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Palam Gas Service *v.* CIT [2017] 394 ITR 300 (SC) **followed** in Shree Choudhary Transport Co. *v.* ITO [2020] 426 ITR 289 (SC)

Palam Gas Service *v.* CIT [2017] 394 ITR 300 (SC) **relied on** in Shree Choudhary Transport Co. *v.* ITO [2020] 426 ITR 289 (SC)

Piu Ghosh *v.* Deputy CIT [2016] 386 ITR 322 (Cal) **disapproved** in Shree Choudhary Transport Co. *v.* ITO [2020] 426 ITR 289 (SC)

Sabh Infrastructure Ltd. *v.* Asst. CIT [2017] 398 ITR 198 (Delhi) **distinguished** in J. M. D. Global Private Limited *v.* Principal CIT [2020] 426 ITR 394 (Delhi)

Self Employers Service Society *v.* CIT [2001] 247 ITR 18 (Ker) **disapproved** in Ananda Social and Educational Trust *v.* CIT [2020] 426 ITR 340 (SC)

United Electrical Co. P. Ltd. *v.* CIT [2002] 258 ITR 317 (Delhi) **relied on** in Principal CIT *v.* SKI Retail Capital Ltd. [2020] 426 ITR 414 (Mad)

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Obviously, this court cannot go into the sufficiency of reasons assigned by the assessing authority for directing such special audit. Only if there were no reasons assigned and objections of the petitioner-assessee were not considered, perhaps, the breach of the principles of natural justice, as required under section 142(2A) of the Act and proviso thereto could be so contended by the assessee, but from the record, it does not appear to be either absence of an opportunity of hearing altogether or the absence of any reasons at all. 7

Thus, this court cannot draw any inference of the breach of the principles of natural justice or arbitrariness in the impugned order passed by the respondent-authority. Accordingly, the requirement of section 142(2A) of the said Act cannot be said to have been not complied with by the respondent-authority. The same requires no interference under article 226 of the Constitution of India. Therefore, the writ petition is liable to be dismissed and is accordingly dismissed. No costs. 8

A copy of this order be sent to the respondents.

[2020] 426 ITR 289 (SC)

[IN THE SUPREME COURT OF INDIA]

SHREE CHOUDHARY TRANSPORT CO.

v.

INCOME-TAX OFFICER

A. M. KHANWILKAR and **DINESH MAHESHWARI** JJ.

July 29, 2020.

SS ▸ ITA 1961, ss 40(a)(ia), 194C
AY ▸ 2005-06
HF ▸ Department

BUSINESS EXPENDITURE—DISALLOWANCE—PAYMENTS LIABLE TO DEDUCTION OF TAX AT SOURCE—OBJECT TO ENSURE STRICT AND PUNCTUAL COMPLIANCE WITH REQUIREMENT OF DEDUCTING TAX AT SOURCE—"PAYABLE"—INCLUDES AMOUNTS ALREADY PAID—PAYMENTS TO CONTRACTORS AND SUB-CONTRACTORS—OBLIGATION TO DEDUCT TAX AT SOURCE ALREADY EXISTING IN SECTION 194C—PROVISO RELAXING PROVISION FOR BONA FIDE ASSESSEES—NO PREJUDICE TO ASSESSEE BY DISALLOWANCE—INCOME-TAX ACT, 1961, SS. 40(a)(ia), 194C.

INCOME-TAX—GENERAL PRINCIPLES—LAW TO BE APPLIED IS THAT IN FORCE IN ASSESSMENT YEAR IN QUESTION—SUB-CLAUSE (ia) OF SECTION 40(a) EFFECTIVE FROM 1-4-2005—EFFECT—APPLICABLE FOR AND FROM

ASSESSMENT YEAR 2005-06—DATE OF ASSENT OF PRESIDENT TO FINANCE (NO. 2) ACT, 2004 NOT DATE OF APPLICABILITY OF PROVISION—INCOME-TAX ACT, 1961, S. 40(a)(ia).

BUSINESS EXPENDITURE—DISALLOWANCE—PAYMENTS LIABLE TO DEDUCTION OF TAX AT SOURCE—CHANGE OF LAW—AMENDMENT BY FINANCE (NO. 2) ACT, 2014 LIMITING DISALLOWANCE UNDER SECTION 40(a)(ia) TO 30 PER CENT. OF SUM PAYABLE—CANNOT BE APPLIED TO ASSESSMENT YEAR 2005-06—INCOME-TAX ACT, 1961, S. 40(a)(ia).

BUSINESS EXPENDITURE—DISALLOWANCE—PAYMENTS LIABLE TO DEDUCTION OF TAX AT SOURCE—ASSESSEE ENTERING INTO CONTRACT WITH COMPANY FOR TRANSPORTING CEMENT TO VARIOUS PLACES IN INDIA—COMPANY EFFECTING PAYMENTS TO ASSESSEE TOWARDS TRANSPORTATION CHARGES AFTER DUE DEDUCTION OF TAX AT SOURCE—ASSESSEE ENGAGING SERVICES OF OTHER TRANSPORTERS FOR FULFILLING CONTRACT—NO PRIVITY OF CONTRACT BETWEEN TRANSPORTERS AND CONSIGNOR COMPANY—HIRING SERVICES OF TRANSPORTERS COULD HAVE ONLY BEEN UNDER CONTRACT WHETHER REDUCED TO WRITING OR NOT—TRANSPORTERS WERE "SUB-CONTRACTORS" FOR CARRYING OUT WHOLE OR PART OF WORK UNDERTAKEN BY CONTRACTOR (ASSESSEE)—SECTION 194C APPLICABLE AND ASSESSEE UNDER OBLIGATION TO DEDUCT TAX AT SOURCE ON PAYMENTS TO SUB-CONTRACTORS—ASSESSEE NOT MAKING DEDUCTION AND DEPOSITING IT SUBSEQUENTLY BUT CLAIMING IT HAD NO LIABILITY TO DEDUCT TAX AT SOURCE AT ALL—NOT BONA FIDE—DISALLOWANCE PROPER—INCOME-TAX ACT, 1961, SS. 40(a)(ia), 194C.

In the overall scheme of the provisions of the Income-tax Act, 1961, relating to collection and recovery of tax, it is evident that the object of the Legislature in introduction of provisions such as sub-clause (ia) of clause (a) of section 40 was to ensure strict and punctual compliance with the requirement of deducting tax at source. In other words, the consequences as provided therein have the underlying objective of ensuring compliance with the requirements of tax deduction at source. By the proviso added to section 40(a)(ia) of the Act, it was provided that where in respect of a payment on which tax is required to be deducted at source, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid in any subsequent year after the expiry of the time prescribed in section 200(1), such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

The term "payable" has been used in section 40(a)(ia) of the Act only to indicate the type or nature of the payments by the assessees to the payees

referred therein. It is descriptive of the payments which attract the liability for deducting tax at source and has not been used in the provision in question to specify any particular class of default on the basis of whether or not payment has been made. The semantical suggestion that this expression "payable" be read in contradistinction to the expression "paid", is not sustainable.

PALAM GAS SERVICE *v.* CIT [2017] 394 ITR 300 (SC) *relied on.*

Section 40(a)(ia) is not a stand-alone provision but provides one of those additional consequences as indicated in section 201 of the Act for default by a person in compliance with the requirements of the provisions contained in Part B of Chapter XVII of the Act. The scheme of these provisions makes it clear that default in compliance with the requirements of the provisions contained in Chapter XVII-B of the Act (that carries sections 194C, 200 and 201) leads, inter alia, to the consequence of section 40(a)(ia) of the Act. When the obligation of section 194C of the Act is the foundation of the consequence provided by section 40(a)(ia) of the Act, reference to the former is inevitable in interpretation of the latter. Reference to the definition of the term "paid" in section 43(2) of the Act is of no relevance. Similarly, the observations in the case of J. K. Synthetics [1994] 94 STC 422 (SC) *as regards the difference in connotation between the expressions "payable" and "paid" in the context of liability to pay interest on the tax payable under the Rajasthan Sales Tax Act, 1954, have no co-relation whatsoever. Section 40(a)(ia) of the Act is not limited to amounts "payable" and relates to amount already paid.*

PALAM GAS SERVICE *v.* CIT [2017] 394 ITR 300 (SC) *followed.*

P. M. S. DIESELS *v.* CIT [2015] 374 ITR 562 (P&H) *approved.*

The decision in Palam Gas Service *v.* CIT [2017] 394 ITR 300 (SC) *does not require any reconsideration.*

In income-tax matters, the law to be applied is that in force in the assessment year in question, unless stated otherwise by express intendment or by necessary implication. The Legislature consciously made sub-clause (ia) of section 40(a) of the Act effective from April 1, 2005, meaning thereby that it was to be applicable for and from the assessment year 2005-06. The observations of the Calcutta High Court in Piu Ghosh *v.* Deputy CIT [2016] 386 ITR 322 (Cal) *as regards the likely prejudice to an assessee in relation to the financial year 2004-05 do not relate to any legal grievance or legal prejudice. The requirement of deducting tax at source already existed in section 194C of the Act and it was the bounden duty of the assessee to make such deduction of tax at source and to make it over to the Government. Section 201, which made it clear that default in making deduction in accordance with the provisions of the Act would make the assessee "an assessee in default", was also in*

existence. Apart from this, by the amendment in question, clause (ia) was added to section 40(a) of the Act with a proviso to the effect that where, in respect of the sum referable to tax deduction at source requirement, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid in any subsequent year after expiry of the time prescribed in section 200(1), such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid. The proviso effectively took care of the case of any bona fide assessee who would earnestly comply with the requirement of deducting the tax at source. In fact, the relaxation by way of the proviso to section 40(a)(ia) of the Act was modulated by various subsequent amendments to further mitigate the hardships of bona fide assessees. The decision in Piu Ghosh *cannot be regarded as correct law.*

Observations in PIU GHOSH *v.* DEPUTY CIT [2016] 386 ITR 322 (Cal) *disapproved.*

The amendment made by the Finance (No. 2) Act, 2014, limiting the disallowance under section 40(a)(ia) to 30 per cent. of the sum payable cannot be stretched anterior to the date of its substitution so as to reach the assessment year 2005-06. The amendment by the Finance (No. 2) Act, 2014 was specifically made applicable with effect from April 1, 2015 and clearly represents the will of the Legislature as to what is to be deducted or what percentage of deduction is not to be allowed for a particular eventuality, from the assessment year 2015-16. The principles dealing with curative amendments, relating to the procedural aspects concerning deposit of tax deducted at source, cannot be applied to the amendment of the substantive provision by the Finance (No. 2) Act, 2014.

CIT *v.* CALCUTTA EXPORT CO. [2018] 404 ITR 654 (SC) *explained and distinguished.*

The assessee-firm entered into contract with a cement company for transporting cement to various places in India. As the assessee did not have transport vehicles of its own, it engaged the services of other transporters for the purpose. The cement company effected payments to the assessee towards transportation charges after due deduction of tax at source. In its return for the assessment year 2005-06, the assessee showed a total income at Rs. 2,89,633 in the financial year 2004-05 arising out of the business of transport contracts. The Assessing Officer observed from the record that while making payment to the truck operators or owners the assessee had not deducted tax at source even if the net payment exceeded Rs. 20,000. He issued notice calling for details of amounts paid to the truck operators and owners, the tax deducted at source thereupon, and the date of deposit with the Govern-

ment. In reply, the assessee contended, inter alia, that the trucks belonged to different operators or owners who were not sub-contractors or contractors, and that the assessee had not made payments exceeding Rs. 20,000 in a single transaction. The Assessing Officer took the view that the payments to different truck operators or owners were made directly by the assessee and not the consignor, that the assessee-firm was responsible for transportation of goods of the company and received payment from the company after tax was deducted at source therefrom, that the assessee paid freight charges to the truck operators or owners from the income so earned and showed the remaining amount as commission, that the truck operators or owners were not contractors but sub-contractors of the assessee, and that the assessee had not deducted tax at source in terms of section 194C of the Act while making payment to the transporters where the payment exceeded Rs. 20,000 on a single challan. Therefore, the Assessing Officer disallowed payments in a sum of Rs. 57,11,625 in terms of section 40(a)(ia) of the Act. The Commissioner (Appeals) dismissed the assessee's appeal and the Appellate Tribunal endorsed the findings of the Assessing Officer and the Commissioner (Appeals). On further appeal, the High Court summarily dismissed the assessee's appeal. On further appeal :

Held, *dismissing the appeal, (i) that the nature of the contract entered into by the assessee with the consignor company made it clear that it was the responsibility of the assessee to transport the goods (cement) of the company ; and how to accomplish this task of transportation was a matter exclusively within the domain of the assessee. There was no privity of contract between the transporters and the consignor company. Hiring the services of the transporters for this purpose could have only been under a contract between the assessee and the transporters. Whether such a contract was reduced into writing or not was not relevant. The transporters answered the description of "sub-contractor" for carrying out the whole or part of the work undertaken by the contractor (i. e., the assessee) for the purpose of section 194C(2) of the Act. If a particular truck was not engaged, there existed no contract but when any truck got engaged for the purpose of execution of the work undertaken by the assessee and freight charges were payable to its operator or owner upon execution of the work, i. e., transportation of the goods, all the essentials of a contract existed ; and the truck operator or owner became a sub-contractor for the purpose of the work in question. The assessee was not acting as a facilitator or intermediary between the consignor company and the truck operators or owners because those two parties had no privity of contract between them. The contract of the company for transportation of its goods was only with the*

assessee and it was the assessee who hired the services of the trucks. The payment made by the assessee to such transporter was clearly a payment made to a sub-contractor. Whether the assessee had specific and identified trucks on its rolls or had been picking them up on freelance basis, the legal effect was that once a particular truck was engaged by the assessee on hire for carrying out part of the work undertaken by it (i. e., transportation of the goods of the company), the operator or owner of that truck became the sub-contractor and all the requirements of section 194C came into operation. The Assessing Officer, the Commissioner (Appeals) and the Tribunal had concurrently decided this issue against the assessee with reference to the facts of the case and the findings had been endorsed by the High Court. There was no error or infirmity in these findings. Section 194C was applicable and the assessee was under obligation to deduct tax at source in relation to the payments made by it for hiring the vehicles for the purpose of its business of transportation of goods.

PALAM GAS SERVICE *v.* CIT [2017] 394 ITR 300 (SC) *relied on.*

(ii) That sub-clause (ia) of section 40(a) of the Act, having come into effect from April 1, 2005, would apply from and for the assessment year 2005-06 and would be applicable for the assessment in question. If the provision were held applicable only from the financial year 2005-06, the result would be that it would apply only from the assessment year 2006-07. Such a result was neither envisaged nor could be countenanced.

(iii) That the disallowance under section 40(a)(ia) of the Act was not limited to the amount outstanding and equally applies in relation to expenses that had already been incurred and paid by the assessee.

(iv) That the date of assent of the President to the Finance (No. 2) Act, 2004 was not the date of applicability of the provision in question, the specific date having been provided as April 1, 2005. The date related to the assessment year commencing from April 1, 2005, i. e., assessment year 2005-06. Even if it be assumed that the requirements of section 40(a)(ia) became known on September 10, 2004, the assessee could have taken all the requisite steps to make deductions or, in any case, to make payment of the tax deducted at source during the same financial year or even in the subsequent year, taking advantage of the relaxation available in the proviso to section 40(a)(ia) of the Act but the assessee simply avoided its obligation and attempted to suggest that it had no liability to deduct tax at source at all. This approach of the assessee was at conflict with law, and the consequence of disallowance under section 40(a)(ia) of the Act was inevitable.

(v) That the assessee was either labouring under the mistaken impression that it was not required to deduct tax at source or under the mistaken belief that by the methodology of splitting a single payment into parts below Rs. 20,000 it would escape the disallowance. In either event, the assessee had not been a bona fide assessee who had made the deduction and deposited it subsequently. Obviously, the assessee could not have derived the benefits that were otherwise available by the curative amendments of 2008 and 2010. Having defaulted at every stage, the attempt on the part of the assessee to seek some benefit in the amendment of section 40(a)(ia) of the Act by the Finance (No. 2) Act, 2014 was entirely baseless and preposterous.

(iv) That the assessee's contention that it would suffer prejudice because of disallowance was not tenable. In the first place, it was clear from the provisions dealing with disallowance of deductions in Part D of Chapter IV of the Act, particularly those contained in sections 40(a)(ia) and 40A(3) of the Act, that they were intended to enforce due compliance with the requirement of other provisions of the Act and to ensure proper collection of tax as also transparency in dealings. The necessity of disallowance comes into operation only when default of the nature specified in the provisions takes place. Secondly, by way of the proviso as originally inserted and its amendments in the years 2008 and 2010, requisite relief to a bona fide taxpayer who had collected tax at source but could not deposit it within time before submission of the return was also provided ; and the amendment of 2010 had retrospective operation. The assessee having failed to avail of the benefit of such relaxation too, could not now raise a grievance of hardship. Thirdly, the assessee had shown total payments in the truck freight account at Rs. 1,37,71,206 and total receipts from the company at Rs. 1,43,90,632. What had been disallowed was the sum of Rs. 57,11,625 on which the assessee had failed to deduct tax at source and not the entire amount received from the company or paid to the truck operators and owners. No case of prejudice or legal grievance was made out by the assessee. The payments in question had rightly been disallowed from deduction while computing the total income of the assessee.

Decision of the Rajasthan High Court (printed below) *affirmed.*

Cases referred to :

CIT *v.* Calcutta Export Co. [2018] 404 ITR 654 (SC) (para 10)

CIT *v.* Crescent Export Syndicate [2013] 1 ITR-OL 1 (Cal) (para 16)

CIT *v.* Hardarshan Singh [2013] 350 ITR 427 (Delhi) (para 10)

CIT *v.* Hindustan Electro Graphites Ltd. [2000] 243 ITR 48 (SC) (para 17)

CIT *v.* Isthmian Steamship Lines [1951] 20 ITR 572 (SC) (para 17)

Institute of Chartered Accountants of India *v.* Price Waterhouse [1997] 90 Comp Cas 113 (SC) (para 10)

J. K. Synthetics Limited *v.* Commercial Taxes Officer [1994] 94 STC 422 (SC) (para 10)

Karimtharuvi Tea Estate Ltd. *v.* State of Kerala [1966] 60 ITR 262 (SC) (para 17)

P. M. S. Diesels *v.* CIT [2015] 374 ITR 562 (P&H) (para 16)

Palam Gas Service *v.* CIT [2017] 394 ITR 300 (SC) (paras 10, 12)

Piu Ghosh *v.* Deputy CIT [2016] 386 ITR 322 (Cal) (para 10)

Tube Investments of India Ltd. *v.* Asst. CIT (TDS) [2010] 325 ITR 610 (Mad) (para 16)

Civil Appeal No. 7865 of 2009.

Appeal from the judgment and order dated May 15, 2009 of the Rajasthan High Court in D. B. I. T. A. No. 164 of 2008. The judgment of the High Court (coram : N. P. GUPTA and GOVIND MATHUR JJ.) ran as follows :

"JUDGMENT

Heard learned counsel for the appellant and perused the impugned order.

In our view, on the language of section 194C(2), and the fact that the goods received were sent through truck owners by the appellant, and there was no privity of direct contract between the truck owners and the cement factory. According to the contract between the appellant and the cement factory, it was the appellant's responsibility to transport the cement, and for that the appellant hired the services of the truck owners, obviously as sub-contractors. In that view of the matter, we do not find any error in the impugned order of the Tribunal. The appeal is, therefore, dismissed summarily."

Puneet Jain, *H. D. Thanvi*, *Rishi Matoliya*, *Ms. Christi Jain*, *Shashank Shekhar*, *Ms. Sheetal Rajput* and *Sarad Kumar Singhania*, Advocates, for the appellant.

Vikramjit Banerjee, Additional Solicitor General, and *V. Shekhar*, Senior Advocate, *(Ms. Praveena Gautam*, *Ms. Purnima Bhat Kak*, *Ms. Siddhartha Sinha*, *Abhishek Mahajan*, *Mrs. Anil Katiyar* and *B. V. Balaram Das*, Advocates, with them) for the respondent.

JUDGMENT

The judgment of the court was delivered by

DINESH MAHESHWARI J.—*Preliminary*

By way of this appeal, the assessee-appellant has called in question the order dated May 15, 2009 passed in Income-tax Appeal No. 164 of 2008 whereby, the High Court of Judicature for Rajasthan at Jodhpur has summarily dismissed the appeal against the order dated August 29, 2008 passed in I. T. A. No. 117/JU/2008 by the Income-tax Appellate Tribunal, Jodhpur Bench at Jodhpur ; and thereby, the High Court has upheld the computation of total income of the assessee-appellant for the assessment year 2005-06 with disallowance of payments to the tune of Rs. 57,11,625, essentially in terms of section 40(a)(ia) of the Income-tax Act, 1961[1], for failure of the assessee-appellant to deduct the requisite tax at source[2]. 1

We may take note of the relevant factual and background aspects of the case while keeping in view the root point calling for determination in this appeal, that is, as to whether the payments in question have rightly been disallowed from deduction in computation of total income of the appellant ? 2

Relevant factual and background aspects ; the impugned order of assessment

In a brief outline of the relevant factual aspects, it could be noticed that the assessee-appellant, a partnership firm, had entered into contract with M/s. Aditya Cement Limited, Shambupura, District Chittorgarh[3] for transporting cement to various places in India. As the appellant was not having the transport vehicles of its own, it had engaged the services of other transporters for the purpose. The cement marketing division of M/s. Aditya Cement Limited, namely, M/s. Grasim Industries Limited, effected payments towards transportation charges to the appellant after due deduction of TDS, as shown in Form No. 16A issued by the company. 3

On October 28, 2005, the assessee-appellant filed its return for the assessment year 2005-06, showing total income at Rs. 2,89,633 in the financial year 2004-05 arising out of the business of "transport contract". 4

In the course of assessment proceedings, the Assessing Officer[4] examined the dispatch register maintained by the appellant for the period April 1, 2004 to March 31, 2005, containing all particulars as regards the trucks 5

1. Hereinafter referred to as "the Act of 1961" or simply "the Act".
2. "Tax deducted at source" being referred as "TDS".
3. Hereinafter also referred to as "the consignor company" or "the company".
4. "AO" for short.

hired, date of hire, bilty and challan numbers, freight and commission charges, net amount payable, the dates on which the payments were made, and the destination of each truck, etc. The contents of the register also indicated that each truck was sent only to one destination under one challan/bilty ; and if one truck was hired again, it was sent to the same or other destination/trip as per separate challan/bilty. The commission charged by the appellant from the truck operators/owners ranged from Rs. 100 to Rs. 250 per trip.

5.1 On verifying the contents of record placed before him, the Assessing Officer observed that while making payment to the truck operators/owners, the appellant had not deducted tax at source even if the net payment exceeded Rs. 20,000. Following this, a notice dated November 5, 2007 was issued to the appellant, requiring the details of amount paid to the truck operators/owners, tax deducted at source thereupon, and date of depositing the same in the Government account. In reply, by its letters dated November 12, 2007 and November 15, 2007, the appellant contended, inter alia, that the trucks hired were belonging to different operators/owners who were not the sub-contractors or contractors ; that they came from different parts of India and mostly required cash payment for diesel and other running expenses ; that the appellant had no liability to deduct tax at source because it had not made payments exceeding Rs. 20,000 in a single transaction ; and that the provisions of section 40(a)(ia) were not applicable to the appellant.

5.2 While drawing up the assessment order dated November 22, 2007, the Assessing Officer observed that the payments to different truck operators/owners were made directly by the appellant-firm and not the consignor company ; that the appellant-firm was responsible for transportation of goods of the company as per the contract for which, the appellant received payment from the company after tax being deducted at source therefrom. The Assessing Officer also observed that the appellant-firm paid freight charges to the truck operators/owners from the income so earned ; and the remaining amount was shown as commission. Looking to the nature of dealings of the parties, the Assessing Officer observed that there existed a contract between the appellant and the truck operators/owners in respect of each challan/bilty for transportation. The Assessing Officer also referred to the circular bearing No. 715, dated August 8, 1995[1] issued by the Central Board of Direct Taxes[2], to observe that each goods receipt could be considered a separate contract. While

1. [1995] 215 ITR (St.) 12.
2. "CBDT" for short.

further observing that a contract may be written or oral, the Assessing Officer held that when the truck operators/owners in the case at hand were not to be considered as contractors, they were undoubtedly the sub-contractors of the appellant. The Assessing Officer also pointed out that despite sufficient opportunity being given, a copy of the agreement of the appellant-firm with the company for providing transportation services was not furnished.

5.3 Having perused the material placed before him, the Assessing Officer held on the appellant's responsibility for deducting tax at source while making payment to the truck operators/owners where such payment exceeded Rs. 20,000 on a single bilty/challan or goods receipt in the following words :

> "The dispatch register of the assessee-firm as well as the cash book clearly establish beyond doubt that payment to the truck operators was made by the assessee-firm. In other words, the assessee- firm was the person responsible for deducting the tax at source therefrom within the meaning of section 194C of the Act. Since the goods were transported by trucks and every truck transported goods under a separate bilty and challan to a particular destination, there was a contract or sub-contract between the assessee-firm and the truck operator as per the provisions of section 194C of the Act and the Board's circular supra, and the assessee should have deducted tax at source while making payment to the truck operators as per the provisions of section 194C(3) of the Act where the amount of any sum credited or paid or likely to be credited or paid to the account of, or to the contractor or sub-contractor exceeded twenty thousand rupees . . .
>
> From the facts and circumstances of the case discussed above the final position emerging is that in view of the provisions of section 194C of the Act the assessee was liable to deduct tax at source while making payment to truck owners/operators where such payment exceeded Rs. 20,000 on the basis of single bilty/challan or GR."

5.4 After examining the details contained in the dispatch register, cash book and payment vouchers, the Assessing Officer found that tax was not deducted at source by the appellant while making payment to the truck operator/owner, even though the payment under a single goods receipt (challan/bilty) exceeded the sum of Rs. 20,000. Thereupon, the assessee-appellant was called upon to explain as to why deduction claimed on account of such payment from the income be not disallowed in terms of section 40(a)(ia) of the Act. In the order of assessment, the Assessing

Officer took note of and dealt with various submissions made on behalf of the assessee-appellant in this regard as follows :

"Since the assessee failed to deduct the tax at source while making payment to truck owners/operators exceeding Rs. 20,000, the assessee was asked to explain as to why deduction claimed on account of such payments from the income be not disallowed within the meaning of section 40(a)(ia) of the Act. The learned counsel of the assessee-firm stated that there was no payment exceeding Rs. 20,000. In this regard he furnished photocopy of extract of cash book and also payment vouchers which indicate that each payment exceeding Rs. 20,000 was shown in the cash book in two parts though paid on the same date and the assessee made two separate vouchers for such payment just to give an impression that payment to truck owners/operators was not exceeding Rs. 20,000. *In this regard it is pertinent to mention that merely by showing payment of one challan/bilty in two pieces the assessee cannot absolve itself of the provisions of the section 40(a)(ia)* inasmuch as section 194C(3)(i) clearly speaks of—'the amount of any sum credited or paid or likely to be credited or paid to the account of, or to, the contractor or sub-contractor, if such sum does not exceed twenty thousand rupees'. The learned counsel further submitted that the receipts of the assessee-firm are full vouched and verifiable and subject to TDS and the payments to truck owners/operators are made by the assessee-firm from such receipts and as such there was no need for further TDS. He further stated that the assessee-firm prepares bills for claiming payments from the company on the basis of freight charges payable to various truck owners/operators and when the payment is received on the basis of such bills, further payment is made to the truck owners/operators and nominal commission is retained by the assessee and, therefore, the payment made to the truck owners/operators was out of the purview of section 194C of the Act. He further stated that it is not practical to deduct tax at source while making payment to a truck owner/operator because no truck owner accepts payment after TDS. This argument put forth on behalf of the assessee-firm is not acceptable inasmuch as section 194C(1) clearly says that—'Any person responsible for paying any sum to any resident . . .' *Since the assessee-firm was responsible for making payment to the truck owners/operators, it was mandatory on the part of the assessee to deduct tax at source while making such payment. Further there is no direct nexus between the company and the truck owners/operators and thus it cannot be said that the assessee-firm was*

a mediator between the company and the truck owners/operators . . . " (emphasis[1] supplied)

5.5 In view of the above, the Assessing Officer proceeded to disallow the deduction of payments made to the truck operators/owners exceeding Rs. 20,000 without TDS, which in total amounted to Rs. 57,11,625 ; and added the same back to the total income of the assessee-appellant. The Assessing Officer also disallowed a lump sum of Rs. 20,000 from various expenses debited to the profit and loss account and finalised the assessment, accordingly, as under :

"Therefore, considering the provisions of section 194C, section 40(a)(ia) and Board's Circular No. 715, dated August 8, 1995, the payment made to the truck owners/operators, exceeding to Rs. 20,000 without deducting tax at source is disallowed and added back to the total income of the assessee-firm which works out to Rs. 57,11,625, supra. The assessee has shown total payments in truck freight account at Rs. 1,37,71,206 and total receipts from the company at Rs. 1,43,90,632.

The assessee has shown commission income of Rs. 6,23,300 on which net profit of Rs. 2,89,694 has been shown giving N.P. rate of 46.47 per cent. as against N.P. rate of 50.91 per cent. declared in the immediate preceding year on commission income of Rs. 6,00,450. The N.P. rate declared this year is on the lower side. Considering the nature of various expenses debited to the profit and loss account like staff welfare expenses, telephone expenses, travelling expenses, motor cycle repairs etc., where involvement of personal element cannot be ruled out, a lump sum disallowance of Rs. 20,000 is made to the declared income."

Before the Commissioner of Income-tax (Appeals), Jodhpur

Aggrieved by the order so passed by the Assessing Officer, the assessee-appellant preferred an appeal before the Commissioner of Income-tax (Appeals)[2], being Appeal No. 183 of 2007-08, that was considered and dismissed on January 15, 2008. 6

6.1 The Commissioner of Income-tax (Appeals) re-examined the record and rejected the contentions of the appellant that it had only received commission income and was not liable to deduct tax at source on payments made to the truck owners while observing as under :

1. Here printed in italics.
2. "CIT(A)" for short.

"On a careful consideration of the material facts, it is observed that the appellant entered into a contract for transportation of goods (cement) with M/s. Aditiya Cement Limited in order to honour the contract, the appellant hired various trucks all through out the year for the purpose of transportation of cement. The appellant received freight charges from M/s. Aditiya Cement Limited on which tax was deducted. The appellant paid freight charges to individual truck owners, after transportation of goods. *There was no nexus between the truck owners/operators and M/s. Aditiya Cement Limited. How the appellant transported the goods (cement) was the exclusive domain of the appellant-firm. Under such circumstances, the gross freight received by the appellant from M/s. Aditiya Cement Limited represents gross income of the appellant-firm. Since the appellant made payments to various truck owners/operators, such payments represent expenditure.* It may be mentioned here that the payments to the truck owners/operators were made only after the goods were transported by them satisfactorily at the given destinations. In other words, there existed a contract or a sub-contract between the appellant-firm and the transporters. Under such circumstances, the appellant was required to deduct tax at source on the payments made to truck drivers/owners within the meaning of provisions of section 40(a)(ia) read with section 194C of the Act. Under no circumstances, it can be said that the appellant only received commission income and therefore the provisions of section 194C are not applicable." (emphasis[1] supplied)

6.2 In regard to the contention that the appellant was not required to deduct tax at source when no payment exceeded Rs. 20,000, the Commissioner of Income-tax (Appeals) found that the appellant had, for its convenience and to avoid the rigour of section 40A(3) of the Act, chose to split the payments into two parts but the entries of such split payments were available consecutively in the cash book. Thus, while not accepting such methodology, the Commissioner of Income-tax (Appeals) observed that even in the split payments, it was required of the appellant to deduct tax at the time of making final payment. The relevant observation of the Commissioner of Income-tax (Appeals) read as under :

"The facts have been gone through and it is observed that the appellant made payments in a manner according to which individual payment to the truck owner(s) did not exceed Rs. 20,000. In other words, the payment was splitted into two parts. However, the total

1. Here printed in italics.

amount paid to the truck owner(s) for individual contract exceeded Rs. 20,000. For instance, cashbook dated January 31, 2005 of the appellant shows payments of Rs. 14,750 and Rs. 10,510 to Truck No. RJ14-G-5599 for transport of cement from the premises of the cement company to Bhatinda. The same cashbook page also shows payments of Rs. 14,750 and Rs. 9,431 to Truck No. RJ23-G-3041 for transport of cement. It is the argument that since the individual payment did not exceed Rs. 20,000, the provisions of section 194C are not applicable. On a careful consideration of the material facts, *it is observed that both the entries are consecutive in the cashbook and, therefore, it is observed that the appellant, for its convenience and to avoid rigours of the provisions of section 40A(3), splitted the payments into two parts*. Had the payments been really made in two parts, both the entries should not have been consecutive. It is also not understood as to why the truck owners after completing the contract, would accept the amount in two parts and why they would come to the office of the appellant twice for seeking payments. *The theory of making payments in two parts is merely a story, which is capable neither on facts nor on practicability*. It is also surprising to note that in none of the case the appellant made fully payment to any truck owner all through out the year exceeding Rs. 20,000." (emphasis[1] supplied)

6.3 The Commissioner of Income-tax (Appeals) also examined in detail the question as to whether transport contracts were subject to deduction of tax at source and, with reference to clause (c) of *Explanation (iii)* of section 194C of the Act as also to the Central Board of Direct Taxes Circular No. 558, dated March 28, 1990[2] and Circular No. 681, dated March 8, 1994[3], held that the provisions of section 194C of the Act were applicable to the contracts for transportation of goods ; and the appellant was required to deduct tax at source if the gross credited or paid or likely to be credited or paid exceeded the limit of Rs. 20,000. Having found that the appellant's case was squarely covered within the provisions of section 194C of the Act, the Commissioner of Income-tax (Appeals) held that in view of the mandatory provisions of section 40(a)(ia) of the Act, the payments in question cannot be allowed as deduction while computing total income. Thus, the Commissioner of Income-tax (Appeals) proceeded to dismiss the appeal while holding, inter alia, as under :

1. Here printed in italics.
2. [1990] 183 ITR (St.) 158.
3. [1994] 206 ITR (St.) 299.

"It is, therefore, clear that the appellant's case was squarely covered within the provisions of the section 194C and, therefore, it was required to deduct tax at source while making payments to the truck owners.

