly referred to in its objections, was studiously ignored when the reassessment notice was issued. Lastly, it was argued that even the revised assessment for previous years, on the same ground, resulted in insignificant additions, thus implying that the expenses were genuine.

10 The note recommending reassessment, in this case, through a letter dated March 23, 2015, inter alia, the Income-tax Officer (Inv.) to the Deputy Commissioner of Income-tax, stated as follows (after referring to the previous assessment, revision, addition and reduction of the amounts added by the Commissioner of Income-tax, and the reassessment for the assessment year 2009-10, and that the assessee was asked to explain its position on the expenditure for the assessment year 2010-11) :

> "The assessee forwarded his submission vide letter dated NIL on March 18, 2015 through a messenger Shri Pankaj Kumar which is placed on record. In this submission it is submitted that the assessee is working for a single client M/s. Pernod Ricard India P. Ltd. and the agreement with them was terminated with effect from March 31, 2010 and since then there is no operation in the company. The assessee has not given the details called at point Nos. 2 to 5 above. The assessee has simply stated that the company used to get some job work carried out by various contractors/sub-contractors and the entire payment has been made through account payee cheques.
>
> It is also submitted that in assessment year 2007-08 the Assessing Officer after recording the statements of 5 contractor parties made 5

per cent. disallowance and added an amount of Rs. 8,03,431. This case was reopened under section 263 of the Income-tax Act and the assessee has filed an appeal before the Income-tax Appellate Tribunal (ITAT) against the order of the Commissioner of Income-tax under section 263 which is pending disposal. A fresh assessment was made under section 143(3)/263 on March 28, 2013 in which disallowance was increased to 7 per cent. as against 5 per cent. by earlier order. The Commissioner of Income-tax (Appeals) vide order dated May 8, 2014 has reduced the disallowance to 5 per cent. of the reimbursement expenses. The assessee has also filed copy of the ITR and balance-sheets for the assessment years 2008-09 to 2014-15 based on which the following chart is prepared

Particulars/assessment year	*2007-08*	*2008-09*	*2009-10*	*2010-11*	*2011-12*
Total turnover	2,22,40,233	2,14,37,482	2,70,24,069	3,31,14,209	0
Contractor	2,00,99,268	1,89,34,807	2,41,79,349	3,07,95,559	20,50,130
Net income as per profit and loss account	6,90,424	10,78,485	13,44,742	3,10,336	(-) 20,11,551

From the above table it seems that from assessment year 2007-08 to 2010-11 the assessee had the same pattern of business.

Findings and recommendation

In order to verify the allegations of bogus expenses claimed under the head 'Contract charges' claimed in the profit and loss account, the assessee was asked to provide opportunity to explain the expenses and to provide the necessary details which were called for vide summons under section 131(1A) dated March 4, 2015, so that independent enquiries could by conducted from the third parties. The assessee has neither provided any justification with documentary evidence nor the details of the parties to whom the contract charges were paid. Mere claim that the payments were made to the contractors through account payee cheques does not prove the genuineness of the transaction and also the identity of the person to whom the payments have been made as claimed under the head contract charges.

In view of the above facts of the case, the assessee did not discharge its onus to prove the genuineness of the expenses claimed under the head contract charges, therefore, I am directed to forward the tax evasion petition to you with request to take necessary reme-

dial action under section 147 of the Income-tax Act for the assessment years 2008-09 to 2011-12.

This issues with the approval of the Principal Director of Income-tax (Inv)-I, New Delhi."