Provisions of section 40(a)(ia) clearly provide that if any amount payable to a contractor or sub-contractor for carrying out any work on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200, such sum shall not be allowed as a deduction while computing the total income. As can be seen, the provisions are mandatorily to be complied with and in the case of default the question of existence of any reasonable cause has got no meaning.

In the light of the entire discussion as above, I hold that the appellant was required by the provisions of the Act to deduct tax on freight payments totalling to Rs. 57,11,625. Since the appellant failed to deduct tax at source the sum of Rs. 57,11,625 was rightly disallowed by the learned Assessing Officer. The learned Assessing Officer rightly invoked the provisions of section 40(a)(ia) of the Act. Therefore, on the given facts as also in law, the ground of appeal fails."

Before the Income-tax Appellate Tribunal, Jodhpur Bench

7 Aggrieved again, the appellant approached the Income-tax Appellate Tribunal, Jodhpur Bench[1] in further appeal, being I. T. A. No. 117/JU/2008. This appeal was considered and dismissed by the Income-tax Appellate Tribunal by way of its order dated August 29, 2008.

7.1 The Income-tax Appellate Tribunal pointed out that by an application dated July 16, 2008, the appellant sought permission to produce additional evidence, i.e., the agreement dated April 1, 2003 executed between itself and M/s. Grasim Industries Limited, and as the Department had no-objection, the same was admitted as additional evidence by the order dated July 17, 2008 but, another application for admission of evidence in the shape of affidavit of partner of the appellant-firm, was objected to by the Department and was rejected.

7.2 The Income-tax Appellate Tribunal found that the agreement in question was on principal to principal basis whereby, the appellant was awarded the work of transporting cement from Shambupura but, as the appellant did not own any trucks, it had engaged the services of other truck

1. "ITAT" for short.

operators/owners for transporting the cement ; and such a transaction was a separate contract between the appellant and the truck operator/owner. The Income-tax Appellate Tribunal, therefore, endorsed the findings of Assessing Officer and the Commissioner of Income-tax (Appeals) in the following words :

"13. The perusal of agreement on record reveals that the assessee was awarded a works contract by M/s. Grasim Industries Limited, a cement marketing division of M/s. Aditya Cement Ltd. This agreement was on principal to principal basis whereby the appellant was awarded the cement transportation work and in terms of agreement the scope of work was to include placement of trucks for cement transportation from their plant at Shambupura on regular basis in the State of Rajasthan. In case the assessee failed to provide trucks as per contractual obligation, the company was free to hire trucks from market at prevailing prices and the amount of expenses incurred if any was to be debited to the assessee's account terming him to be a transporter. The assessee merely acted as an independent contractor while carrying on the aforesaid works contract awarded to it by M/s. Grasim Industries Limited. Admittedly, the appellant did not own trucks of its own for carrying out such transportation contract and has engaged the services of other truck owners/operators for lifting goods from the premises of M/s. Grasim Industries Limited and transporting the same to various sites in Rajasthan. Goods receipt [GR]/bilty were prepared and the same was to be taken as a contract between the appellant and such truck owners/operators. A clarification to this effect given vide the Board Circular No. 715, dated August 8, 1995 has been brought on record by the Revenue and strongly relied upon by the assessing authority as well so as to consider the goods carried under particular goods/receipt/bilty as a separate contract. The assignment of such contract by the appellant to the truck operators/owners was rightly taken as a sub-contract for carrying out the job awarded to the assessee by M/s. Grasim Industries Limited. The provisions of section 194C were duly attracted to such payments which have been made/credited or was likely to be paid on account of obligation under each goods receipt/bilty. The assessing authority has found that the payments made and credited with respect to each of such contracts involving aggregate payment of Rs. 20,000 on a particular day amounted to Rs. 57,11,625. In the light of clear provisions contained in section 194C of the Act and having regard to the fact that both the amounts actually paid or credited or likely to be paid on account of

each contract exceeded Rs. 20,000 on a single day. Section 194C has rightly found applicable. We, therefore, do not find any wrong committed by the learned Commissioner of Income-tax (Appeals) in holding that the assessee has committed default in making deduction with respect to payments aggregating to Rs. 57,11,625 without deduction of tax at source."

7.3 The Income-tax Appellate Tribunal also negated the argument that by the time of issuance of Circular No. 5, dated July 15, 2005[1], the time for payment of tax at source had expired and that section 40(a)(ia) would only be applicable from the assessment year 2006-07 and not from the assessment year 2005-06. The Income-tax Appellate Tribunal also referred to the proviso to section 40(a)(ia) of the Act and pointed out that thereunder, the assessee was eligible to get deduction of such expenditure in a subsequent year in which TDS was actually paid to the Government. The Income-tax Appellate Tribunal observed in regard to these two aspects concerning applicability of the provisions in question as also the effect of the proviso thereto, in the following passage :

"15. The assessee's counsel also raised a plea that Circular No. 5 was issued only on July 15, 2005 by which date the time for payment of tax deducted at source has also expired and as such it was contended that the provisions as contained in section 40(a)(ia) of the Act would be applicable not from the assessment year 2005-06 but from 2006-07. We, however, do not subscribe to the view so canvassed by the assessee. The Finance (No. 2) Act, 2004 has brought an amendment in section 40 of the Act making it applicable with effect from April 1, 2004 (sic)[2]. *Since this amendment came before close of the financial year ended on March 31, 2005 in the statute books, the assessee cannot be held to be ignorant of its liability to deduct tax at source.* The subsequent board circular issued is merely clarificatory. The amendment in section 40 of the Act does not take away the right of the assessee to claim deduction for such expenses for all times to come. It only mandates that the deduction shall not be allowed in the relevant year in which there was liability to deduct and pay tax at source but the same has not been paid before the expiry of the time prescribed under sub-section (1) of section 200 of the Act. *It also had*

1. [2005] 276 ITR (St.) 151.
2. The extraction is from the typed copy of the order of the Income-tax Appellate Tribunal, placed on record as annexure P-5 (at page 84 of the paper book) but there is obvious typographical error on this date "1-4-2004" because the amendment of section 40 of the Act of 1961 by the Finance (No. 2) Act, 2004 was made applicable with effect from "1-4-2005". The effect and implication of the relevant date is examined in question No. 3 infra.

proviso clause whereby the assessee was eligible to get deduction of such expenditure in a subsequent year in which such tax deducted at source has actually been paid. The plea raised by the assessee, therefore, does not support the claim." (emphasis[1] supplied)

7.4 The Income-tax Appellate Tribunal further rejected the contention that the amount of expenditure was not charged to the profit and loss account and only commission was shown as income. The Income-tax Appellate Tribunal observed that mere reflection in two different account books would not qualify for distinct and different treatment since both freight paid and freight charged partake the same character. The Income-tax Appellate Tribunal, accordingly, dismissed the appeal.

Before the High Court

Aggrieved yet again, the appellant approached the High Court in D. B. Income-tax Appeal No. 164 of 2008 against the order passed by the Income-tax Appellate Tribunal. However, the appeal so filed was dismissed summarily by the High Court, by its short order dated May 15, 2009 that reads as under : **8**

"In our view, on the language of section 194C(2), and the fact that the goods received were sent through truck owners by the appellant, and there was no privity of direct contract between the truck owners and the cement factory. According to the contract between the appellant and the cement factory, it was the appellant's responsibility to transport the cement, and for that the appellant hired the services of the truck owners, obviously as sub-contractors. In that view of the matter, we do not find any error in the impugned order of the Tribunal. The appeal is, therefore, dismissed summarily."

Thus, the net result of the proceedings aforesaid had been that the consistent views of the Assessing Officer, the Commissioner of Income-tax (Appeals) and the Income-tax Appellate Tribunal, that deduction, of the payments made to the truck operators/owners, cannot be allowed while computing the total income of the assessee-appellant, came to be affirmed by the High Court. **9**

Rival submissions

Appellant

Assailing the order so passed by the High Court in summary dismissal of the appeal as also the views expressed in the assessment and appellate orders, the learned counsel for the assessee-appellant has urged before us multiple contentions on the scope and applicability of section 194C of the **10**

1. Here printed in italics.

Act as also section 40(a)(ia) thereof and has argued that these provisions could not have been applied to the case at hand.

10.1 Learned counsel for the appellant has strenuously argued that the provisions of section 194C of the Act of 1961, particularly sub-section (2) thereof, were not applicable to the present case for there was no oral or written contract of the appellant with the truck operators/owners, whose vehicles were engaged to execute the work of transportation of the goods. It has been contended that the liability under section 194C(2) would have arisen only if payments were made to "sub-contractor" and that too "in pursuance of a contract" for the purpose of "carrying whole or any part of work undertaken by the contractor". The learned counsel for the appellant would argue that when there had not been any specific contract between the appellant and the truck owners, whose vehicles were hired by the appellant on freelance and need basis, the ingredients of section 194C(2) were not satisfied and the obligation of deducting tax at source could not have been fastened on the appellant.

10.1.1 The learned counsel has supported his contentions against the applicability of section 194C of the Act to the present case with reference to the decision of the Delhi High Court in the case of *CIT* v. *Hardarshan Singh* [2013] 350 ITR 427 (Delhi) wherein it was held that when the assessee merely acted as facilitator or intermediary in the process of transportation of goods, he had no liability to deduct TDS under section 194C of the Act.

10.2 The main plank of the submissions of learned counsel for the appellant has been that disallowance under section 40(a)(ia) of the Act is confined to the expenses that are booked during the year but remain payable or outstanding and not the expenses that had already been paid. The learned counsel has referred to the decision of this court in the case of *J. K. Synthetics Limited* v. *Commercial Taxes Officer* [1994] 4 SCC 276[1] ; and the definition of the term "paid" in section 43(2) of the Act to submit that the two expressions "payable" and "paid" are of entirely different connotations. The learned counsel has painstakingly referred to the contents of the Bill introducing the Finance (No. 2) Act of 2004 where the expressions "credited or paid" were used but in the provision as enacted, the expression "payable" has occurred. According to the learned counsel, if the Legislature intended to disallow the deduction towards the payments made and incurred, it would have used the expression "paid", which term has been specifically defined for the purposes of sections 28 to 41 of the Act but the use of expression "payable" makes it clear that the coverage of the

1. [1994] 94 STC 422 (SC).

provision is restricted and in any case, it is not applicable over the amount already paid. The learned counsel has also attempted to draw support to his contentions with reference to the contents of the proviso to section 40(a)(ia) of the Act with the submissions that the meaning and scope of the main provision is accentuated by the scope of proviso wherein, the expression "paid" is used while giving out the circumstances when a deduction, not allowed under the main provision, could be claimed in the subsequent year.

10.2.1 Taking this line of argument further, learned counsel would contend that the scope of section 40(a)(ia) of the Act cannot be decided on the basis of the scope of section 194C of the Act. Learned counsel would submit that section 201 of the Act provides for consequence of non-deduction of TDS either at the time of payment or booking, whichever is earlier ; and thus, the said provision would apply to both the situations where the expenses amount has been "paid" or is "payable". However, according to the learned counsel, the additional consequence of default as provided in section 40(a)(ia) of the Act would come into operation only if the alleged default strictly falls within the language of this provision, which is limited to the amount "payable". Learned counsel would submit that the scope of section 40(a)(ia) of the Act cannot be expanded beyond its language merely because as per section 194C, the liability to deduct tax is at the time of "credit of such amount to the account of a contractor" or at the time of "payment" whichever is earlier. With reference to the decision of this court in the case of *Institute of Chartered Accountants of India* v. *Price Waterhouse* [1997] 93 Taxman 588 (SC)[1], the learned counsel has argued that when the words are clear and there is no obscurity, the intention of Legislature has to be inferred only from the words used in the provision.

10.2.2 Thus, learned counsel for the appellant has strenuously argued that section 40(a)(ia) of the Act remains limited in its scope and does not apply to the amount already "paid". However, being aware of the position that the substratum of such contentions does not stand in conformity with the view already taken by this court in the case of *Palam Gas Service* v. *CIT* [2017] 394 ITR 300 (SC), the learned counsel has made elaborate submissions that the said decision in *Palam Gas Service* requires reconsideration. According to the learned counsel, such reconsideration is necessitated because of the factors that : (a) the taxing provision for disallowance has to be strictly construed as per the language used and there is no scope for adopting the so-called purposive construction ; (b) the change of words used in the Bill "credited or paid" to the word "payable" has been ignored ;

1. [1997] 90 Comp Cas 113 (SC).

(c) the effect of proviso making it clear that the intent of the main provision is only to disallow the outstanding or payable amounts has not been considered ; and (d) the court has widened the scope of consequences provided under section 40(a)(ia) of the Act based on the scope of sections 194C and 201 of the Act, although such an approach is impermissible while interpreting a provision in the taxing statute.

10.3 Learned counsel for the appellant has argued in the alternative that the said sub-clause (ia), having been inserted to clause (a) of section 40 of the Act with effect from April 1, 2005 by the Finance (No. 2) Act, 2004, would apply only from the financial year 2005-06 and hence, cannot apply to the present case pertaining to the financial year 2004-05. In support, the learned counsel has referred to and relied upon the decision of the Calcutta High Court in the case of *Piu Ghosh* v. *Deputy CIT* [2016] 386 ITR 322 (Cal). Supplemental to these contentions, the learned counsel has also argued that, in any case, the Finance (No. 2) Act, 2004 received the assent of the President of India on September 10, 2004 and hence, the rigour of sub-clause (ia) of section 40(a) of the Act cannot be applied in relation to the payments already made before September 10, 2004, the date of introduction of this provision.

10.3.1 In yet another alternative, learned counsel for the appellant has referred to the amendment made to section 40(a)(ia) of the Act by the Finance (No. 2) Act, 2014, restricting and limiting the extent of disallowance to 30 per cent. of the expenditure and has submitted that the said amendment, being curative in nature and having been introduced to ameliorate the hardships faced by the assessees, deserves to be applied retrospectively and from the date of introduction of sub-clause (ia) to section 40(a) of the Act. The learned counsel has developed this argument by relying on the decision in *CIT* v. *Calcutta Export Co.* [2018] 404 ITR 654 (SC), wherein this court has held the remedial amendment of section 40(a)(ia) of the Act by the Finance Act, 2010 to be retrospective in nature and applicable from the date of insertion of the said provision.

10.4 Learned counsel for the appellant has lastly submitted that the result of applying the provisions in question to the entire payment practically leads to a highly incongruous position that whole of the receipt from the company is treated as the income of the appellant and taxed accordingly, but without due provision towards necessary expenses. According to the learned counsel, in such contracts, the annual income of the transport contractor like the appellant cannot be, and is not, to the extent of about Rs. 57 lakhs, as sought to be taxed in the present matter.

Respondent

Per contra, the learned counsel for respondent-Revenue has duly supported the orders impugned, essentially with reference to the reasonings therein and also with reference to the decision of this court in *Palam Gas Service* (supra). **11**

11.1 Learned counsel for the Revenue has, in the first place, contended with reference to the decided cases that the concurrent findings of fact recorded by the authorities and the Income-tax Appellate Tribunal, as affirmed by the High Court call for no interference for no case of apparent perversity being made out.

11.2 Learned counsel has further submitted that the appellant admittedly carried out the work of transportation by hiring the trucks and made payments to the operators/owners while issuing an invoice/bilty/challan for every such hiring, which constituted a separate contract/sub-contract. According to the learned counsel, in such dealings, the appellant was required to deduct tax at source in terms of section 194C of the Act when making payment to any truck operator/owner in the sum exceeding Rs. 20,000 ; and the appellant having failed to do so, the provisions of section 40(a)(ia) have rightly been invoked.

11.3 Learned counsel for the Revenue has made elaborate reference to the decision of this court in the case of *Palam Gas Service* (supra) and has submitted that the principal contention on the part of the appellant, that the expression "payable", as occurring in section 40(a)(ia) of the Act, refers only to those cases where the amount is yet to be paid and does not cover the cases where the amount is actually paid, has been duly considered and specifically rejected by this court ; and the said decision squarely covers the present matter. The learned counsel has argued that in the case of *Palam Gas Service* (supra), this court having holistically examined the scheme of the provisions in question, there is no scope for reconsideration of the said decision ; and this appeal deserves to be dismissed for the question sought to be raised as regards interpretation of section 40(a)(ia) of the Act being no more res integra.

11.4 Learned counsel for the Revenue has further contended that the amendment to section 40(a) of the Act with insertion of sub-clause (ia) by the Finance (No. 2) Act, 2004 with effect from April 1, 2005 directly applies to the assessment year 2005-06 ; and for the appellant having failed to deduct tax at source from the payment made to the sub-contractors for the work of transportation, deduction of such payment has rightly been disallowed.

11.5 The learned counsel has also argued that the proviso to section 40(a)(ia) of the Act, as inserted by the Finance (No. 2) Act, 2014, does not apply to the case at hand pertaining to the assessment year 2005-06 and hence, the argument for curative benefit with reference to the said proviso does not hold the ground.

Questions for determination

12 Having regard to the submissions made by the learned counsel for the parties and the observations occurring in the orders impugned, the principal questions arising for determination in this appeal could be stated as follows :

1. As to whether section 194C of the Act does not apply to the present case ?

2. As to whether disallowance under section 40(a)(ia) of the Act is confined/limited to the amount "payable" and not to the amount "already paid" ; and whether the decision of this court in *Palam Gas Service* v. *CIT* [2017] 394 ITR 300 (SC) requires reconsideration ?

3. As to whether sub-clause (ia) of section 40(a) of the Act, as inserted by the Finance (No. 2) Act, 2004 with effect from April 1, 2005, is applicable only from the financial year 2005-06 and, hence, is not applicable to the present case relating to the financial year 2004-05 ; and, at any rate, whole of the rigour of this provision cannot be applied to the present case ?

4. As to whether the payments in question have rightly been disallowed from deduction while computing the total income of the assessee-appellant ?

Relevant provisions

13 For determination of the questions aforesaid, we need to closely look at the statutory provisions in the Act of 1961 which have material bearing on this case.

13.1 It is noticed that elaborate provisions have been made in Chapter XVII of the Act of 1961 for "collection and recovery of tax" and Part B thereof carries the provisions concerning "deduction at source". Sections 194C, 200 and 201, which have come in reference in the present matter, are contained in this part and the same, as existing at the relevant point of time pertaining to the assessment year 2005-06, may be usefully noticed.

13.1.1 The liability against the appellant has basically arisen because of its alleged non-compliance of the requirements of section 194C of the Act. At the relevant point of time, this provision read as under :

"194C. *Payments to contractors and sub-contractors*.—(1) Any person responsible for paying any sum to any resident (hereafter in

this section referred to as the contractor) for carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and—

(a) the Central Government or any State Government ; or

(b) any local authority ; or

(c) any corporation established by or under a Central, State or Provincial Act ; or

(d) any company ; or

(e) any co-operative society ; or

(f) any authority, constituted in India by or under any law, engaged either for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages, or for both ; or

(g) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any law corresponding to that Act in force in any part of India ; or

(h) any trust ; or

(i) any University established or incorporated by or under a Central, State or Provincial Act and an institution declared to be a University under section 3 of the University Grants Commission Act, 1956 (3 of 1956) ; or

(j) any firm,

shall, at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to—

(i) one per cent. in case of advertising,

(ii) in any other case two per cent., of such sum as income-tax on income comprised therein.

(2) Any person (being a contractor and not being an individual or a Hindu undivided family) responsible for paying any sum to any resident (hereafter in this section referred to as the sub-contractor) in pursuance of a contract with the sub-contractor for carrying out, or for the supply of labour for carrying out, the whole or any part of the work undertaken by the contractor or for supplying whether wholly or partly any labour which the contractor has undertaken to supply shall, at the time of credit of such sum to the account of the sub-contractor

or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to one per cent. of such sum as income-tax on income comprised therein :

Provided that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such sum is credited or paid to the account of the sub-contractor, shall be liable to deduct income-tax under this sub-section.

Explanation 1.—For the purposes of sub-section (2), the expression 'contractor' shall also include a contractor who is carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and the Government of a foreign State or a foreign enterprise or any association or body established outside India.

Explanation 2.—For the purposes of this section, where any sum referred to in sub-section (1) or sub-section (2) is credited to any account, whether called 'suspense account' or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

Explanation 3.—For the purposes of this section, the expression 'work' shall also include—

(a) advertising ;

(b) broadcasting and telecasting including production of programmes for such broadcasting or telecasting ;

(c) carriage of goods and passengers by any mode of transport other than by railways ;

(d) catering.

(3) No deduction shall be made under sub-section (1) or sub-section (2) from—

(i) the amount of any sum credited or paid or likely to be credited or paid to the account of, or to, the contractor or sub-contractor, if such sum does not exceed twenty thousand rupees :

Provided that where the aggregate of the amounts of such sums credited or paid or likely to be credited or paid during the financial year exceeds fifty thousand rupees, the person responsible for paying

such sums referred to in sub-section (1) or, as the case may be, sub-section (2) shall be liable to deduct income-tax under this section ; or

(ii) any sum credited or paid before the 1st day of June, 1972 ; or

(iii) any sum credited or paid before the 1st day of June, 1973, in pursuance of a contract between the contractor and a co-operative society or in pursuance of a contract between such contractor and the sub-contractor in relation to any work (including supply of labour for carrying out any work) undertaken by the contractor for the co-operative society."

13.1.2 Sections 200 and 201 of the Act, respectively, dealing with the duty of the person deducting tax and consequences on failure to deduct or pay, as applicable at the relevant time, could also be reproduced as under :

"*200. Duty of person deducting tax*.—(1) Any person deducting any sum in accordance with the foregoing provisions of this Chapter[1], shall pay within the prescribed time, the sum so deducted to the credit of the Central Government or as the Board directs.

(2) Any person being an employer, referred to in sub-section (1A) of section 192 shall pay, within the prescribed time, the tax to the credit of the Central Government or as the Board directs.[2]

(3) Any person deducting any sum on or after the 1st day of April, 2005 in accordance with the foregoing provisions of this Chapter or, as the case may be, any person being an employer referred to in sub-section (1A) of section 192 shall, after paying the tax deducted to the credit of the Central Government within the prescribed time, prepare quarterly statements for the period ending on the 30th June, the 30th September, the 31st December and the 31st March in each financial year and deliver or cause to be delivered to the prescribed income-tax authority or the person authorised by such authority such statement in such form and verified in such manner and setting forth such particulars and within such time as may be prescribed.[3]

201. *Consequences of failure to deduct or pay*.—(1) If any such person referred to in section 200 and in the cases referred to in section 194, the principal officer and the company of which he is the principal officer does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it

1. The words "the foregoing provisions of this Chapter" were substituted for the previous expressions carrying various provisions of the Act, by the Finance (No. 2) Act, 2004, w.e.f. 1-10-2004.
2. Sub-section (2) was inserted by the Finance Act, 2002.
3. Sub-section (3) was inserted by the Finance (No. 2) Act, 2004, w.e.f. 1-4-2005.

shall, without prejudice to any other consequences which he or it may incur, be deemed to be an assessee in default in respect of the tax :

Provided that no penalty shall be charged under section 221 from such person, principal officer or company unless the Assessing Officer is satisfied that such person or principal officer or company, as the case may be, has without good and sufficient reasons failed to deduct and pay the tax.

(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest at twelve per cent. per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid.

(2) Where the tax has not been paid as aforesaid after it is deducted, the amount of the tax together with the amount of simple interest thereon referred to in sub-section (1A) shall be a charge upon all the assets of the person, or the company, as the case may be, referred to in sub-section (1)."

13.2 Chapter IV of the Act of 1961 deals with the subject "Computation of total income" and section 40 occurs in Part D thereof, carrying the provisions relating to the "profits and gains of business or profession". Even when sections 30 to 38 provide for various allowances and deductions in computation of the income from profits and gains of business or profession, section 40 specifically ordains that certain amounts shall not be deducted, notwithstanding anything to the contrary contained in the said sections 30 to 38 of the Act. In the present matter, we are concerned with the provisions contained in sub-clause (ia) of clause (a) of section 40 of the Act, which was inserted by the Finance (No. 2) Act, 2004 with effect from April 1, 2005. Hence, the extraction hereunder is essentially of the provision that could be read as section 40(a)(ia) of the Act after insertion by the Finance (No. 2) Act, 2004 :

"40. *Amounts not deductible.*—Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head 'Profits and gains of business or profession',—

(a) in the case of any assessee— . . .

(ia) any interest, commission or brokerage, fees for professional services or fees for technical services payable to a resident, or

amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200 :

Provided that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted in the previous year but paid in any subsequent year after the expiry of the time prescribed under sub-section (1) of section 200, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Explanation.—For the purposes of this sub-clause,—

(i) 'commission or brokerage' shall have the same meaning as in clause (i) of the *Explanation* to section 194H ;

(ii) 'fees for technical services' shall have the same meaning as in *Explanation 2* to clause (vii) of sub-section (1) of section 9 ;

(iii) 'professional services' shall have the same meaning as in clause (a) of the *Explanation* to section 194J ;

(iv) 'work' shall have the same meaning as in *Explanation III* to section 194C ; . . . [1]

13.3 Section 43 in the very same Part D of Chapter IV of the Act of 1961 defines various terms relevant to the income from profits and gains of business or profession ; and clause (2) thereof, carrying the definition of the expression "paid", having been referred in the present matter, could also be usefully reproduced as under :

"43. *Definitions of certain terms relevant to income from profits and gains of business or profession*.—In sections 28 to 41 and in this section, unless the context otherwise requires— . . .

(2) 'paid' means actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under the head 'Profits and gains of business or profession' ; . . ."

13.4 For their relevance in relation to another segment of arguments, we may also take note of the meaning assigned to the expression "assessment

1. We may usefully indicate that section 40(a)(ia) of the Act has undergone several amendments from time to time and in one segment of arguments, the amendments as made in the years 2010 and 2014, have been referred on behalf of the appellant. We shall refer to the relevant contents of this provision after such amendments while dealing with that part of arguments at the appropriate juncture hereafter later.

year" in clause (9) of section 2 ; and to the expression "previous year" in section 3 of the Act of 1961 as follows :

"2. *Definitions.*—In this Act, unless the context otherwise requires,— . . .

(9) 'assessment year' means the period of twelve months commencing on the 1st day of April every year ; . . .

3. *'Previous year' defined.*—For the purposes of this Act, 'previous year' means the financial year immediately preceding the assessment year :"

14 We may now take up the questions involved in this matter ad seriatim.

Question No. 1

15 In order to maintain that the appellant was under no obligation to make any deduction of tax at source, it has been argued that there was no oral or written contract of the appellant with the truck operators/owners, whose vehicles were engaged to execute the work of transportation of the goods only on freelance and need basis. The submission has been that the question of tax deducted at source under section 194C(2) would have arisen only if the payment was made to a "sub-contractor" and that too, in pursuance of a contract for the purpose of "carrying whole or any part of work undertaken by the contractor". In our view, the submissions so made remain entirely baseless.

15.1 The nature of contract entered into by the appellant with the consignor company makes it clear that the appellant was to transport the goods (cement) of the consignor company ; and in order to execute this contract, the appellant hired the transport vehicles, namely, the trucks from different operators/owners. The appellant received freight charges from the consignor company, who indeed deducted tax at source while making such payment to the appellant. Thereafter, the appellant paid the charges to the persons whose vehicles were hired for the purpose of the said work of transportation of goods. Thus, the goods in question were transported through the trucks employed by the appellant but, there was no privity of contract between the truck operators/owners and the said consignor company. Indisputably, it was the responsibility of the appellant to transport the goods (cement) of the company ; and how to accomplish this task of transportation was a matter exclusively within the domain of the appellant. Hence, hiring the services of truck operators/owners for this purpose could have only been under a contract between the appellant and the said truck operators/owners. Whether such a contract was reduced into writing or not carries hardly any relevance. In the given scenario and set up, the said

truck operators/owners answered to the description of "sub-contractor" for carrying out the whole or part of the work undertaken by the contractor (i.e., the appellant) for the purpose of section 194C(2) of the Act.

15.2 The suggestions on behalf of the appellant that the said truck operators/owners were not bound to supply the trucks as per the need of the appellant nor the freight payable to them was predetermined, in our view, carry no meaning at all. Needless to observe that if a particular truck was not engaged, there existed no contract but, when any truck got engaged for the purpose of execution of the work undertaken by the appellant and freight charges were payable to its operator/owner upon execution of the work, i.e., transportation of the goods, all the essentials of making of a contract existed ; and, as aforesaid, the said truck operator/owner became a sub-contractor for the purpose of the work in question. The Assessing Officer, the Commissioner of Income-tax (Appeals) and the Income-tax Appellate Tribunal have concurrently decided this issue against the appellant with reference to the facts of the case, particularly after appreciating the nature of contract of the appellant with the consignor company as also the nature of dealing of the appellant, while holding that the truck operators/owners were engaged by the appellant as sub-contractors. The same findings have been endorsed by the High Court in its short order dismissing the appeal of the appellant. We are unable to find anything of error or infirmity in these findings.

15.3 The decision of the Delhi High Court in the case of *Hardarshan Singh* (supra), in our view, has no application whatsoever to the facts of the present case. The assessee therein, who was in the business of transporting goods, had four trucks of his own and was also acting as a commission agent by arranging for transportation through other transporters. As regards the income of the assessee relatable to transportation through other transporters, it was found that the assessee had merely acted as a facilitator or as an intermediary between the two parties (i.e., the consignor company and the transporter) and had no privity of contract with either of such parties inasmuch as he only collected freight charges from the clients who intended to transport their goods through other transporters ; and the amount thus collected from the clients was paid to those transporters by the assessee while deducting his commission. Looking to the nature of such dealings, the said assessee was held to be "not the person responsible" for making payments in terms of section 194C of the Act and hence, having no obligation to deduct tax at source. In contradistinction to the said case of *Hardarshan Singh*, the appellant of the present case was not acting as a facilitator or intermediary between the consignor company and

the truck operators/owners because those two parties had no privity of contract between them. The contract of the company, for transportation of its goods, had only been with the appellant and it was the appellant who hired the services of the trucks. The payment made by the appellant to such a truck operator/owner was clearly a payment made to a sub-contractor.

15.4 Though the decision of this court in the case of *Palam Gas Service* (supra) essentially relates to the interpretation of section 40(a)(ia) of the Act and while the relevant aspects concerning the said provision shall be examined in the next question but, for the present purpose, the facts of that case could be usefully noticed, for being akin to the facts of the present case and being of apposite illustration. Therein, the assessee was engaged in the business of purchase and sale of LPG cylinders whose main contract for carriage of LPG cylinders was with Indian Oil Corporation, Baddi wherefor, the assessee received freight payments from the principal. The assessee got the transportation of LPG done through three persons to whom he made the freight payments. The Assessing Officer held that the assessee had entered into a sub-contract with the said three persons within the meaning of section 194C of the Act. Such findings of the Assessing Officer were concurrently upheld up to the High Court and, after interpretation of section 40(a)(ia), this court also approved the decision of the High Court while dismissing the appeal with costs. Learned counsel for the appellant has made an attempt to distinguish the nature of contract in *Palam Gas Service* by suggesting that therein, the assessee's sub-contractors were specific and identified persons with whom the assessee had entered into contract whereas the present appellant was free to hire the service of any truck operator/owner and, in fact, the appellant hired the trucks only on need basis. In our view, such an attempt of differentiation is totally baseless and futile. Whether the appellant had specific and identified trucks on its rolls or had been picking them up on freelance basis, the legal effect on the status of parties had been the same that once a particular truck was engaged by the appellant on hire charges for carrying out the part of work undertaken by it (i.e., transportation of the goods of the company), the operator/owner of that truck became the sub-contractor and all the requirements of section 194C came into operation.

15.5 Thus, we have no hesitation in affirming the concurrent findings in regard to the applicability of section 194C to the present case. Question No. 1 is, therefore, answered in the negative ; against the assessee-appellant and in favour of the Revenue.

Question No. 2

While taking up the question of interpretation of section 40(a)(ia), it may **16**
be usefully noticed that section 194C is placed in Chapter XVII of the Act on the subject "collection and recovery of tax" ; and specific provisions are made in the Act to ensure that the requirements of section 194C are met and complied with, while also providing for the consequences of default. As noticed, section 200 specifically provides for the duties of the person deducting tax to deposit and submit the statement to that effect. The consequences of failure to deduct or pay the tax are then provided in section 201 of the Act which, as noticed, puts such defaulting person in the category of "the assessee in default in respect of the tax" apart from other consequences which he or it may incur. The aspect relevant for the present purpose is that section 40 of the Act, and particularly the provisions contained in sub-clause (ia) of clause (a) thereof, indeed provides for one of such consequences.

16.1 Section 40(a)(ia) provides for the consequences of default in the case where tax is deductible at source on any interest, commission, brokerage or fees but had not been so deducted, or had not been paid after deduction (during the previous year or in the subsequent year before expiry of the prescribed time) in the manner that the amount of such interest, commission, brokerage or fees shall not be deducted in computing the income chargeable under "profits and gains of business or profession". In other words, it shall be computed as income of the assessee because of his default in not deducting the tax at source.

16.2 In the overall scheme of the provisions relating to collection and recovery of tax, it is evident that the object of Legislature in introduction of the provisions like sub-clause (ia) of clause (a) of section 40 had been to ensure strict and punctual compliance of the requirement of deducting tax at source. In other words, the consequences, as provided therein, had the underlying objective of ensuring compliance of the requirements of tax deducted at source. It is also noteworthy that in the proviso added to sub-clause (ia) of section 40(a) of the Act, it was provided that where in respect of the sum referable to tax deducted at source requirement, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid in any subsequent year after the expiry of the time prescribed in section 200(1), such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

16.3 The purpose and coverage of this provision as also protection therein have been tersely explained by this court in the case of *Calcutta*

Export Company (supra), which has been cited by learned counsel for the appellant in support of another limb of submissions which we shall be dealing with in the next question. For the present purpose, we may notice the relevant observations of this court in *Calcutta Export Company* as regards section 40(a)(ia) of the Act as follows (at page 662 of 404 ITR) :

> "The purpose is very much clear from the above referred *Explanation* by the memorandum that it came with a purpose to ensure tax compliance. The fact that the intention of the Legislature was not to punish the assessee is further reflected from a bare reading of the provisions of section 40(a)(ia) of the Income-tax Act. It only results in shifting of the year in which the expenditure can be claimed as deduction. In a case where the tax deducted at source was duly deposited with the Government within the prescribed time, the said amount can be claimed as a deduction from the income in the previous year in which the TDS was deducted. However, when the amount deducted in the form of TDS was deposited with the Government after the expiry of period allowed for such deposit then the deductions can be claimed for such deposited TDS amount only in the previous year in which such payment was made to the Government."

16.4 Taking up the question as to whether disallowance under section 40(a)(ia) of the Act is confined to the amount "payable" and not to the amount "already paid", we find that these aspects of interpretation do not require much dilation in view of the ratio of the decision of this court in the case of *Palam Gas Service* (supra).

16.5 In fact, the decision in *Palam Gas Service* (supra) is a direct answer to all the contentions urged on behalf of the appellant in the present case. In that case, this court approved the views of the Punjab and Haryana High Court in the case of *P. M. S. Diesels* v. *CIT* [2015] 374 ITR 562 (P&H) as regards mandatory nature of the provisions relating to the liability to deduct tax at source in the following words (at pages 306-308 of 394 ITR) :

> "The Punjab and Haryana High Court in *P. M. S. Diesels* v. *CIT* [2015] 374 ITR 562 (P&H), has held these provisions to be mandatory in nature with the following observations[1] :
>
> 'The liability to deduct tax at source under the provisions of Chapter XVII is mandatory. A person responsible for paying any sum is also liable to deposit the amount in the Government account. All the sections in Chapter XVII-B require a person to deduct the tax at

1. Page 572 of 374 ITR.

source at the rates specified therein. The requirement in each of the sections is preceded by the word 'shall'. The provisions are, therefore, mandatory. There is nothing in any of the sections that would warrant our reading the word 'shall' as 'may'. The point of time at which the deduction is to be made also establishes that the provisions are mandatory. For instance, under section 194C, a person responsible for paying the sum is required to deduct the tax 'at the time of credit of such sum to the account of the contractor or at the time of the payment thereof . . . '

While holding the aforesaid view, the Punjab and Haryana High Court discussed the judgments of the Calcutta and the Madras High Courts, which had taken the same view, and concurred with the same, which is clear from the following discussion contained in the judgment of the Punjab and Haryana High Court[1] :

'A Division Bench of the Calcutta High Court in *CIT* v. *Crescent Export Syndicate* [2013] 216 Taxman 258 (Cal)[2] held[3] :

". . . The term 'shall' used in all these sections make it clear that these are mandatory provisions and applicable to the entire sum contemplated under the respective sections. These sections do not give any leverage to the assessee to make the payment without making TDS. On the contrary, the intention of the Legislature is evident from the fact that timing of deduction of tax is earliest possible opportunity to recover tax, either at the time of credit in the account of payee or at the time of payment to payee, whichever is earlier."

Ms. Dhugga invited our attention to a judgment of the Division Bench of the Madras High Court in *Tube Investments of India Ltd.* v. *Asst. CIT (TDS)* [2010] 325 ITR 610 (Mad). The Division Bench referred to the statistics placed before it by the Department which disclosed that TDS collection had augmented the revenue. The gross collection of advance tax, surcharge, etc., was Rs. 2,75,857.70 crores in the financial year 2008-09 of which the TDS component alone constituted Rs. 1,30,470.80 crores. The Division Bench observed that introduction of section 40(a)(ia) had achieved the objective of augmenting the TDS to a substantial extent. The Division Bench also observed that when the provisions and procedures relating to TDS are scrupulously applied, it also ensured the identification of the payees thereby confirming the network of assessees and that once the

1. Page 572 of 374 ITR.
2. [2013] 1 ITR-OL 1 (Cal).
3. Page 15 of 1 ITR-OL.

assessees are identified it would enable the tax collection machinery to bring within its fold all such persons who are liable to come within the network of taxpayers. These objects also indicate the legislative intent that the requirement of deducting tax at source is mandatory.

The liability to deduct tax at source is, therefore, mandatory.'

The aforesaid interpretation of section 194C conjointly with section 200 and rule 30(2) is unblemished and without any iota of doubt. We, thus, give our imprimatur to the view taken." (emphasis[1] supplied)

16.5.1 Having said that deducting tax at source is obligatory, this court proceeded to deal with the issue as to whether the word "payable" in section 40(a)(ia) would cover only those cases where the amount is payable and not where it has actually been paid. This court took note of the exhaustive interpretation of various aspects related with this issue by the Punjab and Haryana High Court in the case of *P. M. S. Diesels* (supra) as also by the Calcutta High Court in the case of *CIT* v. *Crescent Export Syndicate* [2013] 216 Taxman 258 (Cal)[2] ; and while approving the same, this court held, as regards implication and connotation of the expression "payable" used in this provision, as follows (at page 310 of 394 ITR) :

"We approve the aforesaid view as well. *As a fortiori, it follows that section 40(a)(ia) covers not only those cases where the amount is payable but also when it is paid*. In this behalf, one has to keep in mind the purpose with which section 40 was enacted and that has already been noted above. We have also to keep in mind the provisions of sections 194C and 200. Once it is found that the aforesaid sections mandate a person to deduct tax at source not only on the amounts payable but also when the sums are actually paid to the contractor, *any person who does not adhere to this statutory obligation has to suffer the consequences which are stipulated* in the Act itself. Certain consequences of failure to deduct tax at source from the payments made, where tax was to be deducted at source or failure to pay the same to the credit of the Central Government, are stipulated in section 201 of the Act. This section provides that in that contingency, such a person would be deemed to be an assessee in default in respect of such tax. While stipulating this consequence, section 201 categorically states that the aforesaid sections would be without prejudice to any other consequences which that defaulter may incur. Other consequences are provided under section 40(a)(ia) of the Act, namely, payments made by such a person to a contractor shall not be

1. Here printed in italics.
2. [2013] 1 ITR-OL 1 (Cal).

treated as deductible expenditure. When read in this context, it is clear that section 40(a)(ia) deals with the nature of default and the consequences thereof. Default is relatable to Chapter XVII-B (in the instant case sections 194C and 200, which provisions are in the aforesaid Chapter). *When the entire scheme of obligation to deduct the tax at source and paying it over to the Central Government is read holistically, it cannot be held that the word 'payable' occurring in section 40(a)(ia) refers to only those cases where the amount is yet to be paid and does not cover the cases where the amount is actually paid.* If the provision is interpreted in the manner suggested by the appellant herein, then even when it is found that a person, like the appellant, has violated the provisions of Chapter XVII-B (or specifically sections 194C and 200 in the instant case), he would still go scot-free, without suffering the consequences of such monetary default in spite of specific provisions laying down these consequence." (emphasis[1] supplied)

16.6 We may profitably observe that in the case of *P. M. S. Diesels* (supra), the Punjab and Haryana High Court had extensively dealt with myriad features of section 40(a)(ia) of the Act, including the term "payable" used therein as also the proviso thereto ; and expounded on the entire gamut of this provision while making reference to Finance (No. 2) Bill of 2004 introducing the provision and while also drawing support from the views expressed by the Calcutta High Court in the case of *Crescent Export Syndicate* (supra). As regards the interpretation of the term "payable", it was observed in *P. M. S. Diesels* as under (at pages 574-575 of 374 ITR) :

"Section 40(a)(ia), therefore, applies not merely to assessees following the mercantile system but also to assessees following the cash system.

If this view is correct and indeed we must proceed on the footing that it is, it goes a long way in indicating the fallacy in the appellant's main contention, namely, if the payments have already been made by the assessee to the payee/contracting party, the provisions of section 40(a)(ia) would not be attracted even if the tax is not deducted and/or paid over to the Government account.

Section 40(a)(ia) refers to the nature of the default and the consequence of the default. The default is a failure to deduct the tax at source under Chapter XVII-B or after deduction the failure to pay over the same to the Government account. *The term 'payable' only indicates the type or nature of the payments by the assessees to the*

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persons/payees referred to in section 40(a)(ia), such as, contractors. It is not in respect of every payment to a payee referred to in Chapter XVII-B that an assessee is bound to deduct tax. There may be payments to persons referred to in Chapter XVII-B, which do not attract the provisions of Chapter XVII-B. The consequences under section 40(a)(ia) would only operate on account of failure to deduct tax where the tax is liable to be deducted under the provisions of the Act and in particular Chapter XVII-B thereof. It is in that sense that the term 'payable' has been used. The term 'payable' is descriptive of the payments which attract the liability to deduct tax at source. *It does not categorize defaults on the basis of when the payments are made to the payees of such amounts which attract the liability to deduct tax at source*." (emphasis[1] supplied)

16.7 We find the above-extracted observations and reasonings, which have already been approved by this court in *Palam Gas Service* (supra), to be precisely in accord with the scheme and purpose of section 40(a)(ia) of the Act ; and are in complete answer to the contentions urged by the learned counsel for the appellant. It is ex facie evident that the term "payable" has been used in section 40(a)(ia) of the Act only to indicate the type or nature of the payments by the assessees to the payees referred therein. In other words, the expression "payable" is descriptive of the payments which attract the liability for deducting tax at source and it has not been used in the provision in question to specify any particular class of default on the basis as to whether payment has been made or not. The semantical suggestion by the learned counsel for the appellant, that this expression "payable" be read in contradistinction to the expression "paid", sans merit and could only be rejected. In a nutshell, while respectfully following *Palam Gas Service* (supra), we could only iterate our approval to the interpretation by the Punjab and Haryana High Court in *P. M. S. Diesels* (supra).

16.8 Faced with the position that declaration of law in *Palam Gas Service* (supra) practically covers this matter, learned counsel for the appellant has endeavoured to submit that the decision in *Palam Gas Service*, requires reconsideration for the reason that certain aspects of law have not been considered therein and correct principles of interpretation have not been applied. We are unable to find substance in any of these contentions. The decision of the Co-ordinate Bench in *Palam Gas Service* (supra) on the core question of law is equally binding on this Bench and could be doubted only if the view, as taken, is shown to be not in conformity with any

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binding decision of the Larger Bench or any statutory provisions or any other reason of the like nature. We find none. In fact, a close look at the decision of *P. M. S. Diesels* (supra), which has been totally approved by this court in *Palam Gas Service*, makes it clear that therein, every aspect of the matter, from a wide range of angles, was examined by the Punjab and Haryana High Court while drawing support from the decisions of other High Courts, particularly that of the Calcutta High Court in the case of *Crescent Export Syndicate* (supra).

16.9 We are in respectful agreement with the observations in *Palam Gas Service* that the enunciations in *P. M. S. Diesels* had been of correct interpretation of the provisions contained in section 40(a)(ia) of the Act. The decision in *Palam Gas Service* covers the entire matter and the said decision, in our view, does not require any reconsideration. That being the position, the contention urged on behalf of the appellant that disallowance under section 40(a)(ia) does not relate to the amount already paid stands rejected.

16.10 Another contention in regard to section 40(a)(ia) of the Act, that its scope cannot be decided on the basis of section 194C, has only been noted to be rejected. The interplay of these provisions is not far to seek where section 40(a)(ia) is not a stand-alone provision but provides one of those additional consequences as indicated in section 201 of the Act for default by a person in compliance of the requirements of the provisions contained in Part B of Chapter XVII of the Act. The scheme of these provisions makes it clear that the default in compliance of the requirements of the provisions contained in Part B of Chapter XVII of the Act (that carries sections 194C, 200 and 201) leads, inter alia, to the consequence of section 40(a)(ia) of the Act. Hence, the contours of section 40(a)(ia) of the Act could be aptly defined only with reference to the requirements of the provisions contained in Part B of Chapter XVII of the Act, including sections 194C, 200 and 201. Putting it differently, when the obligation of section 194C of the Act is the foundation of the consequence provided by section 40(a)(ia) of the Act, reference to the former is inevitable in interpretation of the latter.

16.11 In view of the above, reference to the definition of the term "paid" in section 43(2) of the Act is of no assistance to the appellant. Similarly, the observations in the case of *J. K. Synthetics* (supra), as regards the difference in connotation of the expressions "payable" and "paid", in the context of liability to pay interest on the tax payable under the Rajasthan Sales Tax Act, 1954, has no correlation whatsoever to the present case. Further, when it is found that the process of interpretation of section 40(a)(ia)

of the Act in *P. M. S. Diesels* (supra), as approved by this court in *Palam Gas Service* (supra), had been with due application of the relevant principles, reference to the decision in the case of *Institute of Chartered Accountants of India* (supra), on the general principles of interpretation, does not advance the case of the appellant in any manner.

16.12 In view of the above, question No. 2 is also answered in the negative ; against the assessee-appellant and in favour of the Revenue.

Question No. 3

17 Quite conscious of the position that the decision of this court in *Palam Gas Service* (supra) practically covers the substance of present matter against the assessee, learned counsel for the assessee-appellant has made a few alternative attempts to argue against the disallowance in question.

17.1 The learned counsel would submit that the said sub-clause (ia), having been inserted to clause (a) of section 40 of the Act with effect from April 1, 2005 by Finance (No. 2) Act, 2004, would apply only from the financial year 2005-06 and hence, cannot apply to the present case pertaining to the financial year 2004-05. The learned counsel, of course, drew support to this contention from the decision of the Calcutta High Court in the case of *Piu Ghosh* (supra).

17.1.1 Before proceeding further, it appears apposite to observe, as indicated in paragraph 7.3 hereinbefore, that in the copy of order passed by the Income-tax Appellate Tribunal in this case, there is obvious typographical error on the date of coming into force of the amendment to section 40 of the Act of 1961 by the Finance (No. 2) Act, 2004 inasmuch as the said amendment was made applicable with effect from April 1, 2005 and not April 1, 2004, as appearing in the copy of the order of the Income-tax Appellate Tribunal. However, this error is not of material bearing because the amendment in question was applicable from and for the assessment year 2005-06, for the reasons occurring infra.

17.2 Reverting to the contentions urged in this case, there is no doubt that in *Piu Ghosh* (supra), the Calcutta High Court, indeed, took the view which the learned counsel for the appellant has canvassed before us. The Calcutta High Court observed that the said Finance (No. 2) Act, 2004 got presidential assent on September 10, 2004 and it was provided that the provision in question shall stand inserted with effect from April 1, 2005. According to the Calcutta High Court, the assessee could not have foreseen prior to September 10, 2004 that any amount paid to a contractor without deducting tax at source was likely to become not deductible in computation of income under section 40 and that the Legislature, being conscious of the

likely predicament, provided that the provision shall become operative from April 1, 2005. The High Court further proceeded to observe that any other interpretation would amount to punishing the assessee for no fault of his. The High Court further observed that section 11 of the said Finance Act, inserting sub-clause (ia), did not provide that the same was to become effective from the assessment year 2005-06. We may usefully reproduce the opinion of the Calcutta High Court in the case of *Piu Ghosh*, as under (at page 326 of 386 ITR) :

> "Admittedly, the Finance (No. 2) Act, 2004 got presidential assent on September 10, 2004. The assessee could not have foreseen prior to September 10, 2004 that any amount paid to a contractor without deducting tax at source was likely to become not deductible under section 40. It is difficult to assume that the Legislature was not aware or did not foresee the aforesaid predicament. The Legislature therefore provided that the Act shall become operative on April 1, 2005. Any other interpretation shall amount to 'punishing the assessee for no fault of his' following the judgment in the case of *Hindustan Electro Graphites Ltd.*[1] (supra).
>
> On top of that, section 4 relied upon by Mr. Agarwal merely provides for an enactment as regards rate of tax to be charged in any particular assessment year which has no application to the case before us. Section 11 of the Finance (No. 2) Act, 2004 by which sub-clause (ia) was added to section 40(a) of the Income-tax Act does not provide that the same was to become effective from the assessment year 2005-06. It merely says it shall become effective on April 1, 2005 which for reasons already discussed should mean to refer to the financial year. There is, as such, no scope for any ambiguity nor is there any scope for confusion . . ."

17.3 Learned counsel for the appellant has submitted that the Revenue has accepted the said decision and has not filed any appeal against the same. It appears, however, that the amount of deduction in the said case was only a sum of Rs. 4,30,386 and obviously, the net tax effect in that case, decided on July 12, 2016, was on the lower side. In any case, the said decision cannot be treated as final declaration of law on the subject merely because the same has not been appealed against. Having examined the law applicable, with respect, we find it difficult to approve the above-quoted opinion of the Calcutta High Court, particularly when it does not appear standing in conformity with the scheme of assessment of income-tax under the Act of 1961 and where the High Court seems to have not

1. [2000] 243 ITR 48 (SC).

noticed the proviso to sub-clause (ia) of section 40(a) of the Act forming the part of the amendment in question.

17.4 It needs hardly any detailed discussion that in income-tax matters, the law to be applied is that in force in the assessment year in question, unless stated otherwise by express intendment or by necessary implication. As per section 4 of the Act of 1961, the charge of income-tax is with reference to any assessment year, at such rate or rates as provided in any central enactment for the purpose, in respect of the total income of the previous year of any person. The expression "previous year" is defined in section 3 of the Act to mean "the financial year immediately preceding the assessment year" ; and the expression "assessment year" is defined in clause (9) of section 2 of the Act to mean "the period of twelve months commencing on the 1st day of April every year".

17.5 In the case of *CIT* v. *Isthmian Steamship Lines* [1951] 20 ITR 572 (SC), a 3-judge Bench of this court exposited on the fundamental principle that "in income-tax matters the law to be applied is the law in force in the assessment year unless otherwise stated or implied". This decision and various other decisions were considered by the Constitution Bench of this court in the case of *Karimtharuvi Tea Estate Ltd.* v. *State of Kerala* [1966] 60 ITR 262 (SC) and the principles were laid down in the following terms (at pages 264-266 of 60 ITR) :

> *"Now, it is well-settled that the Income-tax Act, as it stands amended on the first day of April of any financial year must apply to the assessments of that year. Any amendments in the Act which come into force after the first day of April of a financial year, would not apply to the assessment for that year,* even if the assessment is actually made after the amendments come into force . . .
>
> The High Court has, however relied upon a decision of this court in *CIT* v. *Isthmian Steamship Lines*, where it was held as follows[1] :
>
> 'It will be observed that we are here concerned with two datum lines : (1) the 1st of April, 1940, when the Act came into force, and (2) the 1st of April, 1939, which is the date mentioned in the amended proviso. The first question to be answered is whether these dates are to apply to the accounting year or the year of assessment. They must be held to apply to the assessment year, because in income-tax matters the law to be applied is the law in force in the assessment year unless otherwise stated or implied. The first datum line therefore affected only the assessment year of 1940-41, because the amendment

1. Page 577 of 20 ITR.

did not come into force till the 1st of April 1940. That means that the old law applied to every assessment year up to and including the assessment year 1939-40.'

This decision is authority for the proposition that though the subject of the charge is the income of the previous year, the law to be applied is that in force in the assessment year, unless otherwise stated or implied. The facts of the said decision are different and distinguishable and the High Court was clearly in error in applying that decision to the facts of the present case." (emphasis[1] supplied)

17.6 We need not multiply on the case law on the subject as the principles aforesaid remain settled and unquestionable. Applying these principles to the case at hand, we are clearly of the view that the provision in question, having come into effect from April 1, 2005, would apply from and for the assessment year 2005-06 and would be applicable for the assessment in question. Putting it differently, the Legislature consciously made the said sub-clause (ia) of section 40(a) of the Act effective from April 1, 2005, meaning thereby that the same was to be applicable from and for the assessment year 2005-06 ; and neither there had been express intendment nor any implication that it would apply only from the financial year 2005-06.

17.7 The observations of the Calcutta High Court in the case of *Piu Ghosh* (supra) as regards the likely prejudice to an assessee in relation to the financial year 2004-05, in our view, do not relate to any legal grievance or legal prejudice. The requirement of deducting tax at source was already existing as per section 194C of the Act and it was the bounden duty of the appellant to make such deduction of TDS and to make over the same to the Revenue. Section 201 was also in existence which made it clear that default in making deduction in accordance with the provisions of the Act would make the appellant "an assessee in default". The appellant cannot suggest that even if the obligation of TDS on the payments made by him was existing by virtue of section 194C(2), he would have honoured such an obligation only if being aware of the drastic consequence of default that such payment shall not be deducted for the purpose of drawing up the assessment.

17.7.1. Apart from the above, significant it is to notice that by the amendment in question, sub-clause (ia) was added to section 40(a) of the Act with a proviso to the effect that where, in respect of the sum referable to tax deducted at source requirement, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid in

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any subsequent year after expiry of the time prescribed in section 200(1), such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid. The proviso effectively took care of the case of any bona fide assessee who would earnestly comply with the requirement of deducting the tax at source. It is evident that the said proviso has totally escaped the attention of the Calcutta High Court in the case of *Piu Ghosh* (supra). In fact, the relaxation by way of the proviso/s to section 40(a)(ia) of the Act had further been modulated by way of various subsequent amendments to further mitigate the hardships of bona fide assessees, as noticed hereafter later. Suffice it to observe for the present purpose that the said decision in *Piu Ghosh* cannot be regarded as correct on law.

17.8 In fact, if the contention of learned counsel for the appellant read with the proposition in *Piu Ghosh* (supra) is accepted and the said sub-clause (ia) of section 40(a) of the Act is held applicable only from the financial year 2005-06, the result would be that this provision would apply only from the assessment year 2006-07. Such a result is neither envisaged nor could be countenanced. Hence, the contention that sub-clause (ia) of clause (a) of section 40 of the Act would apply only from the financial year 2005-06 and cannot apply to the present case pertaining to the financial year 2004-05 stands rejected.

18 The supplemental submission that in any case, disallowance cannot be applied to the payments already made prior to September 10, 2004, the date on which the Finance (No. 2) Act, 2004 received the assent of the President of India, remains equally baseless. The said date of assent of the President of India to the Finance (No. 2) Act, 2004 is not the date of applicability of the provision in question, for the specific date having been provided as April 1, 2005. Of course, the said date relates to the assessment year commencing from April 1, 2005 (i.e., the assessment year 2005-06).

18.1 Even if it be assumed, going by the suggestions of the appellant, that the requirements of section 40(a)(ia) became known on September 10, 2004, the appellant could have taken all the requisite steps to make deductions or, in any case, to make payment of the TDS amount to the Revenue during the same financial year or even in the subsequent year, as per the relaxation available in the proviso to section 40(a)(ia) of the Act but, the appellant simply avoided his obligation and attempted to suggest that it had no liability to deduct the tax at source at all. Such an approach of the appellant, when standing at conflict with law, the consequence of disallowance under section 40(a)(ia) of the Act remains inevitable.

In yet another alternative attempt, learned counsel for the appellant has **19** argued that by way of Finance (No. 2) Act, 2014, disallowance under section 40(a)(ia) has been limited to 30 per cent. of the sum payable and the said amendment deserves to be held retrospective in operation. This line of argument has been grafted with reference to the decision in *Calcutta Export Company* (supra) wherein, another amendment of section 40(a)(ia) by the Finance Act of 2010 was held by this court to be retrospective in operation. The submission so made is not only baseless but is bereft of any logic. Neither the amendment made by the Finance (No. 2) Act, 2014 could be stretched anterior to the date of its substitution so as to reach the assessment year 2005-06 nor the said decision in *Calcutta Export Company* has any correlation with the case at hand or with the amendment made by the Finance (No. 2) Act of 2014.

19.1 By the amendment brought about in the year 2014, the Legislature reduced the extent of disallowance under section 40(a)(ia) of the Act and limited it to 30 per cent. of the sum payable. On the other hand, by the Finance Act of 2010, which was considered in the case of *Calcutta Export Company* (supra), the proviso to section 40(a)(ia) of the Act was amended so as to provide relief to a bona fide assessee who could not make deposit of deducted tax within the prescribed time. In fact, even before the year 2010, the said proviso was amended by the Finance Act, 2008 and that amendment of the year 2008 was provided retrospective operation by the Legislature itself. For ready reference, we may reproduce in juxtaposition the main part of section 40(a)(ia) of the Act as it would read after the amendments of 2008, 2010 and 2014 respectively, as under[1] :

(i) After the amendment by the Finance Act, 2008

"40. *Amounts not deductible.*—Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head 'Profits and gains of business or profession',—

(a) in the case of any assessee— . . .

(ia) any interest, commission or brokerage, rent, royalty[2], fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under

1. The *Explanation* part of the provision is omitted, for being not relevant for the present purpose.
2. The expressions "rent, royalty" were inserted in the year 2006.

Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid,—

(A) in a case where the tax was deductible and was so deducted during the last month of the previous year, on or before the due date specified in sub-section (1) of section 139 ; or

(B) in any other case, on or before the last day of the previous year :

Provided that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted—

(A) during the last month of the previous year but paid after the said due date ; or

(B) during any other month of the previous year but paid after the end of the said previous year,

such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid."

(ii) After the amendment by the Finance Act, 2010

"40. *Amounts not deductible.*—Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head 'Profits and gains of business or profession',—

(a) in the case of any assessee— . . .

(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139 :

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid :"

(iii) After the amendment by the Finance (No. 2) Act, 2014

"40. *Amounts not deductible.*—Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be

deducted in computing the income chargeable under the head 'Profits and gains of business or profession',—

(a) in the case of any assessee— . . .

(ia) thirty per cent. of any sum payable to a resident, on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139 :

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, thirty per cent. of such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid[1] :

Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso[2] . . ."

19.2 The aforesaid amendment by the Finance (No. 2) Act of 2014 was specifically made applicable with effect from April 1, 2015 and clearly represents the will of the Legislature as to what is to be deducted or what percentage of deduction is not to be allowed for a particular eventuality, from the assessment year 2015-16.

19.3 On the other hand, in the case of *Calcutta Export Company* (supra), this court noticed the aforesaid two amendments to section 40(a)(ia) of the Act by the Finance Act, 2008 and by the Finance Act, 2010, which were intended to deal with procedural hardship likely to be faced by the bona fide taxpayer, who had deducted tax at source but could not make deposit within the prescribed time so as to claim deduction. In paragraph 17 of the judgment in *Calcutta Export Company*, this court took note of the case of genuine hardship, particularly of the assessees who had deducted tax at source in the last month of previous year ; and observed in paragraph 18 that the said amendment of the year 2008 was brought about with a view to mitigate such hardship. After reproducing the said amend-

1. This proviso was substituted in the year 2008 and again in the year 2010 ; and then, was amended by the Finance (No. 2) Act, 2014.
2. This proviso was inserted by Act No. 23 of 2012.

ment of the year 2008 and after noticing its retrospective operation, this court delved into the position obtaining after 2008, where still remained one class of assessees who could not claim deduction for the TDS amount in the previous year in which the tax was deducted and who could claim benefit of such deduction in the next year only ; and, after finding that the amendment of the year 2010 was intended to remedy this position, held that the said amendment, being curative in nature, is required to be given retrospective operation that is, from the date of insertion of section 40(a)(ia).

19.4 Learned counsel for the appellant has only referred to the concluding part of the decision in *Calcutta Export Company* but, a look at the entire synthesis by this court, of the reasons for the amendments of 2008 and 2010, makes it clear as to why this court held that the amendment of the year 2010 would be retrospective in operation. We may usefully reproduce the relevant discussion and exposition of this court in *Calcutta Export Company* as under (at pages 663-666 of 404 ITR) :

> "The above amendments made by the Finance Act, 2008 thus provided that no disallowance under section 40(a)(ia) of the Income-tax Act shall be made in respect of the expenditure incurred in the month of March if the tax deducted at source on such expenditure has been paid before the due date of filing of the return. It is important to mention here that the amendment was given retrospective operation from April 1, 2005, i.e., from the very date of substitution of the provision.
>
> Therefore, the assessees were, after the said amendment in 2008, classified in two categories namely : one, those who have deducted that tax during the last month of the previous year and two, those who have deducted the tax in the remaining eleven months of the previous year. It was provided that in the case of assessees falling under the first category, no disallowance under section 40(a)(ia) of the Income-tax Act shall be made if the tax deducted by them during the last month of the previous year has been paid on or before the last day of filing of return in accordance with the provisions of section 139(1) of the Income-tax Act for the said previous year. In case, the assessees are falling under the second category, no disallowance under section 40(a)(ia) of the Income-tax Act where the tax was deducted before the last month of the previous year and the same was credited to the Government before the expiry of the previous year. The net effect is that the assessee could not claim deduction for the TDS amount in the previous year in which the tax was deducted

and the benefit of such deductions can be claimed in the next year only.

The amendment though has addressed the concerns of the assessees falling in the first category but with regard to the case falling in the second category, it was still resulting into unintended consequences and causing grave and genuine hardships to the assessees who had substantially complied with the relevant tax deducted at source provisions by deducting the tax at source and by paying the same to the credit of the Government before the due date of filing of their returns under section 139(1) of the Income-tax Act. The disability to claim deductions on account of such lately credited sum of TDS in assessment of the previous year in which it was deducted, was detrimental to the small traders who may not be in a position to bear the burden of such disallowance in the present assessment year.

In order to remedy this position and to remove hardships which were being caused to the assessees belonging to such second category, amendments have been made in the provisions of section 40(a)(ia) by the Finance Act, 2010 . . .

Thus, the Finance Act, 2010 further relaxed the rigours of section 40(a)(ia) of the Income-tax Act to provide that all TDS made during the previous year can be deposited with the Government by the due date of filing the return of income. The idea was to allow additional time to the deductors to deposit the TDS so made. However, the Memorandum Explaining the Provisions of the Finance Bill, 2010 expressly mentioned as follows : 'This amendment is proposed to take effect retrospectively from April 1, 2010 and will, accordingly, apply in relation to the assessment year 2010-11 and subsequent years'.

The controversy surrounding the above amendment was whether the amendment being curative in nature should be applied retrospectively, i.e., from the date of insertion of the provisions of section 40(a)(ia) or to be applicable from the date of enforcement . . .

A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section, is required to be read into the section to give the section a reasonable interpretation and requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole.

The purpose of the amendment made by the Finance Act, 2010 is to solve the anomalies that the insertion of section 40(a)(ia) was causing to the bona fide taxpayer. The amendment, even if not given operation retrospectively, may not materially be of consequence to the Revenue when the tax rates are stable and uniform or in cases of big assessees having substantial turnover and equally huge expenses and necessary cushion to absorb the effect. However, marginal and medium taxpayers, who work at low gross product rate and when expenditure which becomes the subject matter of an order under section 40(a)(ia) is substantial, can suffer severe adverse consequences if the amendment made in 2010 is not given retrospective operation, i.e., from the date of substitution of the provision. Transferring or shifting expenses to a subsequent year, in such cases, will not wipe out the adverse effect and the financial stress. Such could not be the intention of the Legislature. Hence, the amendment made by the Finance Act, 2010 being curative in nature is required to be given retrospective operation, i.e., from the date of insertion of the said provision."

19.5 A bare look at the extraction aforesaid makes it clear that what this court has held as regards "retrospective operation" is that the amendment of the year 2010, being curative in nature, would be applicable from the date of insertion of the provision in question, i.e., sub-clause (ia) of section 40(a) of the Act. This being the position, it is difficult to find any substance in the argument that the principles adopted by this court in the case of *Calcutta Export Company* (supra) dealing with curative amendment, relating more to the procedural aspects concerning deposit of the deducted TDS, be applied to the amendment of the substantive provision by the Finance (No. 2) Act, 2014.

19.6 We may in the passing observe that the assessee-appellant was either labouring under the mistaken impression that he was not required to deduct TDS or under the mistaken belief that the methodology of splitting a single payment into parts below Rs. 20,000 would provide him escape from the rigour of the provisions of the Act providing for disallowance. In either event, the appellant had not been a bona fide assessee who had made the deduction and deposited it subsequently. Obviously, the appellant could not have derived the benefits that were otherwise available by the curative amendments of 2008 and 2010. Having defaulted at every stage, the attempt on the part of assessee-appellant to seek some succour in the amendment of section 40(a)(ia) of the Act by the Finance (No. 2) Act, 2014 could only be rejected as entirely baseless, rather preposterous.

19.7 Hence, question No. 3 is also answered in the negative, i.e., against the assessee-appellant and in favour of the Revenue.

Question No. 4

Before finally answering the root question in the matter as to whether **20**
the payments in question have rightly been disallowed from deduction, we may usefully summarise the answers to question Nos. 1 to 3 that the provisions of section 194C were indeed applicable and the assessee-appellant was under obligation to deduct the tax at source in relation to the payments made by it for hiring the vehicles for the purpose of its business of transportation of goods ; that disallowance under section 40(a)(ia) of the Act is not limited only to the amount outstanding and this provision equally applies in relation to the expenses that had already been incurred and paid by the assessee ; that disallowance under section 40(a)(ia) of the Act of 1961 as introduced by the Finance (No. 2) Act, 2004 with effect from April 1, 2005 is applicable to the case at hand relating to the assessment year 2005-06 ; and that the benefit of amendment made in the year 2014 to the provision in question is not available to the appellant in the present case. These answers practically conclude the matter but we have formulated question No. 4 essentially to deal with the last limb of submissions regarding the prejudice likely to be suffered by the appellant.

The suggestion on behalf of the appellant about the likely prejudice **21**
because of disallowance deserves to be rejected for three major reasons. In the first place, it is clear from the provisions dealing with disallowance of deductions in Part D of Chapter IV of the Act, particularly those contained in sections 40(a)(ia) and 40A(3)[1] of the Act, that the said provisions are intended to enforce due compliance of the requirement of other provisions of the Act and to ensure proper collection of tax as also transparency in dealings of the parties. The necessity of disallowance comes into operation only when default of the nature specified in the provisions takes place. Looking to the object of these provisions, the suggestions about prejudice or hardship carry no meaning at all. Secondly, as noticed, by way of the proviso as originally inserted and its amendments in the years 2008 and 2010, requisite relief to a bona fide taxpayer who had collected TDS but could not deposit within time before submission of the return was also provided ; and as regards the amendment of 2010, this court ruled it to be retrospective in operation. The proviso so amended, obviously, safeguarded the interest of a bona fide assessee who had made the deduction as

1. Section 40A(3) envisaged at the relevant time that twenty per cent. of the expenditure exceeding twenty thousand rupees, of which payment was made otherwise than by a crossed cheque or bank draft, shall not be allowed as a deduction.

required and had paid the same to the Revenue. The appellant having failed to avail of the benefit of such relaxation too, cannot now raise a grievance of alleged hardship. Thirdly, as noticed, the appellant had shown total payments in truck freight account at Rs. 1,37,71,206 and total receipts from the company at Rs. 1,43,90,632. What has been disallowed is that amount of Rs. 57,11,625 on which the appellant failed to deduct the tax at source and not the entire amount received from the company or paid to the truck operators/owners. Viewed from any angle, we do not find any case of prejudice or legal grievance with the appellant.