An interesting feature is that the assessee had appealed the Commissioner of Income-tax's decision, under section 263, for the assessment year 2007-08. The Income-tax Appellate Tribunal, in the appeal (I. T. A. No. 2158/Del/2012) held that the assessee did not conceal any particulars, and that :

"We find that the Assessing Officer has made assessment after issuing summons to five parties to whom reimbursements were made. During the assessment proceedings, the Assessing Officer recorded statements of the above persons, who also filed their computation of incomes and copies of income-tax returns and other relevant records to prove that they had genuinely received the payments. The above documents obtained by the Assessing Officer during original assessment proceedings are placed in PB 98 to 158 and further at PB 225 to 230. All these documents highlight the existence of agreement between these persons and the assessee. The documents further prove that the payments were made to these persons and taxes were duly deducted thereon. These documents further show that the contractors had declared the income received from the assessee in their returns of income. The statements recorded by the Assessing Officer of these persons clearly show that the Assessing Officer had examined them sufficiently to ascertain the authenticity and genuineness of the expenses. Therefore, it is not a case where there were no enquiries. It is not a case of lack of enquiry as the Assessing Officer had made sufficient enquiries. The various courts has distinguished the cases of inadequate enquiries and lack of enquiries."

In fact, the Commissioner of Income-tax (Appeals) who reduced and set aside the disallowance of 7 per cent. over the previous disallowance also observed as follows :

"It is observed that all the payments (both fixed as well as reimbursement) were subject to tax deducted at source and the contractors have already shown these payments as their receipts in their income-tax returns. Moreover, the Assessing Officer had already examined these persons under section 131 of the Act and they have admitted the services rendered by them to the appellant and the receipt of

payments in lieu of their services. Considering the nature of business and the evidence/witnesses produced by the appellant before the Assessing Officer, there remains no valid ground for making further disallowance of Rs. 3,21,371 out of total payments made under the head 'Contractors reimbursement expenses'. A reasonable view by disallowing such expenses at 5 per cent. taken by the Assessing Officer in the original assessment order and which was acceptable to the appellant due to his personal conditions, is justified and no further disallowance is called for. The disallowance of Rs. 3,21,371 made by the Assessing Officer is directed to be deleted."

11 In W. P. (C) No. 10507/2016 (*Sky View Consultants P. Ltd.* v. *ITO* [2017] 397 ITR 673 (Delhi), which was allowed by this court on September 7, 2017, it was held that (page 678 of 397 ITR) :

"In the present case, the fact that the assessment order passed after the reopening of the assessment for the assessment year 2008-09 may have found the entities to whom the petitioner issued cheques to be fictitious cannot be looked into for the simple reason that it was an order passed 21 days after the reasons in the present case were recorded for reopening of the assessment for the assessment year 2009-10. In any event, this will not answer one of the principal grounds urged by Dr. Gupta that the tangible material that is required to be shown for justifying the reopening of assessment has to be relevant to the assessment year in question, i.e., the assessment year 2009-10.

In *CIT* v. *Gupta Abhushan P. Ltd.* [2009] 312 ITR 166 (Delhi), it is emphasised that information relating to one assessment year will not automatically become relevant for reopening the assessment for another assessment year. If that would be the position, then the reopening would be only on the basis of suspicion and not 'belief'. This decision in fact reiterated what was earlier explained by the Bombay High Court in *Ramkrishna Ramnath* v. *ITO* [1970] 77 ITR 995 (Bom).

There is no answer by the Revenue to the petitioner's contention that the tax evasion petition pertained only to two financial years and therefore only corresponded to two assessment years, i.e., the assessment years 2007-08 and 2008-09. Further, it is not disputed that the original assessment order for the assessment year 2007-08 was passed by the Assessing Officer on December 11, 2009. It was reopened by the Commissioner of Income-tax (Appeals) by the order dated March

28, 2012 under section 263 of the Act. This resulted in a further assessment order dated March 28, 2013 by the Assessing Officer under section 143(3) read with section 263 of the Act. Only 7 per cent. of the 'contractor's expenses' was disallowed and added back. Therefore, even for the assessment year 2007-08, the tax evasion petition did not result in adding back the entire amount. The decision in *AGR Investment Ltd.* v. *Addl. CIT* [2011] 333 ITR 146 (Delhi) only lays down a general proposition regarding assessments being reopened on the basis of reports of investigation. It does not obviate the need to show that there is tangible material relevant to the assessment year in question that warrants reopening of the assessment for that particular assessment year.

More importantly, it is not understood how despite being aware of the above orders pertaining to the assessment year 2007-08, the Assessing Officer in his reasons for reopening the assessment for the assessment year 2009-10 did not refer to them while recording his reasons on March 10, 2016. Clearly this was an instance of non-application of mind by the Assessing Officer to the relevant material. Since the Assessing Officer failed to justify his reasons to believe that income has escaped assessment for the assessment year 2009-10 on the basis of the tax evasion petition pertaining to the assessment year 2007-08, it was all the more important for the Assessing Officer to refer to all the subsequent developments in relation to reopening of the assessment for the assessment year 2007-08.

As already pointed out hereinabove, the Revenue has no answer to the submission that the entire exercise undertaken by the Income-tax Officer (Inv.) was without jurisdiction. Which is why in the counter-affidavit filed in the present writ petition, the stand taken by the Revenue is that it is not the only reason for reopening the assessment. The fact remains that it could not form tangible material for reopening the assessment. The fact remains that the power under section 131(1A) can be exercised only by officers named therein and they are all officers in the Department superior to the Income-tax Officer. If the Income-tax Officer had to exercise the powers under that provision, he had to be duly authorised to do so. He clearly was not and, therefore, the reports submitted by him could not have formed the valid basis for reopening the assessment.

The third material referred to in the reasons for reopening the assessment, is the investigation undertaken by the DGIT (Vigilance)

into the conduct of the erstwhile Assessing Officer of the petitioner. A perusal of the letter dated November 2, 2011, written by the Director (Vigilance) to the DGIT (Vigilance) does not throw any light on any material relevant to the assessment year 2009-10. In fact, the concluding paragraph of the said letter a request is made for reopening of the assessment for the assessment year 2007-08 by invoking section 263 of the Act. This explains why that route was resorted to for the assessment year 2007-08.

This court is therefore satisfied that the jurisdictional requirement for reopening of the assessment for the assessment year 2009-10 has not been fulfilled in the present case. Consequently, the notice dated March 29, 2016, issued by the Assessing Officer under section 148 of the Act as well as the consequent order dated July 4, 2016, of the Assessing Officer rejecting the petitioner's objections, are hereby quashed."

12 The Revenue's explanation to distinguish the facts of the present case, from those in the assessment year 2009-10 which was dealt with in the earlier proceeding, in this court's opinion, is specious and unconvincing. The Assessing Officer has mechanically followed the investigation unit's recommendation for the assessment year 2008-09. The examination was of material in the light of the facts of the relevant period that the petitioner is showing consultancy income of Rs. 3,31,14,209, from its single client, Pernod Ricard and has debited an amount of Rs. 3,07,95,559 as sub-contractor charges and returned an income of Rs. 3,10,3361 only. However, though the letter from the investigation unit mentioned that the suspicion of bogus expenditure was later dealt with in revision and the addition was revised to only 5 per cent. disallowance, the notice recording reasons to justify the reopening of assessment for the assessment year 2010-11 willfully omits to note that fact. Furthermore, the order of the Income-tax Appellate Tribunal in the assessee's appeal, for the previous year, which had been reassessed, in fact found that the Assessing Officer had called the concerned sub-contractors, who had disclosed the amounts received from the present assessee, in their returns.

13 No doubt, each assessment year is to be seen differently ; however, the note from the investigation unit talks of a pattern of expenditure claims over a five-year period. Three of those years were dealt with ; the assessee emerged unscathed. Given these circumstances, this is clearly a case where the Revenue is attempting to fish from the same stale pond, when it dipped into the tax evasion petition as the basis for the investigation, to suddenly discern a pattern of suspect or bogus expenditure.

The decision in *Phool Chand Bajrang Lal* (supra) pertinently stated that (page 477 of 203 ITR) : **14**

> "From a combined review of the judgments of this court, it follows that an Income-tax Officer acquires jurisdiction to reopen an assessment under section 147(a) read with section 148 of the Income-tax Act, 1961, only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons, which he must record, to believe that, by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profits or gains chargeable to income-tax has escaped assessment. He may start reassessment proceedings either because some fresh facts had come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information."