21.1 Hence, answer to question No. 4 is clearly in the affirmative, i.e., against the appellant and in favour of the Revenue that the payments in question have rightly been disallowed from deduction while computing the total income of the assessee-appellant.

Conclusion

22 For what has been discussed hereinabove, this appeal fails and is, therefore, dismissed with costs.

[2020] 426 ITR 340 (SC)

[IN THE SUPREME COURT OF INDIA]

ANANDA SOCIAL AND EDUCATIONAL TRUST

v.

COMMISSIONER OF INCOME-TAX AND ANOTHER

(C. A. Nos. 5437 and 5438 of 2012)

DIRECTOR OF INCOME-TAX (EXEMPTIONS)

v.

FOUNDATION OF OPHTHALMIC AND OPTOMETRY RESEARCH EDUCATION CENTRE

(C. A. No. 4702 of 2014)

COMMISSIONER OF INCOME-TAX (EXEMPTIONS)

v.

SAI ASHISH CHARITABLE TRUST

(C. A. No. 1727 of 2020)

C. J. I., **B. R. GAVAI** and **SURYA KANT** JJ.

February 19, 2020.

SS ▶ ITA 1961, ss 11(1)(d), 12A, 12AA, 13
HF ▶ Assessee/Department

CHARITABLE PURPOSE—REGISTRATION OF TRUSTS OR INSTITUTIONS—FACTORS TO BE CONSIDERED—COMMISSIONER TO SATISFY HIMSELF THAT OBJECTS OF TRUST ARE GENUINE AND THAT ITS ACTIVITIES ARE IN FURTHERANCE OF OBJECTS AND EQUALLY GENUINE—NEWLY FORMED TRUST CAN BE REGISTERED EVEN THOUGH THERE ARE NO ACTIVITIES—INCOME-TAX ACT, 1961, S. 12AA.

CHARITABLE PURPOSE—REGISTRATION OF TRUSTS—FINDING THAT ASSESSEE HAD NOT SPENT ANY PART OF ITS INCOME FOR CHARITABLE PURPOSES—NOT A CASE OF CARRYING ON ACTIVITIES CONTRARY TO ITS OBJECTS—COMMISSIONER TO CONSIDER FACTS—INCOME-TAX ACT, 1961, S. 12AA.

CHARITABLE PURPOSE—REGISTRATION OF TRUSTS—DIRECTOR (EXEMPTIONS) REFUSING REGISTRATION FOR VIOLATION OF SECTIONS 11(1)(d) AND 13—TRIBUNAL ORDERING GRANT OF REGISTRATION—HIGH COURT HOLDING APPLICATION TO DEPEND UPON ACTIVITY CARRIED ON AND MANAGEMENT OF FUNDS BY TRUSTEES AND GENUINENESS OF ACTIVITIES—HIGH COURT REMANDING MATTER FOR DISPOSAL OF APPLICATION AFRESH ON MERITS—PROPER—INCOME-TAX ACT, 1961, SS. 11(1)(d), 12A, 13.

Section 12AA of the Income-tax Act, 1961 provides for registration of a trust. Such registration can be applied for by a trust which has been in existence for some time and also by a newly registered trust. There is no stipulation that the trust should have already been in existence and should have undertaken any activities before making the application for registration. Section 12AA undoubtedly requires the Commissioner to satisfy himself about the objects of the trust or institution and genuineness of its activities and grant a registration only if he is so satisfied. This is in order to ensure that the objects of the trust and its activities are charitable since the consequence of such registration is that the trust is entitled to claim benefits under sections 11 and 12 of the Act. In other words, if it appears that the objects of the trust and its activities are not genuine, that is to say, not charitable, the Commissioner is entitled to refuse and in fact, bound to refuse, such registration.

The purpose of section 12AA of the Act is to enable registration only of such trusts or institutions whose objects and activities are genuine. In other words, the Commissioner is bound to satisfy himself that the objects of the trust are genuine and that its activities are in furtherance of the objects of the trust, that is equally genuine.

Since section 12AA pertains to the registration of the trust and not to assessment of what a trust has actually done. The term "activities" in the provision includes "proposed activities". That is to say, a Commissioner is bound to consider whether the objects of the trust are genuinely charitable in nature and whether the activities which the trust proposes to carry on are genuine in the sense that they are in line with the objects of the trust. In contrast, the position would be different where the Commissioner proposes to cancel the registration of a trust under sub-section (3) of section 12AA of the Act. There the Commissioner would be bound to record the finding that an activity or activities actually carried on by the trust are not genuine being not in accordance with the objects of the trust. Similarly, the situation would be different where the trust has before applying for registration been found to have undertaken activities contrary to the objects of the trust.

The assessee-trust was formed on May 30, 2008 and applied for registration on July 10, 2008, i. e., within a period of about two months. No activities had been undertaken by the assessee before the application was made. The Commissioner rejected the application on the sole ground that since no activities had been undertaken by the trust, it was not possible to register it, presumably because it was not possible to be satisfied about whether the activities of the trust were genuine. The Appellate Tribunal reversed the orders of the Commissioner. The Department appealed to the High Court which upheld the order of the Tribunal holding that in the case of a newly formed trust even though there was no activities, it was possible to consider whether the trust can be registered under section 12AA of the Act. On appeal :

Held accordingly, *dismissing the appeal, that the view of the High Court was correct.*

Decision of the Delhi High Court in DIT *v.* FOUNDATION OF OPHTHALMIC AND OPTOMETRY RESEARCH EDUCATION CENTRE [2013] 355 ITR 361 (Delhi) *affirmed.*

CIT *v.* R. S. BAJAJ SOCIETY [2014] 222 Taxman 111 (All) *approved.*

SELF EMPLOYERS SERVICE SOCIETY *v.* CIT [2001] 247 ITR 18 (Ker) *disapproved.*

The assessee-trust which applied for registration under section 12AA of the Income-tax Act, 1961, was found not to have spent any part of its income on charitable activities. The Commissioner refused to grant registration to the trust. The Tribunal reversed the decision of the Commissioner and the High Court dismissed the Department's appeal therefrom. On appeal :

Held, *dismissing the appeal, that it had been found that the assessee had not spent any amount of its income for charitable purposes. This was a case of not carrying out the objects of the trust and not of carrying on activities contrary to its objects. These circumstances may arise for many reasons including not finding suitable circumstances for carrying on activities. Undoubtedly the inaction in carrying out charitable purposes might also become actionable depending on other circumstances but it was for the Commissioner to consider the issue by exercising his powers under sub-section (3) of section 12AA, if the facts justified such actions.*

Decision of the Delhi High Court (printed below) *affirmed.*

An application for registration under section 12A of the Income-tax Act, 1961 was filed on January 9, 2002 with an application for condonation of delay. The Director (Exemptions) dismissed it by order dated June 28, 2002 on the grounds, inter alia, of violation of sections 11(1)(d) and 13 of the Act. The Appellate Tribunal ordered grant of registration to the assessee-trust from its inception. The Department's appeal to the High Court from that order was allowed holding that the Tribunal was not justified in simply setting aside the orders of the Director even without considering the fact that section 10(22) of the Act had been deleted as on the date of consideration of the application by the Director (Exemptions), that renewal of registration or considering a fresh application for registration under section 12A would entirely depend upon the activity carried on by the assessee and management of its funds by the trustees and genuineness of its activities carried on in the previous year or years. The court restored the order of the Director (Exemptions) dated June 28, 2002. An application filed on September 21, 2006 by the assessee-trust for registration under section 12A of the Income-tax Act, 1961 and seeking condonation of delay for the period between January 10, 1980 and April 1, 2001 was also dismissed and the Tribunal having held that the assessee was entitled to registration, the Department appealed to the High Court. In view of the earlier order of the High Court on the Department's appeal, the appeal arising out of the application filed on September 21, 2006 was remanded to the Director (Exemptions) for consideration afresh on its merits because, on account of rejection of the earlier application in 2002, the application of 2006 came to be rejected as also the condonation of delay application. The court made it clear that the Tribunal shall consider the application dated September 21, 2006 for registration under section 12A of the Act only from 2002-03 onwards and kept all contentions open. On appeal to the Supreme Court :

Held, *dismissing the appeals, that the reasons assigned by the High Court in the judgments needed no interference as they were in consonance with law.*

Decisions of the Karnataka High Court (printed below) *affirmed.*

Cases referred to :

CIT *v.* R. S. Bajaj Society [2014] 222 Taxman 111 (All) (para 14)

DIT *v.* Foundation of Ophthalmic and Optometry Research Education Centre [2013] 355 ITR 361 (Delhi) (para 4)

Self Employers Service Society *v.* CIT [2001] 247 ITR 18 (Ker) (para 15)

Civil Appeal Nos. 5437 and 5438 of 2012, 4702 of 2014 and 1727 of 2020.

Civil Appeal No. 4702 of 2014 is from the judgment and order dated August 16, 2012 of the Delhi High Court in I. T. A. No. 1687 of 2010. The judgment of the High Court is reported as *DIT* v. *Foundation of Ophthalmic and Optometry Research Education Centre* [2013] 355 ITR 361 (Delhi).

Civil Appeal Nos. 5437 and 5438 of 2012 are from the judgments and orders dated November 9, 2010 and December 7, 2010 of the Karnataka High Court in I. T. A. Nos. 44 of 2006 and 24 of 2008, respectively.

Civil Appeal No. 1727 of 2020 is from the judgment and order dated April 8, 2015 of the Delhi High Court in I. T. A. No. 98 of 2015.

The judgments of the Karnataka High Court (coram : MRS. MANJULA CHELLUR and ARAVIND KUMAR JJ.) ran as follows :

"JUDGMENTS

The judgments of the court were delivered by

MRS. MANJULA CHELLUR J.—(November 9, 2010) : The following substantial question of law was framed in the above appeal :

> 'Whether the Tribunal was right in holding that the assessee would be entitled, to claim registration under section 12A of the Act despite the Commissioner recording a categorical finding that the assessee would not be entitled to claim registration, in view of the fact that the assessee was receiving donations contrary to the Education Act, not maintaining books of account, not filing return of income within time, misappropriation and various other reason assigned ?'

2. The assessee filed an application in Form 10A on January 9, 2002 seeking registration under section 12A of the Income-tax Act, 1961 (hereinafter referred to as the 'Act' for the sake of brevity). According to the

assessee, it is a trust created on January 10, 1980 and M/s. Ananda Social and Educational Society was registered much earlier, i.e., December 3, 1973 under the Karnataka Societies Registration Act. According to the assessee they are conducting social, educational and cultural activities and to the said process have established medical college, dental college apart from, nursing college in and around, Bangalore. The above said application came to be considered by the Director of Income-tax (Exemptions), Bangalore and after considering the returns filed by the assessee and details furnished, by order dated June 28, 2002 rejected the application filed by the assessee for registration under section 12A of the Act. The adjudicating authority found that M/s. Ananda Social and Educational Association had not obtained registration under section 12A of the Act before transferring its assets and liabilities to the present trust. It was also found that it had not taken any approval of the Commissioner for effecting the said transfer. The adjudicating authority on examination of the material produced before it, found that donations were received regularly and it was shown as hundi credits and therefore, it violates section 11(1)(d) of the Act. It was found by the authority that institution was making profit, by collecting donations and it was against Education Act. Therefore, registration sought could not be granted and it was also found by the adjudicating authority that the amounts of the trust were made use of for the personal benefit of the chairman of the trust and as such, it was held that it amounts to violation of section 13 of the Act. On these grounds, registration sought for by the assessee was refused vide order dated June 28, 2002.

3. Aggrieved by the said order, the assessee filed an appeal before the Income-tax Appellate Tribunal in I. T. A. No. 1410/Bang/2002. The Tribunal after considering the arguments advanced by the assessee as well as the Revenue, found that, the assessee was imparting medical, nursing and dental education and if the object of the assessee is to carry out charitable activity and if the object is charitable purpose, and incidentally if some profit out of such activity is earned it cannot be held to be a non-charitable institution, as such it was of the view that registration ought to have been issued under section 12A of the Act. It was held by the Tribunal that the Director (Exemptions) did not refer to any material which would indicate that activity carried on by the respondent-institution does not amount to charity. On these grounds, the Tribunal by order dated August 26, 2005 held that the assessee is entitled for registration under section 12A of the Act and accordingly allowed the appeal filed by the assessee.

4. Aggrieved by same the Revenue is in appeal by raising the above substantial question of law.

5. We have heard the learned counsel, for the Revenue, Sri M. V. Seshachala and Sri H. C. Shivaram, learned counsel appearing for the respondent-assessee and perused the orders passed by the Director (Exemptions) and the order of the Tribunal.

6. The learned counsel for the Revenue would contend that the various amounts received by the assessee under the guise of donation was contrary to the Education Act, and the assessee was not maintaining regular books of account, not filing return of income within time and the activity carried on by the assessee subsequent to deletion of section 10(22) from the Act with effect from April 1, 1991, the so-called activity of education would be outside the purview of the Act and therefore, even if there was an exemption under section 80G, on earlier occasion prior to 1999, it would not enure to the benefit of the respondent-assessee and as such, it is contended, that refusal of registration was justified. He would also contend that the order of the Director (Exemptions) clearly indicates that the assessee was not filing the returns regularly and there was embezzlement of amounts pertaining to the trust in question. Books of account were not produced and the assessee was a profit-making institution rather than conducting any charity work as claimed by them. Therefore, there was no compliance of sections 11, 12 and 18 of the Act. Hence, it is contended that the order of the Tribunal is erroneous. It is contended that the Tribunal has ignored the detailed discussion made by the Director (Exemptions) while refusing registration. In support of his submission he relies upon the judgment of the hon'ble apex court in the case of *CIT* v. *Baldwin Girls High School* in SLP No. 4173 of 2009 disposed of on October 28, 2010.

7. Per contra, the learned counsel for the respondent-assessee contends that right from 1980 the assessee had the benefit of exemption under section 80G and merely there is delay in filing application or filing of wrong application would not come in the way of granting registration under section 12A of the Act and according to him the statement of Mr. P. L. Nanjundaswamy, the then chairman of the trust during 1996-97 was not to the effect that he had made use of the amounts of the trust for his personal benefit and therefore the observations of the director that there was misuse of funds of the trust for personal use was also incorrect and according to him remand report furnished by the Assessing Officer noted in the orders of the Director would indicate that all the books of account were very much before the adjudicating authority as referred to in the remand report and therefore the observation of the Director (Exemptions) that no books of account were produced, while seeking registration under section 12A was

erroneous and therefore he prays for dismissal of the appeal by answering the substantial questions of law in favour of the assessee.

8. He also relies upon the decision reported in *Sanjeevamma Hanumanthe Gowda Charitable Trust* v. *DIT* [2006] 285 ITR 237 (Karn). According to him for the purpose of registration under section 12AA of the Act the authorities have to satisfy themselves as to the genuineness of the activities of the trust or institution and how the income from the trust property was applied and not the nature of the activity by which the income was derived by the trust. According to him in the present case also the predominant activity of the institution is to impart education is to be seen and nothing else while considering the application under section 12A of the Act for registration.

9. Having heard the learned advocates, we have gone through sections 10A, 12A and 12AA of the Act. Section 10A refers to the form in which an application has to be filed. Section 12A refers to the need or necessity of registration and how the application in Form 10A has to be registered. Section 12AA is the exercise done by the authority which issues the registration under section 12A and the criterion upon which such registration has to be issued. Section 12AA reads as under :

> '12AA. (1) The Commissioner, on receipt of an application for registration of a trust or institution made under clause (a) of section 12A, shall—
>
> (a) call for such documents or information from the trust or institution as he thinks necessary in order to satisfy himself about the genuineness of activities of the trust or institution and may also make such inquiries as he may deem necessary in this behalf ; and
>
> (b) after satisfying himself about the objects of the trust or institution and the genuineness of its activities, he—
>
> (i) shall pass an order in writing registering the trust or institution ;
>
> (ii) shall, if he is not so satisfied, pass an order in writing refusing to register the trust or institution,
>
> and a copy of such order shall be sent to the applicant :
>
> Provided that no order under sub-clause (ii) shall be passed unless the applicant has been given a reasonable opportunity of being heard.
>
> (1A) All applications, pending before the Chief Commissioner on which no order has been passed under clause (b) of sub-section (1) before the 1st day of June, 1999, shall stand transferred on that day to the Commissioner and the Commissioner may proceed with such

applications under that sub-section from the stage at which they were on that day.

(2) Every order granting or refusing registration under clause (b) of sub-section (1) shall be passed before the expiry of six months from the end of the month in which the application was received under clause (a) of section 12A.

(3) Where a trust or an institution has been granted registration under clause (b) of sub-section (1) and subsequently the Commissioner is satisfied that the activities of such trust or institution are not genuine or are not being carried out in accordance with the objects of the trust or institution, as the case may be, he shall pass an order in writing cancelling the registration of such trust or institution :

Provided that no order under this sub-section shall be passed unless such trust or institution has been given a reasonable opportunity of being heard.'

Section 12AA refers to the powers of the authority concerned, calling upon the concerned assessee to produce the documents and other information which the authority thinks necessary for consideration of its application in order to arrive at a conclusion about the genuineness of the activity of the trust or institution and the authority can also make other enquiries which it deems fit in the circumstances of a particular case. Only after making such an enquiry, if the authority satisfies itself about the objects of the trust or institution and also the genuineness of its activities, it shall proceed with the passing of an order either allowing and issuing registration or rejecting the application in writing giving the reasons for such refusal. One has to see whether the Director (Exemptions) concerned has acted in accordance with the mandate provided under section 12AA of the Act. Even in the special leave petition referred to by the learned counsel for the Revenue relating to the case of *Baldwin Girls'High School* their Lordships while remanding back the matter for fresh consideration has made the following observations :

'The appellate authorities failed to appreciate that payments had been made towards Home Mission/SIRC, a religious institution. The son of the Bishop had been appointed as principal of Baldwin Methodist College. The daughter of the Bishop was appointed as a high school teacher and several construction activity as well as purchase of items had taken place by the Bishop through one A. G. Hoover at prices more than the market value and advances had been paid for purchase of land at exorbitant rates without any agreements. This clearly showed that the entire organization had systematically not

utilised the funds exclusively for educational purposes but for profit of the Bishop and his family members and therefore not entitled to an exemption under section 10(22) of the Act.'

A perusal of the above order would indicate that the authority concerned also has to see whether the utilisation of funds was made for the organisation or for the benefit of any particular member or members, which applied for considering the case of the applicant for exemption under section 10(22) of the Act. This observation was with reference to the transaction of the year when section 10(22) of the Act was still in the statute. Now we are concerned with a situation in 2002 when section 10(22) itself was deleted from the enactment. Therefore when section 10(22) itself was deleted with effect from April 1, 1999, the claim of the respondent-assessee that its predominant object is to propagate education will be of no avail to the respondent. Then, the observations of the Tribunal that there was all the material available before the Director (Exemptions) for consideration of the matter would also be incorrect since as seen from the findings of the Director (Exemptions) vide his order dated June 28, 2002 at paragraphs 12 and 13.

10. We find that the Director (Exemptions) has held that true accounts are not being maintained by the assessee and even such of those accounts maintained had not been produced. The entire order goes to show that several opportunities were given to the respondent-institution to produce the entire material before the authority concerned to appreciate the claim of the assessee for granting registration as sought by it. After giving opportunity and taking into account the available material on record, the Director (Exemptions) observed that the respondent-trust has not maintained proper accounts though there was an express provision in the deed of the trust that proper accounts has to be maintained and accounts will have to be audited by the accountant and the same was not done. There is a specific observation made by the Director (Exemptions), on this, which the Tribunal has failed to look into. That apart donation was not even accounted for in the books of account of the trust. At para 11 of the order of the Tribunal we note that the Tribunal referred to litigation pending before the court pertaining to the very trust relating to misappropriation of the trust funds by the earlier Chairman. A huge collection of donations was against hundi credits and the details of the donors was also not disclosed. No doubt it is not the nature of the activity from which the donations are collected but the activity for which such donations are utilised has to be looked into while considering the registration of the institution for the purpose of section 12A of the Act. With the deletion of section 10(22) of the

Act when the trust is imparting education it cannot be held to be a charitable activity earlier automatically. It would be incumbent upon the assessee to show that the activity of education done by them would attract the definition of charity as contemplated under section 10(22) subsequent to April 1, 1999.

11. It is not even the case of the respondent that they are imparting medical, dental and nursing education only to weaker sections of the society or to a particular section of society who are unable to meet the expenses of education. In other words, it is not their case imparting education in the institution is on charitable grounds and nothing else. If a portion of the funds are diverted for other charitable purposes, especially in the light of the members of the trust taking benefit of the said funds, it would only indicate that there is gross violation of section 13 of the Act as observed by the Director (Exemptions).

12. Therefore the entire material on record would indicate that the assessee's activity was nothing but profit-making activity. On the other hand, the respondent-institution must demonstrate before the Director (Exemptions) that, in the previous year they did divert their funds mainly for the purpose of charity in order to get registration. If the object of the trust would indicate that it is also meant for charity purpose, unless the charity activity is carried on with the income of the trust such benefit cannot be availed of by them. Therefore, the criteria would be what activity was conducted by the institution in the previous year, whether such activity would amount to charity work or any other work. Therefore from the material available on record the Director (Exemptions) was able to find out that no such charitable activity was carried on by the assessee and on the other hand the receipt of donation against hundi credits was by way of donation from students and it was nothing but a profit-making institution. He also finds that there was violation of section 13 of the Act and there was no promptness on the part of the assessee in furnishing the details sought for by the Director (Exemptions) at relevant point of time. All these facts persuaded the Director (Exemptions) to reject the application filed by the respondent-institution. The Tribunal instead of looking into these grounds on which the Director (Exemptions) rejected the application of the respondent-institution proceeded erroneously holding that the authority or the Director was not able to point out any activity of the assessee was not charitable. On the other hand, the very provision of section 12AA says that the authority who has to issue the exemption must be satisfied about the activities carried on by the institution, to be genuine and it amounts to

charitable activity. The authority on examination of claim and also the records was not satisfied about this.

13. Viewed from any angle we are of the opinion that the Tribunal was not justified in setting aside the orders of the Director (Exemptions) even without considering the fact that there was deletion of section 10(22) of the Act as on the date of consideration of the application by the Director of Income-tax (Exemptions). We also make it clear that this certificate issued cannot be valued for an indefinite period. The renewal of registration, or considering a fresh application of the applicant for registration under section 12A would entirely depend upon the activity carried on by the institution and the management of its funds by the concerned trustees and genuineness of its activities carried on under the previous year or years as the case may be depending upon the information sought for by the authority and furnishing of the same by an appellant.

14. In view of the above discussion, we are of the considered view that the Tribunal was in error in holding that the assessee would be entitled to claim registration under section 12A of the Act by answering the substantial question of law in the negative, i.e., in favour of the Revenue and against the assessee. Hence, the appeal is allowed and the order of the Tribunal, Bangalore passed in I. T. A. No. 1410/Bang/2002 dated August 26, 2005 is hereby set aside and the order of Director (Exemptions) dated June 28, 2002 is restored.

MRS. MANJULA CHELLUR J.—(December 7, 2010)—The present appeal pertains to the application filed by the respondent-trust for registration under section 12A of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') seeking condonation of delay for the period between January 10, 1980 and April 1, 2001. Apparently similar application under section 12A of the Act was filed for registration on January 9, 2002 and the same came to be considered by the Director of Income-tax (Exemptions) and was rejected on merits on June 28, 2002. Similarly an application for condonation of delay was also rejected as no sufficient cause was shown for such delay. Thereafter, the matter was taken up before the Appellate Tribunal and on August 26, 2005, the Tribunal considered the appeal filed by the assessee against the rejection of the application and ordered for grant of registration. However, this order was challenged by the Revenue in I. T. A. No. 44 of 2006.

2. Admittedly, the said I. T. A. No. 44 of 2006 came to be allowed on January 9, 2010 holding that the Tribunal was not justified in simply setting aside the orders of the Director without even considering the fact that there was deletion of section 10(22) of the Act as on the date of consideration of

the application and in the earlier order it is made clear that registration granted cannot be valid for a particular period and issue of registration on fresh application would depend entirely upon the activity carried on by the institution apart from consideration of other materials required to be considered for issuance of such registration.

3. In that view of the matter, we are of the view that the Director of Income-tax (Exemptions) will have to consider the application for registration filed under section 12A of the Act on September 21, 2006 afresh on its merits. Accepting the contention of the Revenue and setting aside the order of the Tribunal in I. T. A. No. 44 of 2006 would disclose that the application dated September 21, 2006 cannot be considered for the assessment years from 1980 to 2001-02 because even in the earlier application the assessee had sought for such registration right from 1980 onwards.

4. In the present case, on account of rejecting the earlier application in 2002, the application for 2006 came to be rejected so also the condonation of delay application came to be rejected for the reasons stated in the earlier order. The rejection order of this matter was taken up before the Tribunal in I. T. A. No. 591 of 2007 by the assessee. The Tribunal held that the explanation for belated application under section 12A of the Act was to be accepted and delay should be condoned. It also held that registration should be granted from the inception of the trust, i.e., from April 1, 1999 retrospectively. This order of the Tribunal is under challenge by the Revenue before us.

5. As the rejection of the application of 2005 was on the ground that the Director of Income-tax (Exemptions) had rejected the application in 2002 and similarly the reason for allowing the condonation of delay, we are of the opinion, that the present appeal has to be disposed of by remanding the matter back to the Tribunal to dispose of the I. T. A. No. 591 of 2007 afresh. We also make it clear that the Tribunal shall consider the application dated September 21, 2006 for registration under section 12A of the Act only from 2002-03 onwards and all contentions are kept open.

Accordingly, the appeal is disposed of."

The judgment of the Delhi High Court (coram : S. RAVINDRA BHAT and R. K. GAUBA JJ.) in I. T. A. No. 98 of 2015 ran as follows :

"JUDGMENT

The Revenue is aggrieved by the decision of the Income-tax Appellate Tribunal (ITAT) dated June 20, 2014 in I. T. A. No. 5501/Del/2012. It urges that the impugned order which sets aside the order of the Director,

Income-tax, refusing registration under section 12A of the Income-tax Act, 1961 (for short 'the Act'), is erroneous.

2. The assessee-trust which was created on September 26, 2009 to carry out the various charitable activities had applied for registration under sections 12A and 80G of the Act on February 17, 2012, using the appropriate statutory forms. The registration was denied on the ground that the activities of the trust did not match the tune of donations received consequently, held that it was not eligible. The Income-tax Appellate Tribunal relied upon a decision of this court in *DIT* v. *Foundation of Ophthalmic and Optometry Research Education Centre* [2013] 355 ITR 361 (Delhi). Likewise, a similar reasoning was adopted by the Allahabad High Court in the case of *CIT* v. *R. S. Bajaj Society* [2014] 222 Taxman 111 (All). It was held in these decisions, inter alia, the registration authorities are not required to verify the activities of the trust while granting the registration and are to satisfy only about the genuineness of the objects and whether they qualify for registration as a 'charitable trust'.

3. Since given the decision of this court in *Foundation of Ophthalmic and Optometry Research Education Centre* (supra), we are of the opinion that no question of law arises.

4. The appeal is consequently dismissed."

Pritesh Kapur and *Ms. Aishwarya Bhati* Senior Advocates, *Senthil Jagadeesan*, *Ms. Sonakshi Malhan*, *Ms. Suriti Chowdhary*, *Ms. Mrinal Kanwar*, *Satyalipsu Ray*, *Vikas Bomsal* and *Mrs. Anil Katiyar*, Advocates, for the appearing parties.

JUDGMENT

Civil Appeal No(s). 5437 and 5438 of 2012

We have heard learned counsel appearing for the parties and perused the impugned judgment(s) and order(s) passed by the High Court of Karnataka. 1

In our considered view, the reasons assigned by the High Court in passing the impugned judgment(s) and order(s) need no interference as the same are in consonance with law. 2

Accordingly, there is no merit in these appeals and they are dismissed. 3

Civil Appeal No. 4702 of 2014

This appeal has been preferred by the appellant-Director of Income-tax against the impugned judgment and order passed by the Delhi High Court[1] 4

1. *DIT* v. *Foundation of Ophthalmic and Optometry Research Education Centre* [2013] 355 ITR 361 (Delhi).

holding that a newly registered trust is entitled for registration under section 12AA of the Income-tax Act, 1961 (for short, the "Act") on the basis of its objects, without any activity having been undertaken. Section 12AA of the Act reads as follows :

"12AA. *Procedure for registration.*—(1) The Principal Commissioner or Commissioner, on receipt of an application for registration of a trust or institution made under clause (a) or clause (aa) or clause (ab) of sub-section (1) of section 12A, shall—

(a) call for such documents or information from the trust or institution as he thinks necessary in order to satisfy himself about the genuineness of activities of the trust or institution and may also make such inquiries as he may deem necessary in this behalf ; and

(b) after satisfying himself about the objects of the trust or institution and the genuineness of its activities, he—

(i) shall pass an order in writing registering the trust or institution ;

(ii) shall, if he is not so satisfied, pass an order in writing refusing to register the trust or institution,

and a copy of such order shall be sent to the applicant :

Provided that no order under sub-clause (ii) shall be passed unless the applicant has been given a reasonable opportunity of being heard.

(1A) All applications, pending before the Principal Chief Commissioner or Chief Commissioner on which no order has been passed under clause (b) of sub-section (1) before the 1st day of June, 1999, shall stand transferred on that day to the Principal Commissioner or Commissioner and the Principal Commissioner or Commissioner may proceed with such applications under that sub-section from the stage at which they were on that day.

(2) Every order granting or refusing registration under clause (b) of sub-section (1) shall be passed before the expiry of six months from the end of the month in which the application was received under clause (a) or clause (aa) or clause (ab) of sub-section (1) of section 12A.

(3) Where a trust or an institution has been granted registration under clause (b) of sub-section (1) or has obtained registration at any time under section 12A as it stood before its amendment by the Finance (No. 2) Act, 1996 (33 of 1996) and subsequently the Principal Commissioner or Commissioner is satisfied that the activities of such trust or institution are not genuine or are not being carried out in accordance with the objects of the trust or institution, as the case may

be, he shall pass an order in writing cancelling the registration of such trust or institution :

Provided that no order under this sub-section shall be passed unless such trust or institution has been given a reasonable opportunity of being heard.

(4) Without prejudice to the provisions of sub-section (3), where a trust or an institution has been granted registration under clause (b) of sub-section (1) or has obtained registration at any time under section 12A as it stood before its amendment by the Finance (No. 2) Act, 1996 (33 of 1996) and subsequently it is noticed that the activities of the trust or the institution are being carried out in a manner that the provisions of sections 11 and 12 do not apply to exclude either whole or any part of the income of such trust or institution due to operation of sub-section (1) of section 13, then, the Principal Commissioner or the Commissioner may by an order in writing cancel the registration of such trust or institution :

Provided that the registration shall not be cancelled under this sub-section, if the trust or institution proves that there was a reasonable cause for the activities to be carried out in the said manner."

5 The above section provides for registration of a trust. Such registration can be applied for by a trust which has been in existence for some time and also by a newly registered trust. There is no stipulation that the trust should have already been in existence and should have undertaken any activities before making the application for registration.

6 In brief, section 12AA of the Act empowers the Principal Commissioner or the Commissioner of Income-tax on receipt of an application for registration of a trust to call for such documents as may be necessary to satisfy himself about the genuineness of activities of the trust or institution and make inquiries in that behalf ; it empowers the Commissioner to thereupon register the trust if he is satisfied about the objects of the trust or institution and genuineness of its activities.

7 In the present case, the trust was formed as a society on May 30, 2008 and it applied for registration on July 10, 2008, i.e., within a period of about two months.

8 No activities had been undertaken by the respondent-trust before the application was made. The Commissioner rejected the application on the sole ground that since no activities have been undertaken by the trust, it was not possible to register it, presumably because it was not possible to be satisfied about whether the activities of the trust are genuine. The Income-

tax Appellate Tribunal, Delhi (for short, the "Tribunal") reversed the orders of the Commissioner. The Revenue Department approached the High Court by way of filing an appeal. The High Court upheld the order of the Tribunal and came to the conclusion that in the case of a newly registered trust even though there was no activities, it was possible to consider whether the trust can be registered under section 12AA of the Act. This judgment is assailed before us.

9 Section 12AA undoubtedly requires the Commissioner to satisfy himself about the objects of the trust or institution and genuineness of its activities and grant a registration only if he is so satisfied. The said section requires the Commissioner to be so satisfied in order to ensure that the object of the trust and its activities are charitable since the consequence of such registration is that the trust is entitled to claim benefits under sections 11 and 12 of the Act. In other words, if it appears that the objects of the trust and its activities are not genuine that is to say not charitable the Commissioner is entitled to refuse and in fact, bound to refuse such registration.

10 It was argued before us that the Commissioner is required to be satisfied about two things—firstly that the objects of the trust and secondly, its activities are genuine. If there have been no activities undertaken by the trust then the Commissioner cannot assess whether such activities are genuine and therefore, the Commissioner is bound to refuse the registration of such a trust.

11 We have given our anxious consideration to the above submissions made by Ms. Aishwarya Bhati, learned senior counsel appearing for the appellant-Director of Income-tax and find that it is not possible to agree with the same. The purpose of section 12AA of the Act is to enable registration only of such trust or institution whose objects and activities are genuine. In other words, the Commissioner is bound to satisfy himself that the objects of the trust are genuine and that its activities are in furtherance of the objects of the trust, that is equally genuine.

12 Since section 12AA pertains to the registration of the trust and not to assess of what a trust has actually done, we are of the view that the term "activities" in the provision includes "proposed activities". That is to say, a Commissioner is bound to consider whether the objects of the trust are genuinely charitable in nature and whether the activities which the trust proposed to carry on are genuine in the sense that they are in line with the objects of the trust. In contrast, the position would be different where the Commissioner proposes to cancel the registration of a trust under sub-section (3) of section 12AA of the Act. There the Commissioner would be bound to record the finding that an activity or activities actually carried on

by the trust are not genuine being not in accordance with the objects of the trust. Similarly, the situation would be different where the trust has before applying for registration found to have undertaken activities contrary to the objects of the trust.