In *Gupta Abhushan* (supra), in respect of a similar reassessment notice, which relied on a survey conducted after the concerned assessment period, the reopening of assessment under section 147/148 was quashed ; the court observed that (page 169 of 312 ITR) :

> "Here too, we note that the survey was conducted on March 7, 2002, which falls in the year subsequent to the three years in question in these appeals. The fact that the renovation expenses had not been booked in that year, i.e., financial year ending on March 31, 2002 does not by itself indicate that the renovation work had been carried on in the earlier three years and, if so, the expenses in respect of the same had not been booked. The conclusion of the Assessing Officer, based on what was noticed in the course of the survey, cannot be extrapolated to other years. The purported belief of the Assessing Officer, on this aspect of the matter, was not a belief at all but was merely a suspicion. Such suspicion cannot take the place of a belief and that too a belief which is based on reasons."

In this case, the trigger for all the reassessment attempts by the Revenue was the same tax evasion petition, which led to previous attempts to reopen completed assessments. The material on record show that the Assessing Officer had conducted inquiries at the time of completion of the original assessments. There is nothing to show that the entities to whom **15**

payments were made (by the assessee) were fictitious ; in fact TDS amounts were apparently deducted. There was no fresh evidence supporting the reassessment. Consequently, there was no tangible, specific material to justify the impugned reassessment notice.

16 For the above reasons, this petition has to succeed. The impugned reassessment notice dated March 30, 2016 and all further proceedings are hereby quashed. The petition is allowed in these terms ; without order on costs.

End of Volume 423

SCHEDULE

Sl. No.	*Name of the Real Estate Regulatory Authority*	*PAN*	*Assessment years*
(1)	*(2)*	*(3)*	*(4)*
1	Real Estate Regulatory Authority, Karnataka	AAAGR0572D	2019-2020, 2020-21, 2021-22, 2022-23 and 2023-24
2	Andhra Pradesh Real Estate Regulatory Authority	AAAGA0918E	2019-2020, 2020-21, 2021-22, 2022-23 and 2023-24

[Notification No. 36/2020, F. No. 300196/38/2017-ITA-I]

Income-tax (16th Amendment) Rules, 2020

Notification No. G. S. R. 429(E), dated 3rd July 2020[1].

In exercise of the powers conferred by sections 194A, 194J, 194K, 194LBA, 194N, 194-O, 197A and 200 read with section 295 of the Income-tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes, hereby, makes the following rules further to amend the Income-tax Rules, 1962, namely :

1. Short title and commencement.—(1) These rules may be called the **Income-tax (16th Amendment) Rules, 2020.**

(2) Save as otherwise provided in these rules, they shall come into force from the date of their publication in the Official Gazette.

2. In the Income-tax Rules, 1962 (hereinafter referred to as the principal rules), in rule 31A, in sub-rule (4),—

(a) in clause (viii), after the words "not deducted", the words "or deducted at lower rate" shall be inserted ;

(b) for clause (ix) the following shall be substituted from the 1st day of July, 2020, namely :—

"(ix) furnish particulars of amount paid or credited on which tax was not deducted or deducted at lower rate in view of the notification issued under second proviso to section 194N or in view of the exemption provided in third proviso to section 194N or in view of the notification issued under fourth proviso to section 194N" ;

(c) after clause (ix), the following clauses shall be inserted, namely :—

"(x) furnish particulars of amount paid or credited on which tax was not deducted or deducted at lower rate in view of the notification issued under sub-section (5) of section 194A.

1. Gaz. of India, Extry. No. 326, dt. 3-7-2020, Pt. II, sec. 3(i).

(xi) furnish particulars of amount paid or credited on which tax was not deducted under sub-section (2A) of section 194LBA.

(xii) furnish particulars of amount paid or credited on which tax was not deducted in view of clause (a) or clause (b) of sub-section (1D) of section 197A.

(xiii) furnish particulars of amount paid or credited on which tax was not deducted in view of the exemption provided to persons referred to in Board Circular No. 3 of 2002, dated 28th June, 2002[1] or Board Circular No. 11 of 2002, dated 22nd November, 2002[2] or Board Circular No. 18 of 2017 dated 29th May 2017[3]."

3. In the principal rules, in Appendix II,

(I) in form 26Q—

(a) for the brackets, words, figures and letters "[See sections 192A, 193, 194, 194A, 194B, 194BB, 194C, 194D, 194DA, 194EE, 194F, 194G, 194H, 194-I, 194J, 194LA, 194LBA, 194LBB, 194LBC, 194N and rule 31A]"

the following brackets, words, figures and letters

"[See sections 192A, 193, 194, 194A, 194B, 194BB, 194C, 194D, 194DA, 194EE, 194F, 194G, 194H, 194-I, 194J, 194K, 194LA, 194LBA, 194LBB, 194LBC, 194N, 194-O, 197A and rule 31A]" shall be substituted ;

(b) for the "Annexure", the following "Annexure" shall be substituted, namely :

1. See [2002] 256 ITR (St.) 22.
2. See [2002] 258 ITR (St.) 98.
3. See [2017] 394 ITR (St.) 14.

"[ANNEXURE : DEDUCTEE/PAYEE WISE BREAK UP OF TDS]

(Please use separate Annexure for each line-item in Table at Sl. No. 4 of main Form 26Q)

Details of amount paid/credited during the quarter ended . . . . . (dd/mm/yyyy) and of tax deducted at source

BSR Code of branch/receipt number of Form No. 24G	
Date on which challan deposited/transfer voucher date (dd/mm/yyyy)	
Challan Serial Number/DDO Serial No. of Form No. 24G	
Amount as per challan	
Total tax to be allocated among deductees/payees as in the vertical total of Col. 421	
Total interest to be allocated among the deductees/payees mentioned below	

Name of the deductor/payer	
TAN	

Sl. No.	*Deductee/payee reference number provided by the deductor/payer, if available*	*Deductee/payee code (01-Company 02-Other than company)*	*PAN of the deductee/payee*	*Name of the deductee/payee*	*Section code (See Note 12)*	*Date of payment or credit (dd/mm/yyyy)*	*Amount paid or credited*	*Amount of cash withdrawal in excess of Rs. 1 crore as referred to in section 194N (in cases not covered by the first proviso to section 194N)*	*Amount of cash withdrawal which is in excess of Rs. 20 lakhs but does not exceed Rs. 1 crore for cases covered by sub-clause (a) of clause (ii) of first proviso to section 194N*	*Amount of cash withdrawal which is in excess of Rs. 1 crore for cases covered by sub-clause (b) of clause (ii) of first proviso to section 194N*	*Total tax deducted*	*Total tax deposited*	*Date of deduction (dd/mm/yyyy)*	*Rate at which deducted*	*Reason for non-deduction/lower deduction/higher deduction/Threshold/transporter, etc. (See notes 1 to 11)*	*Number of the certificate under section 197 issued by the Assessing Officer for non-deduction/lower deduction*
[412]	[413]	[414]	[415]	[416]	[417]	[418]	[419]	[419A]	[419B]	[419C]	[420]	[421]	[422]	[423]	[424]	[425]
1																
2																
3																
Total																

Verification

I, ... , hereby certify that all the particulars furnished above are correct and complete.

Place : . . . .

Signature of the person responsible for deducting tax at source

Date : . . . .

Name and designation of the person responsible for deducting tax at source.

Notes :

1. Write "A" if "lower deduction" or "no deduction" is on account of a certificate under section 197.

2. Write "B" if no deduction is on account of declaration under section 197A other than the cases mentioned in sub-section (1F) of section 197A.

3. Write "C" if deduction is on higher rate on account of non-furnishing of PAN by the deductee/payee.

4. Write "D" if no deduction or lower deduction is on account of payment made to a person or class of person on account of notification issued under sub-section (5) of section 194A.

5. Write "E" if no deduction is on account of payment being made to a person referred to in Board Circular No. 3 of 2002, dated 28th June, 2002 or Board Circular No. 11 of 2002, dated 22nd November, 2002 or Board Circular No. 18 of 2017, dated 28th May, 2017.