We therefore find that the view of the Delhi High Court in the impugned judgment is correct and liable to be upheld. **13**

Ms. Bhati, learned senior counsel for the appellant, fairly drew our attention to a judgment of the Allahabad High Court in Income Tax Appeal No. 36 of 2013 titled as *CIT* v. *R. S. Bajaj Society*[1] which has taken the same view as that of the Delhi High Court in the impugned judgment. The Allahabad High Court has also referred to a similar view taken by the High Courts of Karnataka and Punjab and Haryana. **14**

Apparently, a contrary view has been taken by the Kerala High Court in the case of *Self Employers Service Society* v. *CIT* [2001] 247 ITR 18 (Ker). That view however does not commend itself. However, the facts in *Self Employers Service Society* (supra) suggest that the Commissioner of Income-tax had observed that the applicant for registration as a trust had undertaken activities which were contrary to the objects of the trust. **15**

In the result, we find that there is no reason to interfere with the impugned judgment of the High Court of Delhi. The appeal is, accordingly, dismissed. **16**

Civil Appeal No. 1727 of 2020 (at SLP (C) No. 25761 of 2015)

Leave granted. **17**

In this case, the trust which applied for registration under section 12AA of the Income-tax Act, 1961, was found not to have spent any part of its income on charitable activities. The Commissioner of Income-tax, therefore, refused the registration of trust. **18**

The Income-tax Appellate Tribunal reversed the decision of the Commissioner of Income-tax on the basis of the judgment of the Delhi High Court in matters referred to above. **19**

For the reasons stated earlier, we are of the view that the object of the provision in question is to ensure that the activities undertaken by the trust are not contrary to its objects and that a Commissioner is entitled to refuse registration if the activities are found contrary to the objects of the trust. **20**

In the present case, what has been found is that the trust had not spent any amount of its income for charitable purposes. This is a case of not carrying out the objects of the trust and not carrying on activities contrary to its object. These circumstances may arise for many reasons including not **21**

1. [2014] 222 Taxman 111 (All).

finding suitable circumstances for carrying on activities. Undoubtedly the inaction in carrying out charitable purposes might also become actionable depending on other circumstances ; but we are not concerned with such a case here.

22 In these circumstances, we leave it upon the Commissioner of Income-tax to consider the issue by exercising his powers under sub-section (3) of section 12AA, if the facts justify such actions.

23 The appeal is, however, dismissed.

[2020] 426 ITR 358 (Bom)

[IN THE BOMBAY HIGH COURT]

PRINCIPAL COMMISSIONER OF INCOME-TAX

v.

HYBRID FINANCIAL SERVICES LTD.

(formerly known as Mafatlal Finance Co. Ltd.)

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

February 11, 2020.

SS ▶ ITA 1961, ss 28, 36(1)(vii)
AY ▶ 2001-02, 2003-04
HF ▶ Assessee

BAD DEBTS—CONDITION PRECEDENT—LAW AFTER 1-4-1989—NOT NECESSARY FOR ASSESSEE TO ESTABLISH OR PROVE THAT DEBT HAS BECOME IRRECOVERABLE—RECORDING OF DEBT AS BAD DEBT IN BOOKS OF ACCOUNT BY ASSESSEE SUFFICIENT—ONUS ON ASSESSING OFFICER TO PROVE OTHERWISE—INCOME-TAX ACT, 1961, ss. 28, 36(1)(vii).

It is a settled position in law that after April 1, 1989, it is not necessary for the assessee to establish or prove that the debt has in fact become irrecoverable but it would be sufficient if the bad debt is written off under section 36(1)(vii) of the Income-tax Act, 1961 as irrecoverable in the accounts of the assessee. The decision to treat a debt as a bad debt is a commercial or business decision of the assessee. Recording a debt as a bad debt in his books of account by the assessee prima facie establishes that it is a bad debt. If the Assessing Officer disputes that, the onus would be on him to prove otherwise.

The assessee provided finance in the field of lease and hire purchase transactions, management consultancy services, etc. During the assessment proceedings for the assessment year 2001-02, the Assessing Officer found that the assessee had written off inter corporate deposits, in respect of four cases,

which pertained to advances given either for purchase of vehicles or plant and machinery. The Assessing Officer took the view that unless there was an admitted debt it could not be allowed as bad debt under section 36(1)(vii) when it was written off and that the debt must be incidental to the business or profession of the assessee and disallowed the claim in his order under section 143(3) for the assessment years 2001-02 and 2003-04. The Commissioner (Appeals) held that mere reversal of income in its books of account did not entitle the assessee to claim deduction and affirming the view taken by the Assessing Officer rejected the claim of bad debts made by the assessee. The Tribunal found that the assessee had written off all the debts in question as irrecoverable in its accounts, set aside the findings of the Commissioner (Appeals) and allowed the claim of bad debts of the assessee. On appeals :

Held, *dismissing the appeals, that the Tribunal had recorded from the materials on record that admittedly, the debt in question had been written off as irrecoverable in the accounts of the assessee. The requirement of section 36(1)(vii) had been complied with and the amount covered by the bad debts would be entitled to be deducted while computing income under section 28. There was no requirement under the Act that the bad debt had to accrue out of income under the same head, i. e., "Income from business or profession" to be eligible for deduction. All that was required was that the debt in question must be written off by the assessee in its books of account as irrecoverable. There was no error or infirmity in the view taken by the Tribunal. No question of law arose.*

CIT *v.* Shreyas S. Morakhia [2012] 342 ITR 285 (Bom) *applied*.

Cases referred to :

CIT *v.* Shreyas S. Morakhia [2012] 342 ITR 285 (Bom) (para 16)

DIT (International Taxation) *v.* Oman International Bank [2009] 313 ITR 128 (Bom) (para 10)

T. R. F. Ltd. *v.* CIT [2010] 323 ITR 397 (SC) (para 11)

Income Tax Appeal Nos. 1265 and 1469 of 2017.

Akhileshwar Sharma for the appellant.

Nitesh Joshi instructed by *R. V. Pillai* for the respondent.

JUDGMENT[1]

The judgment of the court was delivered by

Ujjal Bhuyan J.—This order will dispose of both Income Tax Appeal Nos. 1265 of 2017 and 1469 of 2017. **1**

1. Oral judgment

2 Heard learned counsel for the parties.

3 The assessee in both the appeals is the same. While Income Tax Appeal No. 1265 of 2017 relates to the assessment year 2001-02, Income Tax Appeal No. 1469 of 2017 relates to the assessment year 2003-04.

4 However, for the sake of convenience, we may refer to the facts in Income Tax Appeal No. 1265 of 2017.

5 This appeal under section 260A of the Income-tax Act, 1961 ("the Act" for short) is preferred by the Revenue against the order dated August 26, 2016 passed by the Income-tax Appellate Tribunal, Mumbai "H" Bench, Mumbai ("Tribunal" for short) in Income Tax Appeal No. 7175/Mum/2010 for the assessment year 2001-02.

5.1. As already noted, Income Tax Appeal No. 1469 of 2017 assails the same order but arising out of Income Tax Appeal No. 7176/Mum/2010 for the assessment year 2003-04.

6 The Revenue has preferred this appeal projecting the following two questions as substantial questions of law :

> "(i) Whether on the facts and in the circumstances of the case and in law, the order of the Tribunal for the assessment years 2001-02 and 2003-04 is perverse as it is not based on the facts, relevant to the assessment year ?
>
> (ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal has erred in law to allow bad debts on account of inter corporate debt and advances in contravention of section 36(1)(vii) read with section 36(2) of the Act in spite of the fact that the assessee-company is not a banking company or engaged in the business of money lending ?"

7 Basically, the two questions centre around allowance of the claim of the respondent-assessee of bad debts by the Tribunal by deleting the additions made by the Assessing Officer as affirmed by the first appellate authority.

8 For proper appreciation of the aforementioned two questions, it may be apposite to deal with the orders passed by the authorities below.

9 The respondent is an assessee under the Act and subject to assessment jurisdiction of the Assessing Officer, the Assistant Commissioner of Income-tax, Range-10(1)(1), Mumbai. The respondent-assessee is a company engaged in the business of providing finance in the field of lease and hire purchase transaction, management consultancy services, etc. During the assessment proceedings for the assessment year 2001-02, the Assessing Officer noticed that the assessee had claimed bad debts of Rs. 13,01,04,359. While in three cases, the assessee had written off inter corporate deposits,

in respect of four cases, the writing off of bad debts pertains to advances given either for the purchase of vehicles or plant and machinery. Referring to section 36(1)(vii) of the Act, the Assessing Officer took the view that unless there was an admitted debt it could not be allowed as bad debt when it is written off. Besides, the debt must be incidental to the business or profession of the assessee. Taking such view, the Assessing Officer issued a notice to the assessee to show cause as to why the amounts covered by the bad debts should not be added to the income of the assessee. The assessee in its reply stated that writing off any debt as irrecoverable in the accounts was sufficient compliance to section 36(1)(vii) of the Act. However, by the assessment order dated February 19, 2004 passed under section 143(3) of the Act, the Assessing Officer did not accept the reply submitted by the assessee. The Assessing Officer held that a debt is allowable only when it is a debt arising out of and is incidental to the trade carried out by the assessee. Therefore, the Assessing Officer held that the claim of the assessee for writing off all the dues could not be entertained.

Aggrieved by the assessment order, the assessee preferred an appeal **10** before the Commissioner of Income-tax (Appeals)-22, Mumbai (also referred as "first appellate authority"). By the appellate order dated August 4, 2010, the first appellate authority considered the rival submissions and relying on the decision of this court in *DIT (International Taxation)* v. *Oman International Bank* [2009] 313 ITR 218 (Bom) held that apart from writing off the debts as bad debts, action of the assessee has to be bona fide and such decision must be based on some material in possession of the assessee. Mere reversal of income in its books of account did not entitle the assessee to claim deduction. Affirming the view taken by the Assessing Officer, the first appellate authority rejected the claim of bad debts made by the assessee.

In further appeal before the Tribunal, reliance was placed in the case of **11** *T. R. F. Ltd.* v. *CIT* [2010] 323 ITR 397 (SC) wherein the Supreme Court held that after April 1, 1989, it was not necessary for the assessee to establish that the debt in fact has become irrecoverable. It was enough if the bad debt is written off as irrecoverable in the accounts of the assessee. Noticing that the assessee had written off all the debts in question as irrecoverable in its accounts, the Tribunal set aside the findings of the first appellate authority affirming the view of the Assessing Officer and allowed the claim of the assessee. Aggrieved, the Revenue is in appeal before us raising the above two questions for consideration.

Submissions made have been duly considered. **12**

Chapter IV of the Act deals with Computation of total income. Heads of **13** income are mentioned in section 14. The profits and gains of business or

profession is one of the heads of income. Section 28 of the Act deals with Computation of income under the head "Profits and gains of business or profession".

13.1 Section 36 deals with other deductions. As per sub-section (1), the deductions provided therein shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28. Clause (vii) deals with the amounts of bad debt or part thereof which should be written off as irrecoverable in the accounts of the assessee for the relevant previous year.

14 In *Oman International Bank* (supra), this court dealt with the question as to whether it was obligatory on the part of the assessee to prove that the debt written off by the assessee is recorded as a bad debt for the purpose of allowance under section 36(1)(vii). This court opined that to treat a debt as a bad debt, it has to be a commercial or business decision of the assessee. Once the assessee records a debt as bad debt in his books of account that would prima facie establish that it is a bad debt unless the Assessing Officer for good reasons holds otherwise. However, a caveat was put in to the effect that writing off a debt as bad debt in the accounts has to be bona fide.

15 However, this question was specifically dealt with by the Supreme Court in *T. R. F. Ltd.* (supra). The Supreme Court noted the difference in the language of section 36(1)(vii) prior to April 1, 1989 and after the amendment, post April 1, 1989. Since this aspect is relevant, section 36(1)(vii) as it existed prior to April 1, 1989 and after April 1, 1989 are extracted hereunder :

> "*Pre-1st April, 1989* :
>
> 36. *Other deductions.*—(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28— . . .
>
> (vii) subject to the provisions of sub-section (2), the amount of any debt, or part thereof, which is established to have become a bad debt in the previous year.
>
> *Post-1st April, 1989 :*
>
> 36. *Other deductions.*—(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28— . . .
>
> (vii) subject to the provisions of sub-section (2), the amount of any bad debt or part thereof which is written off as irrecoverable in the accounts of the assessee for the previous year."

15.1. Comparing the provisions of section 36(1)(vii), pre-April 1, 1989 and post-April 1, 1989, the Supreme Court held that the position in law has become well settled. After April 1, 1989, it is not necessary for the assessee to establish that the debt in fact has become irrecoverable. It is enough if the bad debt is written off as irrecoverable in the accounts of the assessee.

This court in *CIT* v. *Shreyas S. Morakhia* [2012] 342 ITR 285 (Bom) also **16** considered a claim of a share broker-assessee to deduction by way of bad debts under section 36(1)(vii). This court referred to the decision of the Supreme Court in *T. R. F. Ltd.* (supra) and held that under section 36(1)(vii) of the Act, the amount of any bad debt or any part thereof which is written off as irrecoverable in the accounts of the assessee for the previous year is to be allowed as deduction in computing income under section 28 of the Act.

Thus, it is a settled position in law that after April 1, 1989, it is not nec- **17** essary for the assessee to establish or prove that the debt has in fact become irrecoverable but it would be sufficient if the bad debt is written off as irrecoverable in the accounts of the assessee. This is because, as held by this court, the decision to treat a debt as a bad debt is a commercial or business decision of the assessee. Recording of a debt as a bad debt in his books of account by the assessee prima facie establishes that it is a bad debt. If the Assessing Officer disputes that the onus would be on him to prove otherwise.

Adverting to the facts of the present case, the Tribunal recorded from **18** the materials on record that admittedly, the debt in question had been written off as irrecoverable in the accounts of the assessee.

If that be the position, then there is compliance to the requirement of **19** section 36(1)(vii) of the Act and the amount covered by the bad debts would be entitled to be deducted while computing income under section 28 of the Act. Further, it is not necessary, rather there is no requirement under the Act that the bad debt has to accrue out of income under the same head, i.e., "Income from business or profession" to be eligible for deduction. This is not a requirement of law. All that is required is that the debt in question must be written off by the assessee in its books of account as irrecoverable.

In the light of the above, we do not find any error or infirmity in the **20** view taken by the Tribunal. No question of law arises from the order of the Tribunal. Consequently, the appeal filed at the instance of the Revenue fails and is accordingly dismissed. However, there shall be no order as to costs.

21 In view of the above, the Income Tax Appeal No. 1469 of 2017 would also stand dismissed.

[2020] 426 ITR 364 (Karn)

[IN THE KARNATAKA HIGH COURT]

PRINCIPAL COMMISSIONER OF INCOME-TAX (EXEMPTIONS) AND ANOTHER

v.

GREEN WOOD HIGH SCHOOL

DR. VINEET KOTHARI and **MRS. S. SUJATHA** JJ.

August 14, 2018.

SS ▸ ITA 1961, s 11
AY ▸ 2012-13
HF ▸ Assessee

CHARITABLE PURPOSES—APPLICATION OF INCOME TO CHARITABLE PURPOSES—APPLICATION OF COMMERCIAL PRINCIPLES IN COMPUTATION OF INCOME—ADJUSTMENT OF EXCESS EXPENDITURE OF EARLIER YEAR AGAINST INCOME OF CURRENT YEAR AMOUNTS TO APPLICATION OF INCOME FOR CHARITABLE PURPOSES—INCOME-TAX ACT, 1961, S. 11.

Income derived from the trust property has to be computed on commercial principles and adjustment of expenses incurred by the trust for charitable and religious purposes in 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 is made having regard to the benevolent provisions contained in section 11 of the Income-tax Act, 1961 and such adjustment will have to be excluded from the income of the trust under section 11(1)(a).

CIT (EXEMPTIONS) *v.* OHIO UNIVERSITY CHRIST COLLEGE [2018] 408 ITR 352 (Karn) *followed.*

Cases referred to :

CIT *v.* Agricultural Produce Market Committee [2018] 408 ITR 231 (Karn) (para 3)

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)

I. T. A. No. 231 of 2018.

Sanmathi E. I., Advocate, for the appellants.

JUDGMENT

The judgment of the court was delivered by

DR. VINEET KOTHARI J.—Mr. Sanmathi E. I., advocate for the appel- 1
lants-Revenue.

The learned counsel for the appellants at bar submits that the controversy raised in the present case is covered by a decision of this court.

The suggested substantial question of law in the memo of appeal of the 2
Revenue is quoted hereinbelow for ready reference :

> "1. Whether on the facts and in the circumstances of the case and in law, the Tribunal is right in law in confirming the order of the Commissioner of Income-tax (Appeals) in allowing set-off of excess/ expenditure/application pertaining to current assessment year and earlier years against the income of the future assessment year by following its earlier orders ?"

This court in the case of [1]*CIT* v. *Rajasthan and Gujarati Charitable* 3
Foundation [2018] 402 ITR 441 (SC) ; [2018] 89 taxmann.com 127 (SC) with regard to allowability of depreciation in the hands of religious and charitable trust held as under (page 234 of 408 ITR) :

> "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).

1. This case seems to be *CIT* v. *Agricultural Produce Market Committee* [2018] 408 ITR 231 (Karn).

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 property 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-tax 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."

4 With regard to carrying forward of the losses for being set off against the 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 I. T. A. No. 312 of 2016 and I. T. A. 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 the Central Board of Direct Taxes 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 Central Board of Direct Taxes 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 sub-sections 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 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)'."

In view of the controversy covered by the above decisions of this court, we are of the opinion that the substantial question of law as suggested by the appellants does not now arise for our further consideration in the present appeal.

The appeal by the Revenue is accordingly disposed of in terms of the aforesaid judgments of this court. No costs.

Copy of this order be sent to respondent-assessee forthwith.

[2020] 426 ITR 372 (Bom)

[IN THE BOMBAY HIGH COURT]

PRINCIPAL COMMISSIONER OF INCOME-TAX

v.

SUNIL M. THAKKAR

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

February 11, 2020.

SS ▶ ITA 1961, ss 132, 153C, 158BB, 158BC, 260A
AY ▶ Block period from 1-4-1988 to 13-2-1999
HF ▶ Assessee

SEARCH AND SEIZURE—BLOCK ASSESSMENT—UNDISCLOSED INCOME—COMPUTATION—CONDITION PRECEDENT—ADDITION SHOULD BE ON BASIS OF EVIDENCE FOUND DURING SEARCH OR REQUISITION—APPELLATE AUTHORITIES DELETING ADDITIONS BASED ON CONCURRENT FINDINGS OF FACT THAT ADDITIONS NOT BASED ON MATERIAL FOUND DURING SEARCH—NO PERVERSITY OR AMBIGUITY IN FINDINGS OF FACT—ORDER OF TRIBUNAL NEED NOT BE INTERFERED WITH—INCOME-TAX ACT, 1961, SS. 132, 153C, 158BB, 158BC.

APPEAL TO HIGH COURT—SUBSTANTIAL QUESTION OF LAW—FINDINGS OF FACT CANNOT BE INTERFERED WITH UNLESS SHOWN TO BE PERVERSE, UNSUSTAINABLE AND EXHIBIT NON-APPLICATION OF MIND—INCOME-TAX ACT, 1961, S. 260A.

Section 158BC of the Income-tax Act, 1961, requires the Assessment Officer to determine the undisclosed income of the block period in the manner provided under section 158BB. Section 158BB(1) provides that the undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period computed, in accordance with the provisions of the Act, on the basis of evidence found as a result of the search or requisition of books of account or other documents and such other

materials or information as are available with the Assessing Officer and relatable to such evidence, as reduced by the aggregate of the total income, or as the case may be, as increased by the aggregate of the losses of such previous years. Therefore, while determining or computing the undisclosed income of the block period, the Assessing Officer shall compute the income on the basis of evidence found as a result of the search or on requisition of the books of account. The correctness or otherwise of the return filed in pursuance of notice under section 158BC(a) has to be examined with reference to the materials in the possession of the Assessing Officer having nexus to the assessment of undisclosed income. Hence the block assessment has to be made on the basis of material coming into the possession of the assessing authority pursuant to the search, which is the foundation of the proceedings.

An appeal under section 260A is required to be entertained only on a "substantial question of law" arising out of the order of the Tribunal and findings of fact cannot be interfered with under the section unless such findings are shown to be ex facie perverse, unsustainable and exhibit total non-application of mind.

The Assessing Officer of the assessee received information from the Investigation Wing that pursuant to search and seizure operations under section 132 and survey conducted under section 133A at the V family business premises, that one of the brothers NVB admitted in his statement that he was in the hawala business, that he provided accommodation entries to various parties and that one of the parties involved in such business was the assessee's family which used to send cash to the V family to obtain accommodation entries. The Assessing Officer on the basis of the facts, circumstances, evidence and transactions that appeared in the seized books issued a notice under section 158BC against the assessee. The assessee filed return of income and disclosed the undisclosed income. On the basis of corroborative evidence obtained from the seized books, documents, loose papers, etc., the Assessing Officer held that there was a nexus between the assessee and the V group on the one hand and RR on the other hand. Accordingly the Assessing Officer in his order made the following additions to the income of the assessee for the block period on accounts of : (a) undisclosed income and the earnings on the sale of naphtha ; (b) premium towards unaccounted sale based on the purchases made from RIL to the extent of 82 per cent. ; (c) unexplained cash towards unaccounted capital for starting unaccounted trade ; (d) undisclosed cash deposits on behalf of certain concerns in respect of accommodation entries ; (e) income from the business of hiring of tankers ; (f) foreign travel and household expenses. The Commissioner (Appeals) recorded that there

was no incriminating material found during the search and the additions made by the Assessing Officer were not based on any documentary evidence whatsoever. The Tribunal upheld the findings and deletions made by the Commissioner (Appeals) and held that the Assessing Officer had to determine the undisclosed income of the block period in the manner as required under section 158BB and that the block assessment had to be made on the basis of the material that came into the hands of the Assessing Officer during the search which became the foundation of the proceedings. On appeal :

Held, *dismissing the appeal, that the findings returned by the Tribunal in respect of the five deletions made by the Assessing Officer exhibited due application of mind on the part of the Tribunal and on the basis of the factual evidence on record. There was no perversity or ambiguity, in the findings returned by the Tribunal. The Commissioner (Appeals) had dealt with the related issues in great detail and his findings had been affirmed by the Tribunal. There was no reason to believe that the findings recorded were incorrect or improper. No question of law arose.*

Income Tax Appeal No. 1499 of 2017.

Sham Walve along with *Pritish Chaterji,* Advocates, for the appellant.

JUDGMENT

The judgment of the court was delivered by

1 MILIND N. JADHAV J.—This appeal has been preferred by the Revenue under section 260A of the Income-tax Act, 1961 (hereinafter referred to as "the Act") against the order dated July 5, 2016 passed by the Income-tax Appellate Tribunal, "J" Bench, Mumbai (hereinafter referred to as "the Tribunal") in Income Tax (SS) Appeal No. 173/Mum/2006 for the block period April 1, 1988 to February 13, 1999.

2 The Assessing Officer passed a detailed assessment order dated February 28, 2001 in respect of the block period and made several additions and disallowances to the income of the assessee for the block period. The first appellate authority, i.e., the Commissioner of Income-tax (Appeals) (hereinafter referred to as the CIT(A)) allowed the appeal of the assessee by deleting the additions under various heads made by the Assessing Officer to the income of the assessee. The Revenue challenged the deletion made by the Commissioner of Income-tax (Appeals) in respect of five heads before the Tribunal. The Tribunal by its order dated July 5, 2016 upheld the order passed by the Commissioner of Income-tax (Appeals).

3 The brief facts relevant for the purpose of deciding the present appeal are as follows :

3.1. On the basis of information received from the Investigation Wing of the Income-tax Department in the case of M/s. Galaxy Plasto O-Chen Industry Ltd., it was revealed that the said company belonged to one Vora family comprising of three brothers, viz., Naresh B. Vora, Sudhir B. Vora and Nitin B. Vora. Under the provisions of section 133A of the Act, a survey was conducted at the business premises of the above company on September 4, 1998, pursuant to which the books of account and other documents were seized and impounded on September 25, 1998.

3.2. The statements of Mr. Nitin B. Vora and Mr. Sudhir B. Vora were recorded on September 25, 1998, November 15, 1998 and November 16, 1998. Mr. Nitin B. Vora stated that he was in the hawala business and he admitted to concealment of Rs. 1.35 crores and admitted to providing accommodation entries to various parties. Mr. Nitin B. Vora also stated that, he was holding a quota of "naphtha" which he used to sell in the open market for cash at a high premium and would issue bogus bills to the seller of naphtha and dealers of other chemicals and in return he would receive cash from the bank and cheques on commission basis.

3.3. Further investigation was carried out by the Income-tax Department and it was found that one of the parties involved in the aforesaid business was the Thakkar family consisting of Manoj Thakkar and his three sons, namely, Atul M. Thakkar, Mayur M. Thakkar and Sunil M. Thakkar. Sunil M. Thakkar is the assessee in the present case. The Thakkar family members used to send cash to the Vora family for obtaining accommodation entries.

3.4. Further investigation was done, consequent upon which the Assessing Officer issued a notice under section 158BC on December 13, 1999 and called on the assessee (Mr. Sunil M. Thakkar) to file return covering the block period from April 1, 1988 to February 13, 1999.

3.5. The assessee filed return of income for the block period showing undisclosed income of Rs. 12,58,739.

3.6. The Assessing Officer issued notice under section 142(1) of the Act with a detailed questionnaire served upon the assessee and reply was received from the assessee.

3.7. The Assessing Officer thereafter passed a detailed assessment order in respect of the block period and made a number of additions and disallowances to the income of the assessee.

3.8. The assessee filed an appeal before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals) allowed the appeal of the assessee by deleting the additions made by the Assessing Officer. The Revenue challenged the deletion made by the Commissioner of Income-tax (Appeals) in respect of five heads before the Tribunal.

3.9. The Tribunal passed its order dated July 5, 2016 and returned a finding that the deletion of the additions made by the Commissioner of Income-tax (Appeals) were quite reasonable and did not require any interference. The appeal of the Revenue was dismissed.

3.10. Hence the present appeal by the Revenue.

4 The Revenue has projected the following substantial questions of law :

"(A) Whether on the facts and in the circumstances of the case and in law, the hon'ble Income-tax Appellate Tribunal was right in deleting the addition made on account of the sale of naphtha ignoring the seized material and statement recorded under section 131 of the Income-tax Act, 1961, which established that the assessee sold in the open market the naphtha products at hefty cash premium and part of which unaccounted sale consideration routed back in the books through accommodation entries and the component of cash premium never reflected in the books of account ?

(B) Whether on the facts and in the circumstances of the case and in law, the hon'ble Income-tax Appellate Tribunal was right in deleting the addition made on account of sale of delivery orders purchased from M/s. Reliance Industries Ltd. ignoring the seized material, on the ground that it is not primary, which established that the assessee earned the unaccounted premium out of sale of the goods ?

(C) Whether on the facts and in the circumstances of the case and in law, the hon'ble Income-tax Appellate Tribunal was right in deleting the addition made on protective basis ignoring the statement of Shri Naresh Vora who had categorically alleged that some of the parties on whose behalf the bogus invoices were raised by Thakkar brothers ?

(D) Whether on the facts and in the circumstances of the case and in law, the hon'ble Income-tax Appellate Tribunal was right in deleting the addition made on account of the foreign tour expenses ignoring the fact that the assessee has failed to adduce documentary evidence to prove the genuineness of the said expenses ?

(E) Whether on the facts and in the circumstances of the case and in law, the hon'ble Income-tax Appellate Tribunal was right in deleting the addition made on account of household expenses ignoring the fact that the assessee has failed to explain the cash withdrawals which were unrecorded in the books of account ?"

5 Mr. Walve the learned counsel appearing for the appellant has laid thrust on the assessment order and emphasized on the modus operandi

between the public sector units, industries, illegal users of adulterated petrol, Vijan group, Vora group, etc., for ascertaining the role of the assessee. He has drawn our attention to question No. 8 and its answer in the statement of Shri Naresh B. Vora, which was recorded under section 131 of the Act. Question No. 8 and its answer read thus :-

"*Question No. 8*. Can you explain the modus operandi as far as the sale of naphtha in the open market is concerned ?

Answer. The naphtha is filled from the factory of M/s. RRPL which is located at Sinner, Nashik or at times directly from the refineries of the public undertakings and being sold to the various petroleum dealers on cash basis which is exclusively devoid of any record. This naphtha is used for various purposes and the most important among that is adulteration or mixing with petrol being sold at retail outlets."

5.1. Mr. Walve has thereafter drawn our attention to the contents of question No. 19 and its answer in the statement of Naresh B. Vora which related to the assessee taking accommodation entries on behalf of various parties. Question No. 9 and its answer read thus :

"*Q. 19*. I am drawing your attention towards Vimal Deluse note book inventoried under Sl. No. 1 of annexure 'A' drawn at Vile Parle Office during the course of the survey. A perusal of this note book refers certain entries against 'Sunil Carriers' 'Rama Atlas', etc., kindly explain these entries.

Answer. All the entries appearing under Sunil Carriers, Rama and Atlas are the details of billed invoices and corresponding cash receipt from Sunil Thakkar. In other words, Sunil Thakkar has taken accommodation entries on behalf of Rama means M/s. RRPL, Atlas means Atlas Petrochemicals Ltd. Sunil Carriers is one of the concerns of Sunil Thakkar and that is why reference is appearing in this note book for e.g. I will explain page No. 4 of this note book which shows :

Sunil Carrier			13-9-1997
Rama	1,01,640 x 5	=	5,08,200
Bank commission		=	500
Commission		=	21,000
Atlas	1,20,200 x 5	=	6,00,000
Bank Commission		=	1,200
Commission		=	21,000
		=	3,74,960

The above mentioned entries are related to the accommodation entries taken by Shri Sunil Thakkar for which the name 'Sunil Carrier' appears at the top. The figures against Rama (M/s. RRPL) are nothing but calculation of value of one invoice multiplied by number of 5 invoices the amount comes to Rs. 5,08,200 and Rs. 500, bank commission for 5 pay orders issued for 5 invoices referred earlier. Rs. 21,000 is my commission on the total amount, i.e., Rs. 5,08,200. Similar is the calculation shown against Atlas (Atlas Petrochemicals).

As a matter of fact all the transactions appearing in this note book against 'Rama' and 'Atlas' are transactions related to the accommodation entries taken by Sunil Thakkar on behalf of M/s. RRPL and Atlas Petrochemicals Ltd."

5.2. Mr. Walve submitted that the assessee was referred to in the books of the Vora group by several names such as Sunilbhai, Sunilbhai (Baroda), Sunilbhai Bhanushali, Sunilbhai Bhanushali (Baroda), Sunil Carrier, Sunil Transport and Sunil Agrawal and after reading the answers to the questions given by the Vora group members, it was established that the assessee was involved in giving accommodation entries to various parties. He submitted that there was enough material on record to warrant implication and indictment of the assessee.

6 To appreciate the questions framed and the contentions advanced by the learned standing counsel, it would be necessary to advert to the orders passed by the statutory authorities.

7 During the block assessment proceedings, the modus operandi of the trade as unravelled by the Assessing Officer showed a complex networking between public sector units like : (i) Bharat Petroleum Corporation Ltd., (ii) Indian Oil Corporation Ltd., (iii) Hindustan Petroleum Corporation Ltd., (iv) Gas Authority of India Ltd., and industries manufacturing petro products like (a) Reliance Industries Ltd., (b) Ram Remedies Pvt. Ltd., (c) Silver Chemical Industries (Bom.) Pvt. Ltd., (d) M/s. Paschim Petrochemical Pvt. Ltd. on the one hand and illegal users mainly carrying out adulteration of petrol like (i) chain of petrol pumps scrupulously using "naphtha" and "naphtha based products" for adulteration of petroleum procured from traders like the Thakkar group and the Vora group through their companies/concerns like : (i) Galaxy Plasto Chemical Industries Ltd., (ii) Thinsol Chemicals Pvt. Ltd., (iii) Minalshree Chemicals Pvt. Ltd., etc.

8 The Assessing Officer scrutinized the books, notebook registers, loose papers, diaries and statements of various family members of the Vora and Thakkar groups and came to the following conclusion : (i) that various concerns of the Vora family were floated with the sole intention of providing

accommodation entries to several parties by way of furnishing fictitious bills showing purchase of petro-chemical products by such concerns leading to commission at predetermined rate being received by the Vora family members in cash for the aforesaid service of providing accommodation entries ; (ii) that a number of business concerns dealing in petro-chemical products either as manufacturers, dealers or traders had utilised accommodation entries from the concerns of Vora group ; (iii) that these concerns procured petro chemicals either directly from the pubic sector undertakings like, BPCL, HPCL, IOCL, GAIL, etc., or through the intermediaries providing accommodation entries and that the amounts involved were large.

The Assessing Officer duly scrutinized the statements made by the Vora 9
and Thakkar family members and on the basis of facts, circumstances, evidence and transactions appearing in the seized books confronted with the assessee (Mr. Sunil M. Thakkar) by notice under section 131 of the Act, inter alia, providing the assessee an opportunity to examine Mr. Naresh B. Vora. Since the assessee did not avail of the opportunity at the first instance the assessee was provided a further opportunity on February 20, 2001, on which date the assessee examined Mr. Naresh B. Vora. During cross examination of Mr. Naresh B. Vora it was revealed that the assessee had been regularly depositing cash to avail of accommodation entries for sale of "naphtha" on behalf of M/s. Ram Remedies Pvt. Ltd. On the basis of the corroborative evidence obtained from the seized books, documents, loose papers, etc., the Assessing Officer concluded that there was nexus of the assessee with the Vora group on the one hand and with M/s. Ram Remedies Pvt. Ltd. on the other hand. The Assessing Officer further scrutinised and analysed the various dealings between the parties on the basis of the following materials :

(i) The account books from the Thakkar group, Vijan group and Vora group ; (ii) Statements recorded of Vora group members ; (iii) Facts and circumstances evidencing transactions appearing in Vora group's books as paper transactions only ; (iv) Cross-examination of Mr. Naresh B. Vora ; (v) Analysis of objection/observations, counter reply in the facts available on record made by the assessee ; (vi) Corroborative evidence gathered during search and survey operations ; (vii) Evidence relating to sale of premium as collected ; (viii) Sale on delivery orders purchased from M/s. Reliance Industries Ltd. ; (ix) Income earned from the business of hiring of tankers during the block period ; (x) Expenses on foreign travel by the assessee on the basis of the scrutiny of his passbook and various other books ; (xi) Computation of total income for the block period ; (xii) Cash found from the residence of the assessee as appearing in the books of the Vora family.

10 After the scrutiny and detailed analysis on the basis of the above, the Assessing Officer vide the assessment order dated February 28, 2001 made the following additions to the income of the assessee for the block period April 1, 1988 to February 13, 1999 : (i) The Assessing Officer considered the addition of the undisclosed income at Rs. 22,75,91,170 and added the income earnings on the sale of naphtha amounting to Rs. 48,61,834 to the income of the assessee ; (ii) The Assessing Officer took 82 per cent. as the average rate of premium and made a further addition of Rs. 36,38,634 towards unaccounted sale based on the purchases made from Reliance Industries Ltd. to the income of the assessee ; (iii) The Assessing Officer added a sum of Rs. 22,11,000 as unexplained cash belonging to the income of the assessee and a further sum of Rs. 30,00,000 towards unaccounted capital for starting unaccounted trade ; (iv) The Assessing Officer added the undisclosed cash deposits of Rs. 6,27,97,057 on behalf of certain concerns in respect of accommodation entries ; (v) The Assessing Officer added a sum of Rs. 1,54,197 as income from the business of hiring of tankers to the income of the assessee ; (vi) The Assessing Officer added a sum of Rs. 2,00,000 spent by the assessee on a foreign trip to the income of the assessee as also Rs. 21,83,010 towards household expenses of the assessee.

11 Being aggrieved by the above order, the assessee preferred an appeal before the first appellate authority, i.e., the Commissioner of Income-tax (Appeals), Mumbai. The Commissioner of Income-tax (Appeals) after considering the entire gamut of evidence placed before the Assessing Officer dealt with each and every addition made by the Assessing Officer and vide its order dated March 14, 2006 returned its findings as under :

11.1. In respect of addition of Rs. 2,92,90,123 as undisclosed exempted income disclosed by the assessee, the assessee had claimed exempted income of Rs. 1,96,50,420 for remittances on the basis of his residential status being a non-resident Indian. For the years 1992-93 and 1993-94, the status of the appellant was non-resident Indian and from the assessment year 1994-95 onwards for the next eight years, the status was "not ordinarily resident" and thus the assessee was assessed in regular assessments accordingly. The Assessing Officer held exemption of Rs. 78,31,157 being receipt of India Development Bond (IDB) being not exempt and the interest earned on the said India Development Bond for 23 months at the rate of 12 per cent. per annum amounting to Rs. 18,02,546, as income taxable in the hands of the assessee. The Assessing Officer held that Rs. 1,71,20,932 had been actually remitted in the assessee's account. The assessee submitted before the Commissioner of Income-tax (Appeals) that no addition could be made on this account, since no incriminating document was

found during the search and that the proceeds of the bonds could not be added as undisclosed income as the said bonds were issued by the State Bank of India and the letter of the State Bank of India and folio number of the bonds were made available to the Assessing Officer. The assessee also submitted that notional interest at 12 per cent. per annum was considered wrongly by the Assessing Officer as against the actual interest received at 9 per cent. per annum. After considering the evidence on record the Commissioner of Income-tax (Appeals) returned its finding in respect of the aforesaid issue in favour of the assessee on the ground that the assessee was a non-resident Indian during the assessment years 1992-93 and 1993-94 and there was no incriminating material found during the search on record indicting the assessee. The Commissioner of Income-tax (Appeals) gave detailed findings deleting the above addition made by the Assessing Officer.

11.2. In respect of the addition on account of sale of naphtha on premium amounting to Rs. 12,48,00,000 the Commissioner of Income-tax (Appeals) considered the submissions of the assessee that no evidence was found by the Assessing Officer during the search to suggest and implicate that the assessee was in the business of sale of naphtha. Therefore, the Commissioner of Income-tax (Appeals) held that the addition made under section 158BB was uncalled for as it did not justify the said addition. The Commissioner of Income-tax (Appeals) gave detailed findings after going through the seized materials and the statements of various witnesses and returned a finding in favour of the assessee that the addition made by the Assessing Officer was not based on any documentary evidence whatsoever and not in conformity with reference to the seized materials gathered during the search, thereby deleting the above addition made by the Assessing Officer.

11.3. In respect of the addition on account of the sale and delivery of naphtha amounting to Rs. 36,38,000 the Commissioner of Income-tax (Appeals) once again came to the conclusion that, since there were no details/material available with respect to the vehicles owned by the assessee that were allegedly used for the transactions the finding of the Assessing Officer was not sustainable in the absence of direct involvement of the assessee, thereby deleting the above addition made by the Assessing Officer.

11.4. In respect of addition of cash amount of Rs. 23,11,000 found during the search in the assessee's premises, which was claimed by Mr. Atul Thakkar (assessee's brother) admitting that the said cash belonged to him, the Commissioner of Income-tax (Appeals) after considering the

evidence on record came to the conclusion that since this amount was declared as undisclosed income in the block return by Mr. Atul Thakkar, it could not be made attributable to and foisted on the assessee. The Commissioner of Income-tax (Appeals) therefore deleted this addition made by the Assessing Officer after considering the fact that Mr. Atul Thakkar had paid taxes on the said cash amount as it belonged to him and that there was no evidence on record to link the cash to the assessee.

11.5. In respect of the unaccounted initial capital amounting to Rs. 30,00,000, the Commissioner of Income-tax (Appeals) came to the conclusion that, since the addition on account of alleged sale of naphtha on premium had been deleted, this addition of unaccounted initial capital required for the said transaction could not be upheld. Hence, in the absence of any evidence of sale of naphtha on premium by the assessee, the question of adding this unaccounted initial capital required to start the business did not arise and the same was deleted.

11.6. In respect of the addition of Rs. 4,99,36,298 made on protective basis by the Assessing Officer, the Commissioner of Income-tax (Appeals) came to the conclusion that this addition was made without any material evidence on record. The Commissioner of Income-tax (Appeals) held that this addition was made on the basis of statements recorded by the Assessing Officer which stated that the assessee was working on behalf of certain concerns in Ahmedabad and the cash deposits made in the name of "Sunil Baroda" appearing in the impounded books referred to the assessee, i.e., Mr. Sunil M. Thakkar. The Commissioner of Income-tax (Appeals) extensively referred to the reply filed by the assessee in this regard and the statement of Mr. Naresh Vora which was recorded by the Assessing Officer and came to the conclusion that there was no direct evidence available to establish that the concerns in Ahmedabad, viz., M/s. Atlas Petrochemical Ltd., Ankini Petrochemical Pvt. Ltd. or Avani Petrochemical Ltd. belonged to the assessee. Hence, in the absence of any direct evidence linking the nexus of the assessee to the said firms/companies, the Commissioner of Income-tax (Appeals) deleted the above addition of Rs. 4,99,36,298 made by the Assessing Officer.

11.7. In respect of the addition of Rs. 2,00,000 towards foreign trip expenses by the assessee during the assessment year 1998-99 being held taxable by the Assessing Officer, the Commissioner of Income-tax (Appeals) after considering the entire evidence returned a finding that from the materials seized and the statements recorded during the search proceedings no question was ever asked or investigation carried out regarding the foreign travel of the assessee. The Commissioner of Income-tax

(Appeals) therefore concluded that in the absence of any evidence it could not be held that the above addition made to the income by the Assessing Officer was justified and therefore, this addition made by the Assessing Officer was deleted.

11.8. In respect of the addition of Rs. 21,83,010 towards household expenses, the Assessing Officer had on the basis of entries found in one Gandhi diary during the search of premises of Sunil Chemicals reflecting entries of the monthly cash withdrawals had added the same to the income of the assessee. The Commissioner of Income-tax (Appeals) held that, since no incriminating document or evidence was found which proved that the withdrawal was made by the family members of the assessee, it could not be held that the assessee had earned this undisclosed income. The assessee pleaded that there was no documentary evidence about concealing his household expenditure and that his household expenditure was much more than the expenditure appearing in the said books of account. It weighed with the Commissioner of Income-tax (Appeals) that the Assessing Officer did not consider the total withdrawals by all the family members of the assessee's family. The Commissioner of Income-tax (Appeals) held that in fact the Assessing Officer had added Rs. 62,00,000 approximately to the income of all the members of the family of the assessee for the same period, and therefore considering these facts, the addition made by the Assessing Officer on account of withdrawal towards household expenses came to be deleted.

12 The Revenue being aggrieved by the order passed by the Commissioner of Income-tax (Appeals) approached the Income-tax Appellate Tribunal with respect to deletion of the five additions made by the Commissioner of Income-tax (Appeals). Before the Tribunal, the Revenue pleaded that the deletion of the following five additions was wrongfully done by the Commissioner of Income-tax (Appeals) namely : (i) the deletion of addition on account of sale of naphtha on premium amounting to Rs. 12.48,61,834 ; (ii) the deletion of addition on account of the sale and delivery orders amounting to Rs. 36,38,634 ; (iii) the deletion of addition on account of protective basis relying upon the statement of Naresh B. Vora as recorded by the Assessing Officer amounting to Rs. 4,99,36,28 ; (iv) the deletion of addition on account of the foreign tour expenses by the assessee amounting of Rs. 2,00,000 ; and (v) the deletion of addition on account of household expenses on the basis of entry found in one Gandhi diary amounting to Rs. 21,83,010.

13 The Tribunal after thoroughly considering the entire evidence on record and materials available, vide the order dated July 5, 2016 held that the

Assessing Officer had to determine the undisclosed income of the block period in the manner as required under section 158BB of the Act. The Tribunal held that the block assessment has to be framed on the basis of the material coming into the hands of the Assessing Officer during the search which becomes the foundation of the proceedings. The Tribunal considered the challenge to the five deletions made by the Commissioner of Income-tax (Appeals) and after thoroughly examining each of the five deletions did not find any illegality or infirmity in the order of the Commissioner of Income-tax (Appeals) in deleting the said additions, thereby upholding the order passed by the Commissioner of Income-tax (Appeals).

14 Before we advert to the impugned order passed by the Tribunal, at the outset, we would state that the appeal under section 260A of the Act is required to be entertained only on "substantial question of law" arising out of the order of the Tribunal, keeping in mind that we cannot disturb the findings of facts under section 260A of the Act unless such findings are shown to be ex facie perverse, unsustainable and exhibit a total non-application of mind. In the case before us, the additions/disallowances made by the Assessing Officer were deleted by the Commissioner of Income-tax (Appeals) which order was not interfered with by the Tribunal.

15 Order dated July 5, 2016 passed by the Tribunal :

15.1. The Tribunal considered the first challenge with respect to the deletion of addition on account of the sale on premium of naphtha amounting to Rs. 12,48,61,834 and concurred with the findings of the Commissioner of Income-tax (Appeals) that this addition was merely based upon the statement of Naresh B. Vora. The Tribunal held that not a single word had been written specifically relating to or pointing to the evidence by the Assessing Officer. The Tribunal held that during the entire proceedings under section 132 (search proceedings) no incriminating material was found or seized which could show or prove that the assessee was a quota holder of naphtha or that he owned a factory manufacturing petrochemicals. The Tribunal held that the assessee was not confronted with the alleged material and the statement of Naresh B. Vora which was used against him and no investigation was carried out by the Assessing Officer with respect to the nexus of the assessee with the alleged Ahmedabad and Baroda parties. The Tribunal held that the Commissioner of Income-tax (Appeals) specifically referred to the statement of Naresh B. Vora dated October 15, 1998 and in particular to question Nos. 3, 4 and 5 and their answers and the observation made by the Assessing Officer relating to the collection of evidence during the the course of the search and further details gathered during the block assessment proceedings. However,

the Tribunal after scrutinizing the same found that the Commissioner of Income-tax (Appeals) had correctly analyzed the facts and evidence and returned the finding that there was no illegality or infirmity in the order of the Commissioner of Income-tax (Appeals) in deleting the addition on account of the sale of naphtha on premium and thus this ground of challenge raised by the Revenue came to be dismissed by the Tribunal.

15.2. The Tribunal considered the second challenge with respect to the deletion of addition on account of the sale and delivery orders amounting to Rs. 36,38,634. After looking into the evidence before the Assessing Officer which pertained to the file containing the bills of Reliance Industries Ltd. in favour of Galaxy Petrochemicals and certain other bills in the name of the assessee and one Suresh Mayur, the Tribunal accepted the fact that the assessee had totally denied his involvement. The Tribunal confirmed the finding returned by the Commissioner of Income-tax (Appeals) while deleting this addition and concluded that the addition on account of the sale and delivery orders could not be sustained under section 158BC in the absence of independent primary evidence. The Tribunal held that the appearance of the name of "Sunil Bhai" on the two bills could not prove the involvement of the assessee and there were no reasons offered by the Assessing Officer as to how he arrived at the conclusion that the signature on the two bills was that of the assessee. The Tribunal agreed with the findings of the Commissioner of Income-tax (Appeals) in respect of the deletion of addition on account of the sale and delivery orders amounting to Rs. 36,38,634 and upheld the same. Thus this ground of challenge raised by the Revenue before the Tribunal came to be dismissed.

15.3. The Tribunal considered the third challenge with respect to the deletion of addition of Rs. 4,99,36,298 which was made on protective basis merely relying on the statement of Naresh B. Vora recorded by the Assessing Officer that the assessee was working on behalf of several parties in Ahmedabad and Baroda. This addition was made without any basis or specific evidence with respect to the nexus of the assessee with any party in Ahmedabad and Baroda. Therefore this addition was determined to be not justified. The Tribunal considered the fact that the Assessing Officer had made no inquiries with the alleged parties in Ahmedabad and Baroda as to whether the assessee was working in Atlas Petrochemicals, Ankini Petrochemicals and/or Avani Petrochemicals. Therefore, the above addition which was made merely on the basis of the statement of Naresh B. Vora could not be sustained. The Tribunal considered that there was no document to arrive at such a conclusion. The Tribunal also considered the fact that in the entire statement of Naresh B. Vora, there was no allegation that

the assessee was working on behalf of Atlas Petrochemicals, Ankini Petrochemicals and Avani Petrochemicals and therefore the Tribunal agreed with the findings given by the Commissioner of Income-tax (Appeals) in deleting the addition of Rs. 4,99,36,298 made on protective basis and thus this ground of challenge raised by the Revenue also came to be dismissed by the Tribunal.

15.4. The Tribunal considered the fourth challenge with respect to the deletion of addition of Rs. 2,00,000 on account of the foreign tour expenses on the basis of evidence which was gathered. It was observed by the Tribunal that during the search and seizure proceedings no incriminating documents were found which could be linked with the foreign trips made by the assessee. Further the assessment order was silent about the evidence which could prove that the assessee had spent Rs. 2,00,000 on foreign trips in the assessment year 1998-99 and/or the said money was unaccounted income of the assessee. The Tribunal concluded that the Revenue failed to disclose that there was any material evidence available/seized in respect of the unaccounted income for the foreign travel during the search proceedings. Hence the Tribunal returned a finding that there was no infirmity in the order of the Commissioner of Income-tax (Appeals) in deleting the addition of Rs. 2,00,000 on account of the foreign tour expenses and thus this ground of challenge raised by the Revenue also came to be dismissed.

15.5. The Tribunal thereafter considered the final ground of challenge with respect to the deletion of addition of Rs. 21,83,010 on account of the household expenses in the income of the assessee. The sole basis for this addition was the entry found in one Gandhi diary in the premises of "Sunil Chemicals". The said diary however was not found at the time of search operations. The said diary was not in the handwriting of the assessee or any of his family member. The nexus of the assessee to the said diary could not therefore be established. The Tribunal held that the assessee was not directly concerned with the said diary and therefore the addition which was made by the Assessing Officer was made on his conjectures and surmises. The Tribunal therefore returned a finding that estimated addition cannot be made. The Tribunal agreed with the finding of the Commissioner of Income-tax (Appeals) that for making the above addition, no incriminating document or evidence was found that could prove that the withdrawals were made by the assessee or his family members for their household expenses. Further it was the assessee's case that the aforesaid amount of Rs. 21,83,010 was the total withdrawal made by the assessee's family and not by the assessee alone and this was not considered by the

Assessing Officer. The Tribunal agreed with the finding of the Commissioner of Income-tax (Appeals) in deleting the addition of Rs. 21,83,010 on the ground that the said household expenditure incurred by the family members of the assessee was sufficient and did not require any interference. Thus this ground of challenge raised by the Revenue came to be dismissed.

Section 158BC requires the Assessment Officer to determine the undis- **16** closed income of the block period in the manner provided under section 158BB. Section 158BB(1) states that the undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period computed in accordance with the provisions of the Act, on the basis of the evidence found as a result of search or requisition of the books of account or other documents and such other materials or information as are available with the Assessing Officer and relatable to such evidence, as reduced by the aggregate of the total income, or as the case may be, as increased by the aggregate of the losses of such previous years. Therefore, while determining or computing the undisclosed income of the block period, the Assessing Officer shall compute the income on the basis of evidence found as a result of search or on requisition of the books of account. This is so because the correctness or otherwise of the return filed in pursuance of the notice under section 158BC(a) has to be examined with reference to the materials in possession of the Assessing Officer having nexus to the assessment of the undisclosed income. Hence block assessment has to be framed in the light of the material coming in to the possession of the assessing authority pursuant to the search, which is the foundation of the proceedings.

On a thorough consideration, we have no reason to believe that the **17** above findings are otherwise incorrect or improper. From the above, it is clear that the findings returned by the Tribunal in respect of the five deletions exhibit due application of mind on the part of the Tribunal and on the basis of the factual evidence on record. We do not find any perversity, much less any ambiguity, in the findings returned by the Tribunal. We find that the Commissioner of Income-tax (Appeals) has dealt with the related issues in great detail which have been affirmed by the Tribunal. Thus, there are concurrent findings of fact by the two lower appellate authorities. We are in agreement with the reasons recorded by the Tribunal in respect of the deletion of the five additions made by the Commissioner of Income-tax (Appeals) and upheld by the Tribunal.

In the circumstances, we find that the appeal filed by the Revenue is **18** devoid of merit and the same is liable to be dismissed. We therefore hold

that no substantial question of law, much less any question of law, arises from the order of the Tribunal.

19 In view of the above findings, the appeal filed by the Revenue is therefore dismissed with no order as to costs.

[2020] 426 ITR 388 (Mad)

[IN THE MADRAS HIGH COURT]

RAMCO INDUSTRIES LTD.

v.

DEPUTY COMMISSIONER OF INCOME-TAX

M. SATHYANARAYANAN and **ABDUL QUDDHOSE** JJ.

March 4, 2020.

SS ▸ ITA 1961, s 255
AY ▸ 2012-13, 2013-14
HF ▸ Assessee/Remanded

APPEAL TO APPELLATE TRIBUNAL—POWERS OF TRIBUNAL—PRINCIPLES OF NATURAL JUSTICE—POWER TO CONSIDER ADDITIONAL EVIDENCE—OPPOSING PARTY SHOULD BE GIVEN OPPORTUNITY TO REBUT EVIDENCE—FAILURE TO PUT ASSESSEE ON NOTICE TO REBUT EVIDENCE—ORDERS SET ASIDE AND MATTERS REMANDED TO TRIBUNAL—INCOME-TAX ACT, 1961, S. 255.

Sub-section (6) of section 255 of the Income-tax Act, 1961, refers to section 131 of the Act and under sub-section (1) of section 131 of the Act, the authorities have the same powers that are vested in a court under the Code of Civil Procedure, 1908. In the absence of any specific rule including the applicability of natural justice, it is a well settled position of law that adherence to the principles of natural justice, is implied in any legislation.

The assessee-company produced before the Assessing Officer the certificate of the chartered engineer to claim 100 per cent. depreciation on the ground that the machinery was under operation for pollution control measures. However, the Assessing Officer restricted the depreciation to 15 per cent. for the first quarter and allowed further depreciation to the extent of 20 per cent. This order was affirmed by the Commissioner (Appeals). On further appeal the Tribunal placed reliance upon a google study in order to have an idea about the air pollution control equipment. The Tribunal based on the google search upheld the order of the Commissioner (Appeals). On appeal :

Held, *that with regard to the study or research done by the Tribunal, the assessee was not put on notice. Hence, on this sole ground, the order was to be set aside.*

T. C. A. Nos. 833 and 835 of 2018.

P. J. Rishikesh for the appellant.

Mrs. V. Pushpa, Standing Counsel, for the respondent.

JUDGMENT

The judgment of the court was delivered by

M. SATHYANARAYANAN J.—By consent, both the tax case appeals are taken up together for final hearing and are disposed of by this common judgment. 1

The facts narrated in brief, for the purpose of disposal of these appeals, are as follows : 2

1. The assessee-company is the appellant herein and it is carrying on the business of building products like asbestos etc., and it filed its return of income for the assessment year 2012-13 on September 21, 2012 with a returned income of Rs. 38,22,810 and the same was processed under section 143(1) of the Income-tax Act, 1961, (in short "the IT Act") on August 21, 2014 and it was selected for scrutiny. A notice under section 143(2) of the Income-tax Act was issued on August 8, 2013 and thereafter, it was heard on various occasions. The issue only pertains to the claim of depreciation with regard to machinery used by the appellant-assessee company for pollution control measures.

2. The appellant-assessee-company before the Assessing Officer, has produced the certificate of the chartered engineer to claim depreciation of cent per cent. on the ground that the machinery used, are under operation for pollution control measures. However, the Assessing Officer has disallowed the claim of cent per cent. and 80 per cent. claim of depreciation and restricted to the level of ordinary claim of 15 per cent. for the first quarter as allowed under the Income-tax Act and further depreciation has been allowed to the extent of 20 per cent., vide the assessment order dated March 31, 2016.

3. The appellant-assessee-company, aggrieved by the assessment order, filed an appeal before the Commissioner of Income-tax (Appeals)-I, at Madurai (in short "CIT (Appeals)") and the appellate authority, vide order dated April 5, 2017, dealt with the claim of depreciation and affirmed the order of the Assessing Officer.

4. The appellant-assessee-company, challenging the legality of the order passed by the Commissioner of Income-tax (Appeals), filed further appeals in I. T. A. Nos. 1675 and 1676/Chny/2017 and the Revenue also filed appeals in I. T. A. Nos. 1711 and 1903/Chny/2017 (for the assessment years 2012-13 and 2013-14) before the Income-tax Appellate Tribunal, "B" Bench, at Chennai (in short "ITAT").

5. The Income-tax Appellate Tribunal has passed a common order dated April 27, 2018 and while dealing with the issue relating to depreciation, after extracting the relevant portion of the order passed by the Commissioner of Income-tax (Appeals), has placed reliance upon the google study in order to have an idea about the air pollution control equipment. The Income-tax Appellate Tribunal, based on the google search study, had concluded as follows :

> "7. From the above, it is clear that the air pollution control devices or equipment, specified in the depreciation table, supra, are a series of devices which would prevent a variety of different pollutants, both gaseous and solid, from entering the atmosphere, mainly the exhaust gases passing through the industrial stacks. These systems (in the industrial parlance, a group of integrated plant and machinery for an independent sub-function), if they are installed in the plant in the exhaust pipes or stacks which led them to the atmosphere, they would reduce the air pollution significantly. However, from the nature and the functions of the impugned equipment, as extracted from the order of the Commissioner of Income-tax (Appeals), supra, the pneumatic conveying system is a single deck vibrating screen for collection of foreign particles which is suitable for manual slitting and dumping of bags. Bag opening device and shredder is only bag opening device, stirrers and cutting knife is nothing but a machine, i.e., a stirrer and cutting knife, the fabrication and erection of silo tanks is nothing but a silo fabricated for storage of cement and the ABT meter is nothing but an electrical meter to take reading of electrical units and they are not part of any of the air pollution control devices or systems or equipment, but like any other plant or machinery or tools or a tank performing other functions and hence the Commissioner of Income-tax (Appeals) is correct in concluding that the engineer is not correct in certifying them as dust collector system, etc., and in confirming the action of the Assessing Officer in denying higher depreciation. The corresponding appeal grounds of the assessee fail.

8. In the result, the assessee's appeal for the assessment year 2012-13 is treated as partly allowed and the appeal for the assessment year 2013-14 is treated as allowed."

6. The assessee-company, aggrieved by the impugned common order of the Income-tax Appellate Tribunal, has filed the present tax case appeals and it was admitted/entertained on November 27, 2018 on the following substantial questions of law :

"(1) Whether the Income-tax Appellate Tribunal is justified in relying on an evidence, which was never a part of its record ?

(2) Does not the order of the Income-tax Appellate Tribunal violate the principles of natural justice, when it has not afforded an opportunity to this appellant to rebut fresh evidence, especially when the said evidence based on 'google study' is the reason for dismissing the appeal of the appellant ?

(3) Is not pulveriser, duct collector and ball mill, air pollution controlling equipment as per R-6-III-machinery and plant-3(vi)(c) and hence, entitled for 100 per cent. depreciation ? and

(4) Whether the equipment are air pollution control devices or systems, which are entitled for higher depreciation ?"

Mr. P. J. Rishikesh, learned counsel for the appellant-assessee-company 3
has invited the attention of this court to paragraph Nos. 6 and 7 of the impugned common order passed by the Income-tax Appellate Tribunal and would submit that the Income-tax Appellate Tribunal, in paragraph No. 6, has extracted the relevant portion of the order passed by the Commissioner of Income-tax (Appeals) and in order to reach the conclusion that the machinery used for pollution control measures are like any other plant or machinery or tools or a tank performing other functions and thereby, confirmed the findings of the Commissioner of Income-tax (Appeals), is per se unsustainable for the reason that for the purpose of reaching the said conclusion, primordial reliance has been placed upon the google study done by the Income-tax Appellate Tribunal, that too, without putting either the assessee or the Revenue on notice. The learned counsel for the appellant-assessee-company has also invited the attention of this court to the provisions of section 255 of the Income-tax Act, 1961 as well as rules 18 and 29 of the Income-tax (Appellate Tribunal) Rules, 1963 and would submit that the substantial provision as well as the subordinate legislation do not expressly exclude the applicability of the principles of natural justice and would further add that under sub-section (6) of section 255 of the Income-tax Act "the Appellate Tribunal shall, for the purpose of discharging its functions, have all the powers which are vested in the

income-tax authorities referred to in section 131 . . .". The learned counsel, further drawing the attention of this court to section 131, would submit that as per sub-section (1) of section 131, the authorities meant for the purpose of Income-tax Act, have the same powers as are vested in a court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matter, viz., (a) discovery and inspection ; (b) enforcing the attendance of any person, including any officer of a banking company and examining him on oath ; (c) compelling the production of the books of account and other documents ; and (d) issuing commissions and assuming for the sake of argument, the report of the chartered engineer produced before the Assessing Officer which was also referred to by the Commissioner of Income-tax (Appeals), lack necessary particulars and an opportunity should have been afforded to the appellant-assessee to take out an application for appointment of an Expert Commission or the Tribunal, suo motu appointed some other expert to go into that aspect and without affording any opportunity, whatsoever, the Income-tax Appellate Tribunal suo motu rendered its findings based upon the google study and therefore, prays for remanding of the matters in so far as substantial questions of law Nos.1 and 2 are concerned.

4 Per contra, Mrs. V. Pushpa, learned standing counsel appearing for the respondent-Revenue has invited the attention of this court to the order of assessment, the order passed by the Commissioner of Income-tax (Appeals) as well as the impugned common order passed by the Income-tax Appellate Tribunal and would submit that the report of the chartered engineer is bereft of any material particulars/details and the authorities below as well as the Tribunal had taken into consideration, the report of the chartered engineer as well as the bills pertain to the purchase of the said machinery and had rightly reached the conclusion that the machinery are not meant exclusively for pollution control measures and the findings rendered are concurrent in nature and further, there are no substantial questions of law that arise for adjudication in these appeals and prays for dismissal of the same.

5 This court paid its best attention to the rival submissions and also perused the materials placed before it.

6 Sub-section (6) of section 255 of the Income-tax Act, 1961, in turn, refers to section 131 of the Act and under sub-section (1) of section 131 of the Act, the authorities have the same powers that are vested in a court under the Code of Civil Procedure, 1908, the details of which, have been enumerated in the earlier paragraphs.

Rule 29 of the Income-tax (Appellate Tribunal) Rules, 1963 also speaks about the production of additional evidence and rule 30 speaks about the mode of taking additional evidence and it is relevant to extract the same : **7**

"Rule 29. *Production of additional evidence before the Tribunal.*—The parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the Tribunal, but if the Tribunal requires any documents to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or, if the income-tax authorities have decided the case without giving sufficient opportunity to the assessee to adduce evidence either on points specified by them or not specified by them, the Tribunal, for reasons to be recorded, may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced.

Rule 30. *Mode of taking additional evidence.*—Such document may be produced or such witness examined or such evidence adduced either before the Tribunal or before such income-tax authority as the Tribunal may direct."

A perusal and consideration of paragraph No. 7 of the impugned common order passed by the Income-tax Appellate Tribunal would disclose that the Tribunal, for reaching the conclusion to confirm the order of the Assessing Officer, has also done its part by doing some research on google study. Admittedly, the research done by the Income-tax Appellate Tribunal in the form of google study was not put either to the appellant-assessee-company or to the said Revenue. As already pointed out by this court in the earlier paragraphs, in the absence of any specific rule including the applicability of the natural justice, it is a well settled position of law that adherence to the principles of natural justice, is implied in any legislation. **8**

As rightly pointed out by the learned counsel for the appellant-assessee with regard to the study or research done by the Income-tax Appellate Tribunal, the appellant-assessee was not put on notice. Hence, on this sole ground, the impugned common order warrants interference. **9**

The substantial questions of law Nos. 1 and 2 are answered in the affirmative and in favour of the appellant-assessee-company. **10**

In the result, the tax case appeals are partly allowed and the impugned common order of the Income-tax Appellate Tribunal in so far as I. T. A. Nos. 1675/Chny/2017 and 1711/Chny/2017 (assessment year 2012-13) are set aside and the said appeals are remanded to the Tribunal for fresh consideration and adjudication. **11**

12 In the light of the said appeals being remanded for fresh adjudication, there is no necessity to answer the substantial questions of law Nos. 3 and 4. The Income-tax Appellate Tribunal, "B" Bench, Chennai, is directed to accord priority and dispose of I. T. A. Nos. 1675/Chny/2017 and 1711/Chny/2017 (assessment Year 2012-13) as expeditiously as possible. No costs.

[2020] 426 ITR 394 (Delhi)

[IN THE DELHI HIGH COURT]

J. M. D. GLOBAL PRIVATE LIMITED

v.

PRINCIPAL COMMISSIONER OF INCOME-TAX AND ANOTHER

VIPIN SANGHI and SANJEEV NARULA JJ.

October 31, 2019.

SS ▶ ITA 1961, ss 68, 147, 148
AY ▶ 2012-13
HF ▶ Department/Assessee

REASSESSMENT—NOTICE—VALIDITY—REASON TO BELIEVE INCOME HAD ESCAPED ASSESSMENT—EFFECT OF SECTION 68—MONETARY TRANSACTION DECLARED AND ACCEPTED DURING ORIGINAL ASSESSMENT—SUBSEQUENT DISCOVERY THAT TRANSACTION WAS WITH NAME LENDER—NOTICE VALID—INCOME-TAX ACT, 1961, SS. 68, 147, 148

REASSESSMENT—NOTICE—DUTY OF TAX AUTHORITIES TO HEAR OBJECTIONS OF ASSESSEE—ASSESSEE GIVEN OPPORTUNITY TO RAISE OBJECTIONS—INCOME-TAX ACT, 1961, SS. 147, 148.

The Supreme Court has held that the use of the words "any sum found credited in the books" in section 68 of the Income-tax Act, 1961, indicates that the section is widely worded, and includes investments made by the introduction of share capital or share premium. The principles which emerge where sums of money are credited as share capital or premium are : (i) The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and creditworthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the Assessing Officer, so as to discharge the primary onus. (ii) The Assessing Officer is duty-bound to investigate the creditworthiness of the creditor or subscriber, verify the identity of the subscribers, and ascertain

whether the transaction is genuine, or these are bogus entries of name-lenders. (iii) If the enquiries and investigations reveal that the identity of the creditors is dubious or doubtful, or they lack creditworthiness, the genuineness of the transaction would not be established. In such a case, the assessee would not have discharged the primary onus contemplated by section 68 of the Act.

On the one hand, the sanctity of concluded assessment proceedings needs to be protected, and an assessee should be protected against undue harassment by the taxation authorities by recourse to reopening of the concluded assessment. However, when subsequently, it comes to light that the assessee has had financial or monetary dealings with dubious entities or persons—such as bogus entry providers, giving rise to a serious well founded doubt about the creditworthiness of the investor and genuineness of the transaction, the endeavour of the Assessing Officer to reopen the assessment in terms of section 147/148 of the Act should normally not be thwarted by the court if it is done within the limitation period, and is not merely a case of change of opinion on the same set of facts. A serious and well founded doubt about the genuineness of the transaction would justify formation of the reasonable belief that taxable income has escaped assessment in the light of the scheme of section 68, which provides that cash credits which, in the opinion of the Assessing Officer are not satisfactorily explained, would be charged to income-tax as income. The subsequent acquisition of knowledge that the monetary transaction undertaken by the assessee was with a bogus entity or person such as an accommodation entry provider–which knowledge was not available to the Assessing Officer at the time of completion of the scrutiny assessment, would be a material change of circumstances, and the formation of belief that taxable income has escaped assessment would not suffer from the taint of change of opinion.

The right vested in the assessee to raise objections and invite an order there on, has been conferred by the Supreme Court on the assessee by its decision in GKN Driveshafts (India) Ltd. *v.* ITO [2003] 259 ITR 19 (SC). *The purpose of such an opportunity is to explore the possibility of the reassessment proceedings being dropped, even if validly reopened, after consideration of objections that the assessee may have. The right cannot be reduced to an empty formality.*

Held accordingly, *that the fact that the monetary transaction had been conducted through a banking channel, and was acknowledged, did not render the opinion of the Assessing Officer regarding the escapement of taxable income illegal or unreasonable since, at the time of the conduct of scrutiny*

assessment proceedings, the assessee did not disclose the material fact that the so-called investor was engaged in the business of providing accommodation entries, and the Assessing Officer had no basis to so assume. The live link between the information, and the formation of the belief that taxable income had escaped assessment was the fact that the petitioner, admittedly, received Rs. 3 crores from that party. This live link was actionable as it was found and acted upon within the period of limitation under the proviso to section 147. The notice was valid.