6. Write "Y" if no deduction is on account of payment below threshold limit specified in the Income-tax Act, 1961.

7. Write "T" if no deduction is on account of deductee/payee being transporter. PAN of deductee/payee is mandatory [section 194C (6)].

8. Write "Z" if no deduction or lower deduction is on account of payment being notified under section 197A(1F).

9. Write "M" if no deduction or lower deduction is on account of notification issued under second proviso to section 194N.*

10. Write "N" if no deduction or lower deduction is on account of payment made to a person referred to in the third proviso to section 194N or on account of notification issued under the fourth proviso to section 194N.*

11. Write "O" if no deduction is as per the provisions of sub-section (2A) of section 194LBA.

12. List of section codes is as under :

Section	*Nature of payment*	*Section code*
192A	Payment of accumulated balance due to an employee	192A
193	Interest on securities	193
194	Dividend	194
194A	Interest other than interest on securities	94A

194B	Winnings from lotteries and crossword puzzles	94B
194BB	Winnings from horse race	4BB
194C	Payment of contractors and sub-contractors	94C
194D	Insurance Commission	94D
194DA	Payment in respect of life insurance policy	4DA
194EE	Payments in respect of deposits under National Savings Schemes	4EE
194F	Payments on account of repurchase of Units by Mutual Funds or UTIs	94F
194G	Commission, prize, etc., on sale of lottery tickets	94G
194H	Commission or brokerage	94H
194-I(a)	Rent	4-IA
194-I(b)	Rent	4-IB
194J(a)	Fees for Technical Services (not being professional services), royalty for sale, distribution or exhibition of cinematographic films and call centre (@ 2%)	94J-A
194J(b)	Fee for professional service or royalty, etc. (@ 10%)	94J-B
194K	Income in respects of units.	94K
194LA	Payment of compensation on acquisition of certain immovable property	4LA
194LBA(a)	Certain income in the form of interest from units of a business trust to a residential unit holder	4BA1
194LBA(b)	Certain income in the form of dividend from units of a business trust to a resident unit holder	4BA2
194LB	Income in respect of units of investment fund	LBB
194LBC	Income in respect of investment in securitization trust	LBC
194N	Payment of certain amounts in cash	94N
194N First proviso*	Payment of certain amounts in cash to non-filers	94N-F
#194-O	Payment of certain sums by e-commerce operator to e-commerce participant	94O"

(II) in form 27Q—

(a) for the brackets, words, figures and letters

"[See sections 194E, 194LB, [194LBA, 194LBB, 194LBC], 194LC, 195, 196A, 196B, 196C, 196D and rule 31A]"

the brackets, words, figures and letters

"[See sections 194E, 194LB, [194LBA, 194LBB, 194LBC], 194LC, 194N, 195, 196A, 196B, 196C, 196D, 197A and rule 31A]" shall be substituted ;

(b) for the "Annexure" the following "Annexure" shall be substituted, namely :—

"[ANNEXURE : DEDUCTEE WISE BREAK UP OF TDS]

(Please use separate Annexure for each line item in Table at Sl. No. 4 of main Form 27Q)

Details of amount paid/credited during the quarter ended (dd/mm/yyyy) and of tax deducted at source	
BSR Code of branch/receipt number of Form No. 24G	
Date on which challan deposited/transfer voucher date (dd/mm/yyyy)	
Challan Serial Number/DDO Serial No. of Form No. 24G	
Amount as per challan	
Total TDS to be allocated among deductees as in the vertical total of Col. 726	
Total interest to be allocated among the deductees mentioned below	