SABH INFRASTRUCTURE LTD. *v.* ASST. CIT [2017] 398 ITR 198 (Delhi) *distinguished.*

(ii) That however the assessee had not been given an opportunity to raise objections to the notice. [The assessee was permitted to raise its objections in the light of the documents provided by the respondent in court within seven days. The Assessing Officer shall decide the objections that may be raised within two weeks.]

Cases referred to :

Chetan Sabharwal *v.* Asst. CIT [2019] 418 ITR 8 (Delhi) (para 29)

CIT *v.* Divine Leasing and Financing Ltd./Lovely Exports Pvt. Ltd [2008] 299 ITR 268 (Delhi) (paras 10, 16)

CIT *v.* Kamdhenu Steel and Alloys Ltd. [2014] 361 ITR 220 (Delhi) (para 14)

CIT *v.* Mohankala (P.) [2007] 291 ITR 278 (SC) (para 16)

CIT (Pr.) *v.* NDR Promoters Pvt. Ltd. [2019] 410 ITR 379 (Delhi) (para 16)

CIT *v.* NR Portfolio (P.) Ltd. [2014] 2 ITR-OL 68 (Delhi) (para 16)

CIT (Pr.) *v.* NRA Iron and Steel Pvt. Ltd. [2019] 412 ITR 161 (SC) (para 5)

CIT *v.* Oasis Hospitalities Pvt. Ltd. [2011] 333 ITR 119 (Delhi) (para 12)

CIT *v.* Precision Finance Pvt. Ltd. [1994] 208 ITR 465 (Cal) (para 11)

CIT *v.* Value Capital Service (P.) Ltd. [2008] 307 ITR 334 (Delhi) (para 16)

GKN Driveshafts (India) Ltd. *v.* ITO [2003] 259 ITR 19 (SC) (para 34)

ITO *v.* Selected Dalurband Coal Co. Pvt. Ltd. [1996] 217 ITR 597 (SC) (para 29)

ITO *v.* Techspan India P. Ltd. [2018] 404 ITR 10 (SC) (para 29)

Kale Khan Mohammad Hanif *v.* CIT [1963] 50 ITR 1 (SC) (para 12)

Nemi Chand Kothari *v.* CIT [2003] 264 ITR 254 (Gauhati) (para 16)

Roshan Di Hatti *v.* CIT [1977] 107 ITR 938 (SC) (paras 12, 16)

Sabh Infrastructure Ltd. *v.* Asst. CIT [2017] 398 ITR 198 (Delhi) (para 29)

Shankar Ghosh *v.* ITO [1985] 23 TTJ (Cal) 20 (para 13)

Sumati Dayal *v.* CIT [1995] 214 ITR 801 (SC) (para 16)

W. P. (C). No. 10953 of 2019 and C. M. No. 45242 of 2019.

Ms. Suruchi Aggarwal, Advocate, for the petitioner.

Ms. Vibhooti Malhotra, Advocate, for the respondents.

JUDGMENT[1]

The judgment of the court was delivered by

Vipin Sanghi J.—The petitioner has preferred this writ petition to assail 1
the notice dated March 29, 2019 issued under section 148 of the Income-tax Act, 1961 (the Act) by respondent No. 2 alleging escapement of income chargeable to tax in respect of the assessment year 2012-13, and the order dated August 30, 2019, passed by respondent No. 2 disposing of the petitioner's objection to reopening of the case under section 147/148 of the Act. The writ petition was initially taken up for hearing on October 16, 2019 when the following order was passed :

> *"W. P. (C) No. 10953 of 2019 and C. M. No. 45242 of 2019*
>
> One of the reasons given by the Assessing Officer for issuing notice under section 147 of the Act is that the notice issued to the entry provider M/s. Aadhar Ventures India Ltd. (which was earlier known as M/s. Prraneta Industries Ltd.) was not served. The petitioner states that the notice was not issued to the said party at the correct address. The petitioner states that this information has been gathered on inspection of the records of the respondents. The petitioner has also stated in its communication dated August 16, 2019 and September 9, 2019 that when the notice was initially issued to M/s. Aadhar Ventures India Ltd., they had duly complied with the same. There are other issues also raised by the petitioner in its challenge to the issuance of notice under section 147 of the Act and to the orders passed on the objections raised by the petitioner.
>
> Before looking into any other aspect, we call upon the respondents to file an affidavit dealing with these two factual aspects. Let a short affidavit in this regard be filed within a week. The original record shall also be kept available before the court on the next date of hearing.
>
> List on October 31, 2019."

1. Oral judgment.

2 In terms of the last order, an affidavit has been filed on behalf of respondent No. 2. From the said affidavit, it appears that the Assessing Officer issued notice dated January 31, 2019 under section 133(6) of the Act to M/s. Aadhar Ventures India Ltd., which was earlier known as M/s. Prraneta Industries Ltd. at Office No. 215, 2nd floor, Make Bhavan No. III, Commercial Premises Co-op Society Ltd., New Marine Lines, Mumbai-400020. This was not the address of M/s. Aadhar Ventures India Ltd. as per the PAN database.

3 To the aforesaid extent, the grievance of the petitioner - that the notice was not sent to M/s. Aadhar Ventures India Ltd. (formerly M/s. Prraneta Industries Ltd.) at the correct address, before issuance of the notice under section 148 of the Act to the petitioner, appears to be justified. The non-receipt of response to the said notice under section 133(6) of the Act issued to M/s. Aadhar Ventures India Ltd. could not have been the reason to form the belief that the petitioner's income chargeable to tax has escaped assessment. The matter, however, does not end here. This is for the reason that on a reading of the reasons for reopening of assessment recorded by the Assessing Officer, it is clear to us that the non-receipt of a response to the notice under section 133(6) of the Act from M/s. Aadhar Ventures India Ltd. is not the sole basis or reason for reopening of the assessment proceedings. The reasons are multiple and independent of each other. The reasons recorded by the Assessing Officer read as follows :

> "In this case information has been received from Deputy Commissioner of Income-tax, Central Circle-2(2), Mumbai. It is informed that a search under section 132 of the Income-tax Act, 1961 was carried out at the residence and various premises of the Shri Shirish C. Shah who happened to be main persons engaged in providing bogus accommodation entries like long-term capital gains, share capital with huge share premium, turnover, loan, etc. The assessee directly and indirectly controlled more than 200 companies which include some of the public limited companies also. The details of these companies are available in the assessment order of Shri Shirish C. Shah.
>
> 2. It is seen from the impounded material from the computer of Shri Shirish C. Shah that M/s. Prraneta Industries Ltd. has made investment in the form of share capital of Rs. 300,00,000 vide cheque No. RTGS dated November 25, 2011, November 2, 2011, November 3, 2011, November 5, 2011, November 8, 2011, November 25, 2011, November 30, 2011 and December 1, 2011.
>
> 3. The assessments of the companies providing accommodation entries have since been completed wherein it had been held that the impugned companies were engaged in providing accommodation

entries. The assessment of Shri Shirish C. Shah has also been completed wherein detailed facts and modus operandi, etc., had been described.

4. I have perused the information received and available on record. The assessment in this case has been completed under section 143(3) to verify the addition of share capital of Rs. 3,00,00,000 taken from M/s. Prraneta Industries Ltd. Now the information received from Deputy Commissioner of Income-tax, CC 2(2), Mumbai is that M/s. Prraneta Industries Ltd. is the company of Shri Shirish C. Shah who is engaged in providing accommodation entry. The information also state that the assessment in the case of Shirish C. Shah has been completed wherein detailed facts and modus operandi, etc., had been described. The assessments of the companies providing accommodation entries have also been completed wherein it had been held that impugned companies were engaged in providing accommodation entries. During the assessment proceedings of these companies, they were asked to establish the source of funds. At this stage, all these companies filed a letter which is either annexed or part of the order wherein they stated that all the funds were arranged by Shri Shirish C. Shah who can explain the same. These companies allowed their bank account with user ID and password to Shri Shirish C. Shah. This issue has been discussed in the assessment order of Shri Shirish C. Shah. This clearly shows that how the source of fund remained unexplained.

On receipt of information, a notice under section 133(6) was issued to M/s. Prraneta Industries Ltd. (now Aadhar Ventures India Ltd.) on January 31, 2019 by this office to verify the genuineness of the transaction but the same has been received back from the postal authorities on February 11, 2019 with remarks 'no'. This shows that this is accommodation entry which has not been verified from this angle at the time of original assessment order.

The total of the above accommodation entries taken by the assessee comes to Rs. 300,00,000. Taking, on a conservative basis, the rate of commission paid to entry operators, the assessee has also paid the said amount of commission at 2 per cent., i.e., Rs. 6,00,000 (i.e., 300,00,000) to the entry operators out of undisclosed sources. Having perused and considered the information received from the wing, I have reason to believe that income of the assessee to the extent of Rs. 306,00,000 has escaped assessment. The escapement of income has been clearly on account of failure on the part of the assessee-company to truly and fully disclose all material facts necessary for

assessment. Thus, it is a fit case for initiation of proceedings under section 147 of the Income-tax Act, 1961.

5. On the basis of the facts as stated above, I have reasons to believe that income chargeable to tax exceeding Rs. 1 lakh has escaped assessment, as the assessee has not disclosed fully and truly all material facts necessary for his assessment for the relevant assessment year. Hence, a notice under section 148 read with section 147 for reopening of assessment is required to be issued in this case.

Submitted for kind perusal and approval as per provisions of section 151(1) of the Income-tax Act, 1961."

4 From the above, it would be seen that the primary reason for reopening of the assessment proceedings in respect of the petitioner for the assessment year 2012-13 is that M/s. Prraneta Industries Ltd. (which is now known as M/s. Aadhar Ventures India Ltd.) with which the petitioner had transactions worth Rs. 3 crores for capital infusion, was found to be engaged in the business of providing accommodation entries. This fact came to the notice of the Assessing Officer only upon receiving the investigation report from the Deputy Commissioner of Income-tax, Central Circle-2(2), Mumbai which, itself, is premised on search conducted under section 132 of the Act on the premises of Shri Shirish C. Shah, who was managing the affairs of M/s. Prraneta Industries Ltd. The reasons record that the assessment proceedings in respect of Shri Shirish C. Shah, as well as the company providing accommodation entries has been completed, wherein the said fact, viz., that they are engaged in providing accommodation entries, has been established.

5 Before proceeding further, we may also take note of the recent decision of the Supreme Court in *Pr. CIT* v. *NRA Iron and Steel Pvt. Ltd.* [2019] 412 ITR 161 (SC) decided on March 5, 2019. The respondent-assessee had shown receipt of share capital/premium during the financial year 2009-10 aggregating to Rs. 17.60 crores from 19 companies—some of which were based in Mumbai, some in Kolkata and some in Gauhati. Shares having face value of Rs. 10 were subscribed by the said 19 investor companies in the assessee-company at a premium of Rs. 190 per share. It appears that the original assessment was completed and the investment made by the said 19 companies in the share capital or premium of the respondent assessee-company was accepted by the Assessing Officer. Subsequently, a notice under section 148 of the Act was issued on April 13, 2012 to reopen the assessment, for reasons recorded therein. The assessee filed its objections, which were rejected. Summons or notices were also issued to the representatives of the investor companies. However, none appeared on

behalf of either of them. The stand of the assessee-company was that the amounts had been received through normal banking channels through account payee cheques or demand drafts and, therefore, there was no cause to take recourse to section 68 of the Act. The assessee claimed that it had discharged the onus upon it to establish the genuineness of the transactions under section 68 of the Act.

6 The Assessing Officer made inquiries with regard to the genuineness of the transactions of investment in share capital with premium in the assessee-company. In the independent inquiry, the Assessing Officer found that the investor companies despite service of notice did not appear ; that in respect of some of them, their office was found closed ; some other entities were found not existing at the given address ; in some cases, the premises was found to be owned by some other person. Consequently, notices could not be served in these cases. Even when they responded, the investor companies did not provide justification for applying in equity shares in the assessee-company at a premium of Rs. 190 per share.

7 The reply submitted by the investor companies were found to be incomplete and unsatisfactory. In regard to the said 19 investor companies, the finding recorded by the Assessing Officer has been paraphrased by the Supreme Court in the following words (page 173 of 412 ITR) :

> "The Assessing Officer recorded that the enquiries at Mumbai revealed that out of the four companies at Mumbai, two companies were found to be non-existent at the address furnished.
>
> With respect to the Kolkata companies, the response came through dak only. However, nobody appeared, nor did they produce their bank statements to substantiate the source of the funds from which the alleged investments were made.
>
> With respect to the Guwahati companies—Ispat Sheet Ltd. and Novelty Traders Ltd., enquiries revealed that they were non-existent at the given address."

8 On the basis of the detailed inquiry, the Assessing Officer found that :

> "(i) None of the investor-companies which had invested amounts ranging between Rs. 90,00,000 and Rs. 95,00,000 as share capital in the respondent assessee-company during the assessment year 2009-10, could justify making investment at such a high premium of Rs. 190 for each share, when the face value of the shares was only Rs. 10 ;
>
> (ii) Some of the investor companies were found to be non-existent ;

(iii) Almost none of the companies produced the bank statements to establish the source of funds for making such a huge investment in the shares, even though they were declaring a very meagre income in their returns ;

(iv) None of the investor-companies appeared before the Assessing Officer, but merely sent a written response through dak.

The Assessing Officer held that the assessee had failed to discharge the onus by cogent evidence either of the creditworthiness of the so-called investor-companies, or genuineness of the transaction."

9 Consequently, the Assessing Officer added back the amount of Rs. 17.60 crores to the total income of the assessee for the assessment year in question.

10 The Commissioner of Income-tax (Appeals) allowed the assessee's appeal by observing, inter alia, that if the relevant details of the address of PAN identity of the creditor/subscriber along with copies of the shareholders' register, share application form, share transfer register, etc., are available, the same would constitute acceptable proof or acceptable explanation by the assessee and that the Department would not be justified in drawing an inference, only because the creditor/subscriber fails or neglects to respond to the notice issued by the Assessing Officer. In support of this conclusion, the Commissioner of Income-tax (Appeals) relied upon a decision of this court in *CIT* v. *Lovely Exports Pvt. Ltd.* [2008] 299 ITR 268 (Delhi). The Income-tax Appellate Tribunal dismissed the Revenue's appeal on October 16, 2017 on the ground that the assessee had discharged their primary onus to establish the identity and creditworthiness of the investors, especially when the investor companies had filed their return and were being assessed. The Revenue's appeal before this court, i.e., I.T. A. No. 244 of 2018 under section 260A of the Act was dismissed on February 26, 2018 on the ground that the issues raised before the High Court were factual, and that the lower appellate authorities had taken sufficient time to consider the relevant circumstances. This court held that no substantial question of law arose for its consideration.

11 In this background, the Department appealed before the Supreme Court. The respondent-assessee did not appear before the Supreme Court despite service. The Supreme Court heard the appeal on merits and considered the issue whether the respondent-assessee had discharged the primary onus to establish the genuineness of the transaction required under section 68 of the Act. The Supreme Court held that the use of the words "any sum found credited in the books" in section 68 of the Act indicates that the section is widely worded, and includes investments made by the

introduction of share capital or share premium. The Supreme Court relied on *CIT* v. *Precision Finance Pvt. Ltd.* [1994] 208 ITR 465 (Cal), wherein the court held that the assessee was expected to establish to the satisfaction of the Assessing Officer (page 176 of 412 ITR) :

"• Proof of identity of the creditors ;

• Capacity of creditors to advance money ; and

• Genuineness of transaction."

12 The Supreme Court also took note of its decision in *Kale Khan Mohammad Hanif* v. *CIT* [1963] 50 ITR 1 (SC) and *Roshan Di Hatti* v. *CIT* [1977] 107 ITR 938 (SC), wherein it had laid down the onus of proving the source of money found to have been received by the assessee, is on the assessee. Once the assessee has submitted the documents relating to identity, genuineness of the transactions and creditworthiness of the payee, then the Assessing Officer must conduct an inquiry and call for more details before invoking section 68. If the assessee is not able to provide a satisfactory explanation of the nature and source of investment made, it is open to the Revenue to hold that such investment is the income of the assessee, and that there would be no further burden on the Revenue to show that the income is from any particular source. The Supreme Court also observed that with respect to the genuineness of the transaction, it is for the assessee to prove the same by cogent and credible evidence, since the investment was claimed to have been made in the share capital of the assessee-company, it was for the assessee to establish that it was a genuine investment, since the facts are exclusively within the assessee's knowledge. The Supreme Court also noticed the decision of this court in *CIT* v. *Oasis Hospitalities Pvt. Ltd.* [2011] 333 ITR 119 (Delhi), wherein this court observed (page 139 of 333 ITR) :

> "The initial onus is upon the assessee to establish three things necessary to obviate the mischief of section 68. Those are : (i) identity of the investors ; (ii) their creditworthiness/investments ; and (iii) genuineness of the transaction. Only when these three ingredients are established prima facie, the Department is required to undertake further exercise."

13 Merely providing the identity of the investors does not discharge the onus of the assessee, if the capacity or creditworthiness has not been established. The Supreme Court also took note of the decision of the Calcutta Tribunal in *Shankar Ghosh* v. *ITO* [1985] 23 TTJ (Cal) 20, where the assessee failed to prove the financial capacity of the person from whom he had allegedly taken the loan. The said loan amount was rightly held to be the assessee's own undisclosed income.

14 The Supreme Court also placed reliance on *CIT* v. *Kamdhenu Steel and Alloys Ltd.* [2014] 361 ITR 220 (Delhi) ; [2012] 206 Taxman 254 (Delhi) wherein the court had observed (page 242 of 361 ITR) :

> "Even in the instant case, it is projected by the Revenue that the Directorate of Income-tax (Investigation) had purportedly found such a racket of floating bogus companies with sole purpose of lending entries. But, it is unfortunate that all this exercise is going in vain as few more steps which should have been taken by the Revenue in order to find out causal connection between the cash deposited in the bank accounts of the applicant banks and the assessee were not taken. It is necessary to link the assessee with the source when that link is missing, it is difficult to fasten the assessee with such a liability."

15 It was held that the Assessing Officer ought to have conducted an independent inquiry to verify the genuineness of the credit entries.

16 The Supreme Court also noticed several other decisions relating to the issue of unexplained credit entries/share capital subscriptions. We may quote the relevant extract from the decision of the Supreme Court in this regard (page 178 of 412 ITR) :

> "(i) In *Sumati Dayal* v. *CIT* [1995] 214 ITR 801 (SC) this court held that (page 805 of 214 ITR) :
>
> 'if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory, there is prima facie evidence against the assessee, viz., the receipt of money, and if he fails to rebut the same, the said evidence being unrebutted can be used against him by holding that it is a receipt of an income nature. While considering the explanation of the assessee, the Department cannot, however, act unreasonably.'
>
> (ii) In *CIT* v. *P. Mohankala* [2007] 291 ITR 278 (SC), this court held that (headnote of 291 ITR 278) :
>
> 'A bare reading of section 68 of the Income-tax Act, 1961, suggests that (i) there has to be credit of amounts in the books maintained by the assessee ; (ii) such credit has to be a sum of money during the previous year ; and (iii) either (a) the assessee offers no explanation about the nature and source of such credits found in the books or (b) the explanation offered by the assessee, in the opinion of the Assessing Officer, is not satisfactory. It is only then that the sum so credited may be charged to income-tax as the income of the assessee of that previous year. *The expression 'the assessee offers no explanation' means the assessee offers no proper, reasonable and acceptable*

explanation as regards the sums found credited in the books maintained by the assessee . . .

The burden is on the assessee to take the plea that, even if the explanation is not acceptable, the material and attending circumstances available on record do not justify the sum found credited in the books being treated as a receipt of inco me nature.' (emphasis[1] supplied)

(iii) The Delhi High Court in a recent judgment delivered in *Pr. CIT* v. *NDR Promoters Pvt. Ltd.* [2019] 410 ITR 379 (Delhi) upheld the additions made by the Assessing Officer on account of introducing bogus share capital into the assessee-company on the facts of the case.

(iv) The courts have held that in the case of cash credit entries, it is necessary for the assessee to prove not only the identity of the creditors, but also the capacity of the creditors to advance money, and establish the genuineness of the transactions. The initial onus of proof lies on the assessee. This court in *Roshan Di Hatti* v. *CIT* [1977] 107 ITR 938 (SC) ; [1977] 2 SCC 378, held that if the assessee fails to discharge the onus by producing cogent evidence and explanation, the Assessing Officer would be justified in making the additions back into the income of the assessee.

(v) The Guwahati High Court in *Nemi Chand Kothari* v. *CIT* [2003] 264 ITR 254 (Gauhati) held that merely because a transaction takes place by cheque is not sufficient to discharge the burden. The assessee has to prove the identity of the creditors and genuineness of the transaction :

'It cannot be said that a transaction, which takes place by way of cheque, is invariably sacrosanct. Once the assessee *has proved the identity of his creditors,* the genuineness of the transactions which he had with his creditors, and the creditworthiness of his creditors vis-a-vis the transactions which he had with the creditors, his burden stands discharged and the burden then shifts to the Revenue to show that though covered by cheques, the amounts in question, actually belonged to, or was owned by the assessee himself." (emphasis[1] supplied)

(vi) In a recent judgment the Delhi High Court *CIT* v. *NR Portfolio (P.) Ltd.* [2014] 2 ITR-OL 68 (Delhi) ; [2014] 42 taxmann.com 339 ; 222 Taxman 157 (Delhi) (Mag.) held that the creditworthiness or

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genuineness of a transaction regarding share application money depends on whether the two parties are related or known to each other, or mode by which parties approached each other, whether the transaction is entered into through written documentation to protect investment, whether the investor was an angel investor, the quantum of money invested, creditworthiness of the recipient, object and purpose for which payment/investment was made, etc. The incorporation of a company, and payment by banking channel, etc. cannot in all cases tantamount to satisfactory discharge of onus.

(vii) Other cases where the issue of share application money received by an assessee was examined in the context of section 68 are *CIT* v. *Divine Leasing and Finance Ltd.* [2008] 299 ITR 268 (Delhi) ; [2007] 158 Taxman 440 and *CIT* v. *Value Capital Services (P.) Ltd.* [2008] 307 ITR 334 (Delhi)."

17 The principles culled out by the Supreme Court are contained in para 11 of its judgment, which read as follows (page 180 of 412 ITR) :

"The principles which emerge where sums of money are credited as share capital/premium are :

(i) The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and creditworthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the Assessing Officer, so as to discharge the primary onus.

(ii) The Assessing Officer is duty bound to investigate the creditworthiness of the creditor/subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.

(iii) If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack creditworthiness, then the genuineness of the transaction would not be established.

In such a case, the assessee would not have discharged the primary onus contemplated by section 68 of the Act."

18 The Supreme Court found that the Assessing Officer had made inquiries, which revealed that there was no material on record to prove that the share application money had been received from independent entities, some of which were found to be non-existent and had no office at the address mentioned by the assessee. Some of the investor companies were found to lack the financial capacity to make such investments, and there was no explanation as to why the investor companies had subscribed to the

shares of the assessee-company at high premium of Rs. 190 per share, when the face value was only Rs. 10 per share. Moreover, the investor companies had not established the source of funds from which the high share premium was invested. Mere mention of the income-tax file number of the investor was not sufficient to discharge the onus under section 68 of the Act. The Supreme Court held that the lower authorities, namely, the Commissioner of Income-tax (Appeals) and the Income-tax appellate Tribunal had ignored the detailed findings of the Assessing Officer and that they had erroneously held that merely because the assessee had filed all the primary evidence, the onus on the assessee under section 68 of the Act stood discharged. The Supreme Court held (page 181 of 412 ITR) :

"The lower appellate authorities failed to appreciate that the investor companies which had filed income-tax returns with a meagre or nil income had to explain how they had invested such huge sums of money in the assessee-company-respondent. Clearly the onus to establish the creditworthiness of the investor companies was not discharged. The entire transaction seemed bogus, and lacked credibility. The court/authorities below did not even advert to the field enquiry conducted by the Assessing Officer which revealed that in several cases the investor companies were found to be non-existent, and the onus to establish the identity of the investor companies, was not discharged by the assessee.

The practice of conversion of unaccounted money through the cloak of share capital/premium must be subjected to careful scrutiny. This would be particularly so in the case of private placement of shares, where a higher onus is required to be placed on the assessee since the information is within the personal knowledge of the assessee. The assessee is under a legal obligation to prove the receipt of share capital/premium to the satisfaction of the Assessing Officer, failure of which, would justify addition of the said amount to the income of the assessee.

On the facts of the present case, clearly the assessee-company-respondent failed to discharge the onus required under section 68 of the Act, the Assessing Officer was justified in adding back the amounts to the assessee's income." (emphasis[1] supplied)

Consequently, the appeal preferred by the Revenue was allowed by the **19** Supreme Court.

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20 Though the said decision was rendered by the Supreme Court while dealing with a civil appeal arising from a decision of this court dismissing the appeal under section 260A of the Act, the findings returned by the Supreme Court, as extracted hereinabove, are extremely pertinent and relevant in the present context as well.

21 In the light of the dubious character of the so-called investor, viz., M/s. Prraneta Industries Ltd. (now known as M/s. Aadhar Ventures India Ltd.) now having been discovered by the Assessing Officer, the genuineness of the said transaction has come under a serious doubt, giving rise to a reasonable belief in the mind of the Assessing Officer that the petitioner may have indulged in a dubious transaction with the said M/s. Prraneta Industries Ltd. to launder its undisclosed income. In our view, since the petitioner does not dispute the receipt of Rs. 3 crores from M/s. Prraneta Industries Ltd. towards alleged capital infusion, the belief formed by the Assessing Officer, that taxable income of the petitioner has escaped assessment cannot, but, be described as reasonable.

22 The mere fact that the petitioner had produced evidence before the Assessing Officer during the scrutiny assessment proceeding that the said amount had been received as share application money from M/s. Prraneta Industries Ltd., and the fact that M/s. Prraneta Industries Ltd. had confirmed having invested Rs. 3 crores in the assessee-company for allotment of shares, is neither here, nor there. This is for the reason that one part of any such transaction would invariably be conducted through banking channels and would be duly recorded—whether the same is genuine or not. That is how money would be laundered. Thus, the fact that the monetary transaction has been conducted through a banking channel, and is acknowledged, does not render the opinion of the Assessing Officer regarding the escapement of taxable income illegal or unreasonable since, at the time of the conduct of scrutiny assessment proceedings, the assessee did not disclose the material fact that the so-called investor—in this case M/s. Prraneta Industries Ltd., is engaged in the business of providing accommodation entries, and the Assessing Officer had no basis to so assume. In fact, the assessment order passed by him is completely silent on the said aspect. The assessment order dated March 24, 2014, passed by him is as innocuous as it could be. The same reads as follows :

"Assessment order

The return declaring nil income was filed on September 30, 2012. The return was processed under section 143(1) of the Act. The case was selected for scrutiny under Computer Aided Scrutiny Selection (CASS). First Notice under section 143(2) of the Income-tax Act, 1961

was issued on August 6, 2013 and duly served upon the assessee within the statutory time period. In response to the notice Shri Anil Jain, chartered accountant of the assessee-company attended from time to time and filed necessary details and the case was discussed with him.

The details filed by the assessee were examined and have been placed on record. The books of account of the assessee were test checked.

The assessee-company is exploring the mining activity for supply of coal to various big industrial client as well as to provide consultancy in the field of real estate and mining.

Assessed at nil. Issue demand notice and challan and a copy of ITNS 150."

We may also refer to *Explanation 1* to section 147 of the Act which reads **23** "Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

The information/knowledge that M/s. Prraneta Industries Ltd. (now **24** known as M/s. Aadhar Ventures India Ltd.) is engaged in the business of providing accommodation entries dawned upon the Assessing Officer only upon receipt of information from Deputy Commissioner of Income-tax, Central Circle-2(2), Mumbai, which is well after the framing of the assessment order dated March 24, 2014.

We are not suggesting that all monetary transactions of a person or **25** entity indulging in the activity of providing accommodation entries, would justify the entertainment of a belief, that the taxable income of the third parties-with whom such monetary transactions are undertaken, has escaped assessment. This is because, the person or entity found to be indulging in the activity of providing accommodation entries, may have entered into some genuine transactions as well. It would be essential for the Assessing Officer of such third party/parties to find a live-link, i.e., a link which is actionable between the person or entity indulging in the activity of providing accommodation entries and such third party or assessee. The person who has undertaken such financial transaction(s) with such a person/entity (the bogus entry provider) cannot avoid further scrutiny of such a transaction by laying a challenge to the reopening of the assessment under section 147/148 of the Act when the reopening is, otherwise, within the period of limitation.

26 In the present case, the live-link between the said material information, and the formation of the belief that taxable income has escaped assessment is the fact that the petitioner, admittedly, received Rs. 3 crores from M/s. Prraneta Industries Ltd., now known as M/s. Aadhar Ventures India Ltd. This live-link is actionable as it was found and acted upon within the period of limitation under the proviso to section 147 of the Act.

27 No doubt, on the one hand, sanctity of concluded assessment proceedings needs to be protected, and an assessee should be protected against undue harassment by the taxation authorities by resort to reopening of the concluded assessment. However, when subsequently, it comes to light that the assessee has had financial or monetary dealings with dubious entities or persons—such as bogus entry providers, including of the kind noticed hereinabove, giving rise to a serious well founded doubt about the creditworthiness of the investor and genuineness of the transaction, the endeavour of the Assessing Officer to reopen the assessment in terms of section 147/148 of the Act should normally not be thwarted by the court if the same is done within the limitation period, and the same is not merely a case of change of opinion on the same set of facts. A serious and well founded doubt about the genuineness of the transaction would justify formation of the reasonable belief that taxable income has escaped assessment in the light of the scheme of section 68 of the Act, which provides that cash credits which, in the opinion of the Assessing Officer are not satisfactorily explained, would be charged to income-tax as the income of the assessee. The subsequent acquisition of knowledge that the monetary transaction (including of the kind discussed above) undertaken by the assessee was with a bogus entity/person such as an accommodation entry provider—which knowledge was not available to the Assessing Officer at the time of completion of the scrutiny assessment, would be a material change of circumstances, and the formation of belief that taxable income has escaped assessment would not suffer from the taint of simplicitor change of opinion.

28 One cannot lose sight of the fact that once the proceedings are reopened, the assessee would have full opportunity to meet the material/evidence that the Assessing Officer may seek to rely upon to recompute the taxable income in accordance with law. Moreover, an assessment order passed by the Assessing Officer would be open to challenge in appeals under the Act.

29 Ms. Aggarwal has strongly placed reliance on the decision of this court in *Sabh Infrastructure Ltd.* v. *Asst. CIT* [2017] 398 ITR 198 (Delhi). In our view, the said decision has no application to the facts of the present case

since, in the present case, the reassessment has been ordered on the basis of not merely statements of the alleged accommodation entry provider, but on the basis of completed assessment proceedings of the entry provider. In fact, in the said decision in *Sabh Infrastructure Ltd.* (supra) in paragraph 12, the court observed that there was no new material which had been found or mentioned in the reasons to believe, which is not the position in the present case. In fact, the present case is squarely covered by the decision of this court in *Chetan Sabharwal* v. *Asst. CIT* [2019] 418 ITR 8 (Delhi) W. P.(C) No. 10897 of 2015 along with other connected petitions, decided on August 6, 2019. In the said decision, the court, inter alia, held as follows (page 22 of 418 ITR) :

> "As far as the case of Mr. Chetan Sabharwal is concerned, *the original assessment orders for both assessment years under section 143(3) of the Act do not give any indication on the Assessing Officer having formed any opinion whatsoever on the basis of which the reopening has been ordered*. In this context the following observations in *ITO* v. *Techspan India P. Ltd.* [2018] 404 ITR 10 (SC) are relevant (page 17 of 404 ITR) :
>
> 'Before interfering with the proposed reopening of the assessment on the ground that the same is based only on a change in opinion, *the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable*. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the Assessing Officer any opinion on the questions that are raised in the proposed reassessment proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the reassessment proceedings.'
>
> Consequently, even in the cases of Mr. Chetan Sabharwal in view of the fact that the original assessment orders are totally silent on this aspect of the matter, it cannot be said that the reason to believe constitutes a 'change of opinion'.
>
> At this juncture it must be stated that on a perusal of the report of the Investigation Wing which was produced before this court, it appears prima facie that there was sufficient material to justify the reopening of the assessment in both sets of cases. Further, upon reading the reasons to believe as a whole the 'live link' between the

material in the form of the investigation report and the formation of belief that income that has escaped assessment is prima facie discernible. The court hastens to add that this is a prima facie view which is all that is necessary at this stage.

The court in this context would like to refer to the following observations of the Supreme Court in *ITO* v. *Selected Dalurband Coal Co. Limited* [1996] 217 ITR 597 (SC) where it was considering the effect of a letter of the Chief Mining Officer which emerged after the conclusion of the assessments (page 599 of 217 ITR) :

'After hearing the learned counsel for the parties at length, we are of the opinion that we cannot say that the letter aforesaid does not constitute relevant material or that on that basis, the Income-tax Officer could not have reasonably formed the requisite belief. The letter shows that a joint inspection was conducted in the colliery of the respondent on January 9, 1967 by the officers of the Mining Department in the presence of the representatives of the assessee and according to the opinion of officers of the Mining Department, there was under-reporting of the raising figure to the extent indicated in the said letter. The report is made by the Government Department and that too after conducting a joint inspection. It gives a reasonably specific estimate of the excessive coal mining said to have been done by the respondent over and above the figure disclosed by it in its returns. Whether the facts stated in the letter are true or not is not the concern at this stage. It may well be that the assessee may be able to establish that the fact stated in the said letter are not true but that conclusion can be arrived at only after making the necessary enquiry. At the stage of the issuance of the notice, the only question is whether there was relevant material, as stated above, on which a reasonable person could have formed the requisite belief. Since, we are unable to say that the said letter could not have constituted the basis for forming such a belief, it cannot be said that the issuance of notice was invalid. Inasmuch as, as a result of our order, the reassessment proceedings have now to go on we do not and we ought not to express any opinion on the merits." (emphasis[1] supplied)

30 As noticed hereinabove, the Assessing Officer while making regular assessment did not undertake scrutiny that he should have undertaken in respect of the investment into the share capital of the petitioner by Pranetta Industries Ltd. Though the identity of the investor Pranetta Industries Ltd. stood established, neither the financial capacity/creditworthiness of

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the said investor companies, nor the genuineness of the transaction was examined. We have already extracted hereinabove the assessment order passed by the Assessing Officer during regular assessment. Since the investor company Pranetta Industries Ltd. (now known as Aadhar Ventures India Limited) has been found to be an entry provider, most certainly, there was reasonable cause for belief that the monies received by the petitioner from Pranetta Industries Ltd. may also be part of the bogus entries provided by Pranetta Industries Ltd. and, consequently, the taxable income of the petitioner had escaped the assessment.