Name of the deductor/payer	
TAN	

Sl. No.	*Deductee reference number provided by the deductor, if available*	*Deductee code (01-Company 02-Other than company)*	*[Permanent Account Number or Aadhaar Number] of the deductee [see note 9]*	*Name of the deductee*	*Section code (See Note 8)*	*Date of payment or credit (dd/mm/yyyy)*	*Amount of cash withdrawal in excess of Rs. 1 crore as referred to in section 194N (in cases not covered by the first proviso to section 194N)**	*Amount of cash withdrawal which is in excess of Rs. 20 lakhs but does not exceed Rs. 1 crore for cases covered by sub-clause (a) of clause (ii) of first proviso to section 194N**	*Amount of cash withdrawal which is in excess of Rs. 1 crore for cases covered by sub-clause (b) of clause (ii) of first proviso to section 194N *	*Amount paid or credited*	*Tax*	*Surcharge*	*Education Cess*	*Total tax deducted [722+723+724]*	*Total tax deposited*
[714]	*[715]*	*[716]*	*[717]*	*[718]*	*[719]*	*[720]*	*[720A]*	*[720B]*	*[720C]*	*[721]*	*[722]*	*[723]*	*[724]*	*[725]*	*[726]*
1															
2															
3															
Total															

Date of deduction (dd/mm/yyyy)	*Rate at which deducted*	*Reason for nondeduction/ lower deduction/ grossing up/ Higher Deduction (See notes 1 to 3)*	*Number of the certificate issued by the Assessing Officer for non-deduction/ lower deduction*	*Whether the rate of TDS is as per IT Act (a) DTAA (b)*	*Nature of remittance*	*Unique acknowledgement of the corresponding Form No. 15CA, if available*	*Country to which remittance is made*	*E-mail ID of deductee*	*Contact number of deductee*	*Address of deductee in country of residence*	*Tax identification number/ Unique identification number of deductee*
[727]	*[728]*	*[729]*	*[730]*	*[731]*	*[732]*	*[733]*	*[734]*	*[735]*	*[736]*	*[737]*	*[738]*
1											
2											
3											
Total											

Verification

I, ... , hereby certify that all the particulars furnished above are correct and complete.

Place : . . . . . .

. . . . . .

Signature of the person responsible for deducting tax at source

Date : . . . . . .

. . . . . .

Name and designation of the person responsible for deducting tax at source

Notes:

1. Write "A" if "lower deduction" or "no deduction" is on account of a certificate under section 197.
2. Write "C" if grossing up has been done.
3. Write "D" if deduction is on higher rate on account of non-furnishing of [Permanent Account Number or Aadhaar Number] by the deductee.
4. Write "O" if no deduction is in view of sub-section (2A) of section 194LBA.

5. Write "M" if no deduction or lower deduction is on account of notification issued under second provision to section 194N.*

6. Write "N" if no deduction or lower deduction is on account of payment made to a person referred to in the third proviso to section 194N or on account of notification issued under the fourth proviso to section 194N.*

7. Write "G" if no deduction is in view of clause (a) or clause (b) of sub-section (1D) of section 197A.

8. List of section codes is as under :

Section	*Nature of payment*	*Section Code*
192A	Payment of accumulated balance due to an employee	192A
194E	Payments to non-resident sportsmen/sport associations	94E
194LB	Income by way of interest from infrastructure debt fund	4LB
194LBA(a)	Income referred to in section 10(23FC)(a) from units of a business trust	LBA1
194LBA(b)	Income referred to in section 10(23FC)(b) from units of a business trust	LBA2
194LBA(c)	Income referred to in section 10(23FCA) from units of a business trust	LBA3
194LBB	Income in respect of units of investment fund	LBB
194LBC	Income in respect of investment in securitisation trust	LBC]
194LC	Income by way of interest from Indian company	4LC
194LD	Income by way of interest on certain bonds and Government securities.	4LD
194N	Payment of certain amounts in cash	94N
194N First Proviso*	Payment of certain amount in cash to non-filers.	94N-F
195	Other sums payable to a non-resident	195
196A	Income in respect of units of non-residents	96A
196B	Payments in respect of units to an offshore Fund	96B
196C	Income from foreign currency bonds or shares of Indian company payable to non-resident	96C
196D	Income of foreign institutional investors from securities	96D

9. In case of deductees covered under rule 37BC, Permanent Account Number or Aadhaar Number NOT AVAILABLE should be mentioned."

*in relation to section 194N, the changes shall come into effect from 1st July, 2020.

#in relation to section 194-O, the changes shall come into effect from 1st October, 2020.

[Notification No. 43/2020/F. No. 370142/11/2020-TPL]

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