We, therefore, do not find any merit in the present petition, so far as the **31** challenge to the issuance of notice under section 148 of the Act is concerned, on the ground of wrong assumption of jurisdiction. The notice dated March 29, 2019 is sustained.

Another grievance raised by the petitioner is that along with the reasons **32** to believe, the petitioner was not provided with any material on the basis of which the reasons are recorded. The submission is that due to the relevant material and documents not being provided, the right of the petitioner to raise objections has been effectively curtailed.

Ms. Malhotra has submitted that she is carrying the assessment orders **33** in respect of M/s. Aadhar Ventures India Ltd. and Shri Shirish C. Shah, which form the basis of the reasons recorded by the assessment officer. She has provided copies of the same to learned counsel for the petitioner in the court today.

The right vested in the assessee to raise objections and invite an order **34** thereon, has been conferred by the Supreme Court on the assessee by its decision in *GKN Driveshafts (India) Ltd.* v. *ITO* [2003] 259 ITR 19 (SC). The purpose of such an opportunity appears to be, to explore the possibility of the reassessment proceedings being dropped, even if validly reopened, after consideration of objections that the assessee may have. The said right cannot be reduced to an empty formality.

Therefore, we set aside the order dated August 30, 2019, passed by the **35** respondent disposing of the objections of the petitioner. We permit the petitioner to raise its objections in the light of the documents provided by the respondent today in the court within seven days from today. No further time shall be granted for that purpose. The Assessing Officer shall decide the objections that may be raised within two weeks from today. The assessee shall co-operate and shall not take any adjournments before the Assessing Officer. During the said period, the reassessment proceedings shall not be undertaken. In case, the Assessing Officer rejects the objections that the petitioner may raise, he shall be at liberty to proceed with the

reassessment proceedings so that they are completed before they get time barred.

36 The petition stands disposed of in the aforesaid terms.

[2020] 426 ITR 414 (Mad)

[IN THE MADRAS HIGH COURT]

PRINCIPAL COMMISSIONER OF INCOME-TAX

v.

SKI RETAIL CAPITAL LTD.

M. SATHYANARAYANAN and **ABDUL QUDDHOSE** JJ.

May 7, 2020.

SS ▶ ITA 1961, ss 147, 148, 151
AY ▶ 2007-08
HF ▶ Assessee

REASSESSMENT—NOTICE AFTER FOUR YEARS—CONDITION PRECEDENT—ASSESSEE DISCLOSING ALL MATERIALS IN RESPONSE TO REASSESSMENT NOTICE—NO NEW TANGIBLE MATERIAL AVAILABLE WITH ASSESSEE TO FORM BELIEF THAT INCOME ESCAPED ASSESSMENT—NOTICE ISSUED BY SAME ASSESSING OFFICER WHO PROPOSED TO DROP AUDIT OBJECTIONS ON ISSUE IN QUESTION—REASSESSMENT ON CHANGE OF OPINION—IMPERMISSIBLE—INCOME-TAX ACT, 1961, SS. 147, 148, 151.

For the assessment year 2007-08 the Assessing Officer passed an order under section 143(1) of the Income-tax Act, 1961. After a period of four years he issued a notice under section 148 to reopen the assessment under section 147. The assessee filed a return of income in response to the notice. Notice under section 143(2) was issued, in response to which also the assessee furnished the details called for. Thereafter the Assessing Officer passed an order under section 143(3) read with section 147. The Assessing Officer on consideration of the materials and the explanation offered by the assessee found that RSC, a sister concern of the assessee rendered certain services to the assessee and advances were paid by RSC to the assessee towards cost of services. The Assessing Officer also found that one VR held 28 per cent. and 29.996 per cent. of shares in both RSC and the assessee and held that the provisions of section 2(22)(e) were applicable in respect of the transactions which involved RSC and the assessee and that the loan amount received by the assessee from RSC was to be treated as deemed dividend to the extent of the accumulated profits in the books of RSC or else as income of the assessee.

Accordingly he treated the credit balance as on March 31, 2007 as deemed dividend. The Commissioner (Appeals) deleted the addition made as deemed dividend. Before the Tribunal, the Department filed an appeal and the assessee filed cross objections. The Tribunal found that there was an audit objection, that the Assessing Officer had given reasons to drop the audit objections and therefore, the Assessing Officer on application of his mind found that there was no escapement of income from assessment and subsequently, issued the notice under section 148 for reopening of the assessment. The Tribunal recorded a finding that the Assessing Officer did not independently satisfy himself about the escapement of income and held that in the absence of any material the reopening of the assessment was not justified and accordingly, quashed the order of the Assessing Officer and allowed the cross-objections filed by the assessee. On appeals :

Held, *dismissing the appeals, that the reasons recorded in the notice issued under section 148 as to the income escaping assessment and the order of assessment passed under section 143(3) read with section 147 were unsustainable on the facts as well as on law. The assessee had not suppressed any material facts and whatever materials were in its possession, had been submitted by the assessee in response to the notice under section 148. The Income-tax Officer had passed the order of assessment and had also drawn the attention of the Deputy Director of Revenue Audit as to such material, especially referring to the amount in question and had prayed for dropping of the audit objections in respect of the assessment year 2007-08. In the light of the materials available, it was obligatory on the part of the Assessing Officer to record reasons for the purpose of believing that income had escaped assessment. The findings recorded by the Tribunal as to non-application of mind on the part of the Assessing Officer to apply his mind independently for the purpose of reopening of the assessment were proper because the very same official, in response to the audit objection, had taken into consideration all the materials placed and requested dropping of the audit objection and therefore, passing of the second order of assessment by him amounted to change of opinion on the very same set of facts. There was no error or infirmity in the reasons assigned by the Tribunal in dismissing the appeal filed by the Department and allowing of the cross-objection filed by the assessee.*

UNITED ELECTRICAL CO. P. LTD. *v.* CIT [2002] 258 ITR 317 (Delhi) *relied on*.

Cases referred to :

Adani Infrastructure and Developers (P.) Ltd. *v.* Asst. CIT [2019] 101 taxmann.com 256 (Guj) (paras 5, 19)

Bawa Abhai Singh *v.* Deputy CIT [2002] 253 ITR 83 (Delhi) (para 10)
Calcutta Discount Co. Ltd. *v.* ITO [1961] 41 ITR 191 (SC) (paras 7, 9)
Cartini India Ltd. *v.* Addl. CIT [2009] 314 ITR 275 (SC) (para 16)
CIT *v.* Akbarali Jummabhai [1992] 198 ITR 69 (Guj) (para 9)
CIT *v.* Annamalai Finance Ltd. [2005] 275 ITR 451 (Mad) (para 12)
CIT *v.* A. V. Thomas Exports Ltd. [2008] 296 ITR 603 (Mad) (paras 12, 30)
CIT *v.* Elgi Finance Ltd. [2006] 286 ITR 674 (Mad) (para 12)
CIT *v.* Foramer France [2003] 264 ITR 566 (SC) (paras 11, 12, 29)
CIT *v.* Kelvinator of India Ltd. [2002] 256 ITR 1 (Delhi) [FB] (para 16)
CIT *v.* Kelvinator of India Ltd. [2010] 320 ITR 561 (SC) (paras 16, 17)
CIT *v.* P. V. S. Beedies (P.) Ltd. [1999] 237 ITR 13 (SC) (paras 4, 14)
CIT *v.* Rajan N. Aswani [2018] 403 ITR 30 (Bom) (para 18)
FIS Global Business Solutions India Pvt. Ltd. *v.* Pr. CIT [2018] 409 ITR 560 (Delhi) (para 17)
Foramer *v.* CIT [2001] 247 ITR 436 (All) (para 11)
Ganga Saran and Sons P. Ltd. *v.* ITO [1981] 130 ITR 1 (SC) (para 10)
Gupta (L. R.) *v.* Union of India [1992] 194 ITR 32 (Delhi) (para 10)
ICICI Home Finance Co. Ltd. *v.* Asst. CIT [2012] 25 taxmann.com 241 (Bom) (paras 5, 16)
Idea Cellular Ltd *v.* Deputy CIT [2008] 301 ITR 407 (Bom) (para 16)
ITO *v.* Lakhmani Mewal Das [1976] 103 ITR 437 (SC) (para 7)
Lakhmani Mewal Das *v.* ITO [1975] 99 ITR 296 (Cal) [FB] (para 7)
Larsen and Toubro Ltd. *v.* State of Jharkhand [2017] 103 VST 1 (SC) (paras 5, 15)
Narayanappa (S.) *v.* CIT [1967] 63 ITR 219 (SC) (paras 7, 10)
New Excelsior Theatre Pvt. Ltd. *v.* M. B. Naik, ITO [1990] 185 ITR 158 (Bom) (para 8)
United Electrical Co. P. Ltd. *v.* CIT [2002] 258 ITR 317 (Delhi) (paras 10, 28)

T. C. A. Nos. 66 and 67 of 2018.

J. Narayanaswamy, Senior Standing Counsel, assisted by *T. R. Senthilkumar* for the appellant.

R. Sivaraman for the respondent.

JUDGMENT

The judgment of the court was delivered by

1 M. SATHYANARAYANAN J.—The tax case appeals are preferred against the common order dated August 10, 2017 made in I. T. A. No. 2276/Mds/

2016 and C. O. No. 129/Mds/2016 pertains to the assessment year 2007-08, by the Revenue.

The facts in brief relevant and necessary for the disposal of these appeals **2** are as follows :

2.1. The Income-tax Officer, Company Ward-VI(1), Chennai/Assessing Officer, vide assessment order dated November 25, 2011 pertains to the assessment year 2007-08, dealt with the return of income filed by the respondent-company on October 31, 2007 in and by which total income of Rs. 23,92,140 was admitted. The return of income was processed under section 143(1) of the Income-tax Act, 1961 (in short "IT Act") on March 6, 2009.

2.2. The case was reopened under section 148 of the Income-tax Act on August 26, 2010 by issuance of notice and in response to the same, the respondent-assessee has sent a letter dated September 14, 2010 stating that the return of income already filed by him be treated as return filed by him in compliance of notice issued under section 147 of the Income-tax Act dated August 26, 2010.

2.3. A personal hearing was afforded and details were also called for from time to time. The Assessing Officer finalized the assessment under section 143(3) read with section 147 of the Income-tax Act as follows :

	Rs.	*Rs.*
Total income computation :		
Total income admitted		23,92,137
Add : 1. Disallowance under section 14A	14,602	
2. Depreciation	10,979	
3. Donation	100	25,681
Total income determined		24,17,818
Tax, S.C. & E.C.		8,13,837
Less : TDS		16,16,214
Refund		8,02,377
Add : section 244A Interest		96,285
Total refund		8,98,662
Less : Refund already issued		9,08,420
Balance payable		9,758

2.4. The Assessing Officer subsequently had noticed certain income chargeable to tax has escaped assessment for the assessment year 2007-08 and accordingly, the said assessment was reopened with the approval of the Commissioner of Income-tax (CIT)-VI and a notice under section 148

of the Income-tax Act was issued on March 31, 2014. The respondent-assessee, in response to the said notice, filed return of income on April 18, 2014 and it was followed by a notice under section 143(2) of the Income-tax Act and that apart, the details concerning the assessment were also called for.

2.5. The authorized representative/one of the officials of the respondent-company appeared and furnished the information called for and the books of account and the bank account statements were produced and verified. The Assessing Officer, after taking note of the materials as well as the explanation offered by the assessee, had found that Road Safety Club Private Limited (RSC) is a sister concern of the assessee-company and they were doing services to the respondent-company/SKI Retail Capital Ltd., in terms of insurance marketing etc., and advances were paid by RSC to SKI towards cost of services.

2.6. The Assessing Officer also noted by looking into the shareholding pattern of both the companies and found that one Mr. V. Rajagopalan is holding substantial interest in both the companies by holding 28 per cent. and 29.996 per cent. of shares and as such, found that the provisions of section 2(22)(e) of the Income-tax Act is squarely applicable in respect of the transactions involving both the companies.

2.7. The assessee-respondent's authorized representative was asked to show cause as to why the loan amount of Rs. 10,70,01,891 received by the assessee from RSC should not be treated as deemed dividend to the extent of accumulated profits in the books of RSC or else treat the loans as income of the assessee-respondent company ? The authorized representative of the respondent-company has submitted a written representation dated March 27, 2015. The Assessing Officer, after considering and scrutinizing the materials, had treated the credit balance as on March 31, 2007 amounting to Rs. 5,30,99,960 as deemed dividend in the hands of the respondent-company and completed the scrutiny assessment, vide order dated March 31, 2015 and it is relevant to extract the same :

	Rs.
Total income as per order dated 25-11-2011	24,17,818
Add : Deemed dividend under section 2(22)(e)	2,29,00,539
Assessed total income	2,53,18,357
Balance tax payable	1,09,30,440

2.8. The respondent-assessee, aggrieved by the said assessment order, filed an appeal in I. T. A. No. 55/CIT(A)-15/15-16 dated May 25,

2016 before the Commissioner of Income-tax (Appeals)-15, Chennai-600 034. The assessee before the Commissioner of Income-tax (Appeals) contended among other things that the notice under section 148 of the Income-tax Act was issued after 4 years from the assessment order despite the fact that there was no failure on the part of the assessee to furnish truly and fully all material facts necessary for assessment. The assessee also took a stand that reopening of the assessment is purely on account of audit objections for which the Assessing Officer himself sent a reply that there is no justification for raising objections and the assessment can be reopened only if the Assessing Officer is in possession of tangible materials/facts on the basis of which, he had reason to believe that income had escaped assessment. The assessee also contended as to the sustainability of addition of Rs. 2,29,00,539 as deemed dividend under section 2(22)(e) of the Income-tax Act and that apart, also took a stand that the credit balance in the accounts of RSC cannot be treated as deemed dividend under section 2(22)(e) of the Income-tax Act. The appellate authority had allowed the appeal partly, vide order dated May 25, 2016 by directing the deletion of Rs. 2,29,00,530 towards deemed dividend.

2.9. The Revenue, aggrieved by the order of the Commissioner of Income-tax in partly allowing the appeal filed by the assessee and dismissal of their grounds pertaining to the assessment, filed I. T. A. No. 2276/Mds/2016 before the Income-tax Appellate Tribunal "C" Bench, Chennai (ITAT), wherein the assessee-respondent filed cross objection in C. O. No. 129/Mds/2016. The Income-tax Appellate Tribunal, Chennai, vide impugned common order dated August 10, 2017, taking note of the fact that there is an audit objection, for which the Assessing Officer, vide response dated March 4, 2014, had given reasons for dropping audit objections and therefore, it is obvious that the Assessing Officer, after applying his mind, found that there is no escapement of income to the assessment and subsequently, issued the notice under section 148 of the Income-tax Act for reopening of assessment.

2.10. The Tribunal had recorded a finding that the Assessing Officer has not independently satisfied himself about the escapement of income and further found that in the absence of any material, is of the considered opinion that the reopening of the assessment is not justified and accordingly, quashed the order of the Assessing Officer. The Tribunal, in the light of the decision taken in the cross-objection filed by the assessee, found that it is not necessary to go into the merits of the appeal filed by the Revenue.

2.11. The Revenue, aggrieved by the dismissal of the appeal filed by them and allowing of the cross-objection filed by the assessee, vide

common order dated August 10, 2017 made in I. T. A. No. 2276/Mds/2016 and C. O. No. 129/Mds/2016, has filed these appeals.

3 The tax case appeals were admitted on March 20, 2018 on the following common substantial question of law :

> "Whether an assessment can be reopened under section 147 of the Income-tax Act, 1961, on the basis of audit objection pointing out factual omissions in the original assessment order ?"

4 Mr. J. Narayanaswamy, learned senior standing counsel assisted by Mr. T. R. Senthil Kumar, learned counsel appearing for the Revenue made the following submissions :

• In the audit objection, it was pointed out that the assessee debited only the expenditure incurred such as salary, etc., without any profit/commission and it was only a system/colourable device adopted by the assessee to reduce the tax liability, for which the balance amount of Rs. 6,01,84,164 is to be treated as net profit and it had to be taxed under section 69 of the Income-tax Act.

• The audit party has also considered the reply submitted by the Assessing Officer and found that RSC is making reimbursement for expenses incurred by the assessee-company year after year and if that is so, RSC would have reimbursed the exact expenses incurred by the respondent-assessee and not any additional amount year after year and that apart, RSC did not make payment for rendering services and the entire amount was required to be brought to tax and therefore, the balance amount of Rs. 6,01,84,164 is required to be brought to tax and reiterated the said fact.

• The Assessing Officer had submitted his response dated March 4, 2014 reiterating their earlier stand for which there was a communication dated March 20, 2014 from the Deputy Director (DT) to the Officer of the Commissioner of Income-tax, Chennai (VI), vide letter dated April 3, 2014. The Assessing Officer, has submitted his response dated April 10, 2014 stating among other things that the assumption that there is no agreement between the assessee-company and RSC is not correct and it will not be possible to tax the advance received as a revenue receipt even without the service having been rendered.

• The Deputy Director, DTI has sent a reply for which Mr. K. Krishna Kumar, Income-tax Officer, Corporate Ward-6(3), Chennai-34, has sent his response dated January 30, 2015 through proper channel stating among other things as to the justification of the assessment order and requested for dropping of audit objection for all the assessment years, viz., 2007-08 to 2010-11.

• In the assessment order dated March 31, 2015, the Assessing Officer, on an independent application of mind, had given cogent reasons as to the credit balance of Rs. 5,30,00,960 in the account of RSC as on March 31, 2007 as deemed income and the audit objections pointed out did not dealt with the said issue at all and as such, reopening of the case on factual error pointed out by the audit party is also permissible under law.

• In sum and substance, it is the submission of the learned senior standing counsel appearing for the appellant that in the light of the points urged, the substantial question of law raised in this appeal is to be answered positively in favour of the appellant.

The learned senior standing counsel appearing for the appellant, in support of his submissions, has placed reliance upon the judgment rendered by the hon'ble apex court in *CIT* v. *P. V. S. Beedies (P.) Ltd.* [1999] 237 ITR 13 (SC).

Per contra, Mr. R. Sivaraman, learned counsel appearing for the 5
respondent-assessee-company made the following submissions :

• The Assessing Officer, in response to the audit objections, reiterated the grounds for completing the assessment and in fact, response to the audit objections dated January 30, 2015 was submitted by Mr. S. Krishna Kumar, Income-tax Officer, Corporate Ward-6(3), Chennai-34, but quite contrary to the said stand had passed the reassessment order dated March 31, 2015 under section 143(3) read with section 147 of the Income-tax Act for the assessment year 2007-08 and it virtually amounts to change of opinion and it is totally impermissible under law.

• It is not even the case of the Assessing Officer that the respondent-assessee had failed to disclose truly and fully the material facts necessary for assessment and in the absence of any such reason, the notice for reopening of the assessment under section 143(3) read with section 147 of the Income-tax Act cannot be recorded as a valid material.

• Admittedly, notice under section 148 of the Income-tax Act came to be issued after 4 years from the end of the assessment year and the Assessing Officer has also failed to furnish reasons for the issuance of notice under section 148 and only after the representation was submitted, the reasons were furnished that too after the completion of the assessment.

• As regards the deemed dividend, the credit balance in the account of RSC cannot be treated as deemed dividend under section 2(22)(e) of the Income-tax Act for the reason that RSC had enlisted the services of the assessee for the purpose of selling road safety equipment which are basically insurance products to promote road safety and the said amount has

been advanced to the assessee without any interest and debited to RSC account and the said arrangement was supported by an agreement dated April 1, 2005 and since it is in the nature of fresh advance for the purpose of commercial transaction, the said advance do not attract section 2(22)(e) of the said Act and the said aspect was also considered by the Commissioner of Income-tax (Appeals) and a direction was given to delete the said addition.

The learned counsel appearing for the respondent/assessee, in support of his submissions, has placed reliance upon the following decisions :

(i) The judgment dated March 21, 2017 made in Civil Appeal No. 5390 of 2007 (*Larsen and Toubro Ltd.* v. *State of Jharkhand* [2017] 103 VST 1 (SC)) ;

(ii) *ICICI Home Finance Co. Ltd.* v. *Asst. CIT* [2012] 25 taxmann.com 241 (Bom) ;

(iii) *Adani Infrastructure and Developers (P.) Ltd.* v. *Asst. CIT* [2019] 101 taxmann.com 256 (Guj).

Attention of this court was also invited to Instruction No. 9 of 2006 dated November 7, 2006 issued by the Central Board of Direct Taxes (CBDT), New Delhi and modification of Instruction No. 9 of 2009 dated March 17, 2016 issued by the Central Board of Direct Taxes, New Delhi and Circular No. 19 of 2017 ([2017] 395 ITR (St.) 20) issued by the Central Board of Direct Taxes in F. No. 279/Misc./140/2015/ITJ dated June 12, 2017.

6 This court has carefully considered the arguments advanced on either side and also perused and considered the materials placed as well as the decisions relied on by either side.

7 In *ITO* v. *Lakshmani Mewal Das* [1976] 103 ITR 437 (SC), quashment of the notice issued under section 148 of the Income-tax Act came up for consideration and a perusal of the said judgment would disclose that the respondent/assessee made a challenge to the notice issued under section 148 of the Income-tax Act before the Calcutta High Court and it was referred to a Full Bench of the Calcutta High Court reported in *Lakhmani Mewal Das* v. *ITO* [1975] 99 ITR 296 (Cal) [FB], which had quashed the said notice and therefore, the Revenue preferred a special leave petition, which was entertained and converted as civil appeal. The hon'ble Supreme Court of India, having taken note of sections 147 and 148 of the Income-tax Act, 1961 and section 34(1)(a) and (b) of the Indian Income-tax Act, 1922, observed in page 445 as follows (page 445 of 103 ITR) :

> "It would appear from the perusal of the provisions reproduced above that two conditions have to be satisfied before an Income-tax Officer acquires jurisdiction to issue notice under section 148 in

respect of an assessment beyond the period of four years but within a period of eight years from the end of the relevant year, viz., (1) the Income-tax Officer must have reason to believe that income chargeable to tax has escaped assessment, and (2) he must have reason to believe that such income has escaped assessment by reason of the omission or failure on the part of the assessee (a) to make a return under section 139 for the assessment year to the Income-tax Officer, or (b) to disclose fully and truly material facts necessary for his assessment for that year. Both these conditions must co-exist in order to confer jurisdiction on the Income-tax Officer. It is also imperative for the Income-tax Officer to record his reasons before initiating proceedings as required by section 148(2). Another requirement is that before notice is issued after the expiry of four years from the end of the relevant assessment years, the Commissioner should be satisfied on the reasons recorded by the Income-tax Officer that it is a fit case for the issue of such notice. We may add that the duty which is cast upon the assessee is to make a true and full disclosure of the primary facts at the time of the original assessment. Production before the Income-tax Officer of the account books or other evidence from which material evidence could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure contemplated by law. The duty of the assessee in any case does not extend beyond making a true and full disclosure of primary facts. Once he has done that his duty ends. It is for the Income-tax Officer to draw the correct inference from the primary facts. It is no responsibility of the assessee to advise the Income-tax Officer with regard to the inference which he should draw from the primary facts. If an Income-tax Officer draws an inference which appears subsequently to be erroneous, mere change of opinion with regard to that inference would not justify initiation of action for reopening the assessment.

The grounds or reasons which lead to the formation of the belief contemplated by section 147(a) of the Act must have a material bearing on the question of escapement of income of the assessee from assessment because of his failure or omission to disclose fully and truly all material facts. Once there exist reasonable grounds for the Income-tax Officer to form the above belief, that would be sufficient to clothe him with jurisdiction to issue notice. Whether the grounds are adequate or not is not a matter for the court to investigate. The sufficiency of the grounds which induce the Income-tax Officer to act

is, therefore, not a justifiable issue. It is, of course, open to the assessee to contend that the Income-tax Officer did not hold the belief that there had been such non-disclosure. The existence of the belief can be challenged by the assessee but not the sufficiency of the reasons for the belief. The expression 'reason to believe' does not mean a purely subjective satisfaction on the part of the Income-tax Officer. The reasons must be held in good faith. It cannot be merely a pretence. It is open to the court to examine whether the reasons for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant for the purpose of the section. To this limited extent, the action of the Income-tax Officer in starting proceedings in respect of income escaping assessment is open to challenge in a court of law. (See observations of this court in the cases of *Calcutta Discount Co. Ltd.* v. *ITO* [1961] 41 ITR 191 (SC) and *S. Narayanappa* v. *CIT* [1967] 63 ITR 219 (SC), while dealing with the corresponding provisions of the Indian Income-tax Act, 1922)."

8 In *New Excelsior Theatre Pvt. Ltd.* v. *M. B. Naik, ITO* [1990] 185 ITR 158 (Bom), the writ court while quashing the notice issued under section 147(a) of the Income-tax Act has held that the condition for reopening of the assessment was that formation of belief that income had escaped assessment must be by reason of either the assessee's omission to file a return of income or non-disclosure of full and material facts necessary for assessment and having taken note of the fact that the assessee had furnished full particulars, had quashed the notice.

9 In *CIT* v. *Akbarali Jummabhai* [1992] 198 ITR 69 (Guj), the Gujarat High Court had considered the reference made by the Income-tax Appellate Tribunal under section 256(2) of the Income-tax Act for answering the following questions of law (page 71 of 198 ITR) :

"1. Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was justified in law in holding that the reopening of assessment under section 147(a) of the Income-tax Act, 1961, was not justified ?

2. Whether, on the facts and in the circumstances of the case, it can be said that the assessee had disclosed fully and truly all the material necessary for the assessment and, therefore, the reassessment under section 147(a) of the Income-tax Act, 1961, was not justified ?"

The Assessing Officer therein had passed an assessment order and thereby, notice under section 148 was issued on the assessee for the reason that the income returned was understated compared to the assets held by the

assessee and it was overruled and passed revised order of assessment and the assessee therein filed an appeal and the Appellate Assistant Commissioner allowed the appeal of the assessee holding that the Income-tax Officer was not within his power and jurisdiction to invoke section 147A of the Income-tax Act and the appeal filed by the Revenue before the Income-tax Appellate Tribunal had ended in dismissal. It is relevant to extract the observations made in page No. 75 of the said judgment (page 75 of 198 ITR) :

> ". . . Two distinct conditions precedent are required to be fulfilled before the Assessing Officer can exercise jurisdiction under clause (a) of section 147, namely, (i) he must have reason to believe that income has escaped assessment, and (ii) he must have reason to believe that such escapement is by reason of omission or failure on the part of the assessee to make a return or to disclose fully and truly all the material facts necessary for his assessment for the relevant years.
>
> The next question which is required to be examined in order to arrive at a proper determination of the questions referred to us is the question as to what is meant by the expression 'material facts' which it is the duty of the assessee to disclose before the Income-tax Officer at the time of assessment. In the case of *Calcutta Discount Co. Ltd* v. *ITO* [1961] 41 ITR 191 (SC), the Supreme Court had occasion to consider this very provision. As per the said decision of the Supreme Court, the 'material facts' which are required to be disclosed by the assessee at the time of his assessment are 'primary facts' mainly necessary for the purpose of his assessment. The duty of the assessee is to disclose only the primary facts and it is for the Assessing Officer to decide what inferences of facts can be reasonably drawn from the primary facts, and what legal inferences must ultimately be drawn from the primary facts and other facts inferred from them. The assessee is not bound to tell the assessing authority what inferences, whether of fact or law, should be drawn and his failure to communicate to the assessing authority the proper and correct inferences to be drawn from the primary facts cannot be regarded as failure to disclose 'material facts'. The assessee is required to disclose only primary facts and the primary facts to be disclosed by him must be material or relevant to the decision of the question before the assessing authority so that the non-disclosure of such facts would have a material bearing on the question of escapement of income from assessment. If the assessee has disclosed the primary facts which are material and necessary for the purpose of his assessment, his assessment cannot be reopened by

the Income-tax Officer by resorting to section 147(a), but, if there is omission or failure on the part of the assessee to disclose any material or relevant primary facts and, in consequence, there is escapement of income from assessment, such income can be got taxed by the Revenue by reopening the assessment under section 147(a) . . .

From the aforesaid observations in the case before the Supreme Court, it becomes clear that to confer jurisdiction under section 147(a) to issue notice in respect of an assessment beyond the period of four years from the end of the relevant year, two conditions have to be satisfied. The first is that the Income-tax Officer must have reason to believe that income chargeable to tax has escaped assessment, and the second is that he must also have reason to believe that such escapement has taken place by reason of either, (i) omission or failure on the part of the assessee to make a return of his income under section 139, or (ii) omission on the part of the assessee to disclose fully and truly all the material facts necessary for his assessment for that year. Both these conditions are conditions precedent to be fulfilled for the Income-tax Officer to have jurisdiction to issue notice for the assessment or reassessment beyond the period of four years from the end of the assessment year."

The High Court of Gujarat had found that the Tribunal as well as the Appellate Assistant Commissioner were justified in holding that the Income-tax Officer was not justified in exercising powers under section 147(a) of the Income-tax Act and accordingly, answered the questions of law in favour of the assessee and against the Revenue.

10 In *United Electrical Co. P. Ltd.* v. *CIT* [2002] 258 ITR 317 (Delhi), a writ petition was filed before the Delhi High Court challenging the notice dated April 30, 2002 issued under section 148 of the Income-tax Act. The hon'ble Mr. Justice D. K. Jain (as the hon'ble judge then was) had spoken for the Bench and it is relevant to extract the following (page 321 of 258 ITR) :

"Section 147 of the Act authorises the Assessing Officer to assess or reassess the income chargeable to tax, if he has reason to believe that the said income for any assessment year has escaped assessment. The power conferred under the said section, particularly after April 1, 1989, is no doubt very wide but it cannot be said to be plenary. True, the amended provisions of section 147 are contextually different from the pre-1989 provision, inasmuch as the cumulative conditions spelt out in clause (a) of the old section 147, namely, that income chargeable to tax had escaped assessment by reason of : (i) omission or failure on the part of the assessee to make a return of his income under

section 139 of the Act for any assessment year, or (ii) failure to disclose fully and truly all material facts necessary for his assessment for that year, are not present in the new main section but the crucial expression 'reason to believe' still exists in the new provision. The amended section 147 provides that where the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may apply the provisions of sections 148 to 153 and assess or reassess the income which has escaped assessment. For the present purpose, only sections 148 and 151 are relevant. Sub-section (2) of section 148 of the Act mandates that before issuing notice to the assessee under sub-section (1), for filing the return, the Assessing Officer shall record his reasons for doing so. Therefore, formation of reason to believe and recording of reasons are imperative before the Assessing Officer can reopen the completed assessment. The proviso to sub-section (1) of section 151 of the Act provides that after the expiry of four years from the end of the relevant assessment year, notice under section 148 shall not be issued unless the Chief Commissioner or the Commissioner, as the case may be, is satisfied, on the reasons recorded by the Assessing Officer concerned, that it is a fit case for the issue of such notice. These are some in-built safeguards to prevent arbitrary exercise of power by an Assessing Officer to fiddle with the completed assessment.

In *Bawa Abhai Singh* v. *Deputy CIT* [2002] 253 ITR 83 (Delhi), a Division Bench of this court, speaking through Chief Justice Arijit Pasayat (as his Lordship then was), has said that the crucial expression 'reason to believe' predicates that the Assessing Officer must hold a belief . . . by the existence of reasons for holding such a belief. In other words, it contemplates existence of reasons on which the belief is founded and not merely a belief in the existence of reasons, inducing the belief. Such a belief may not be based merely on reasons but it must be founded on information.

In *Ganga Saran and Sons P. Ltd.* v. *ITO* [1981] 130 ITR 1 (SC), their Lordships of the Supreme Court, inter alia, observed that the expression 'reason to believe' is stronger than the expression 'is satisfied'. The belief entertained by the Assessing Officer should not be irrational or arbitrary. Alternatively put, it must be reasonable and must be based on reasons which are material.

Thus, the existence of tangible material, for the formation of opinion is a prerequisite for initiation of action under section 147 of

the Act. Therefore, what section 147 of the Act postulates is that the Assessing Officer must have reason to believe that income has escaped assessment. There should be facts before him that reasonably give rise to the belief, but the facts on the basis of which he entertains the belief need not at this stage be rebuttably conclusive to support his tentative conclusion. In case of challenge, it is open to the court to examine whether there was material before the Assessing Officer, having rational connection or relevant bearing to the formation of the belief that is claimed to have been held at the time when he issued the notice. But the court cannot for the purpose of ascertaining validity of the notice examine the sufficiency of the reasons for the belief (see *S. Narayanappa* v. *CIT* [1967] 63 ITR 219 (SC)).

Explaining the scope of the expression 'information', in the background of section 132 of the Act, which logic is equally applicable to a case under section 147 of the Act, in *L. R. Gupta* v. *Union of India* [1992] 194 ITR 32 (Delhi), a Division Bench of this court observed thus (page 45 of 194 ITR) :

'The expression "information" must be something more than a mere rumour or a gossip or a hunch. There must be some material which can be regarded as information which must exist on the file on the basis of which the authorising officer can have reason to believe that action under section 132 is called for, for any of the reasons mentioned in clause (a), (b) or (c). When the action of issuance of an authorisation under section 132 is challenged in a court, it will be open to the petitioner to contend that, on the facts or information disclosed, no reasonable person could have come to the conclusion that action under section 132 was called for. The opinion which has to be formed is subjective and, therefore, the jurisdiction of the court to interfere is very limited. A court will not act as an appellate authority and examine meticulously the information in order to decide for itself as to whether action under section 132 is called for. But the court would be acting within its jurisdiction in seeing whether the act of issuance of an authorisation under section 132 is arbitrary or *mala fide or whether the satisfaction which is recorded is such which shows lack of application of mind of the appropriate authority. The reason to believe must be tangible in law and if the information or the reason has no nexus with the belief or there is no material or tangible information for the formation of the belief, then, in such a case, action taken under section 132 would be regarded as bad in law.*' (emphasis[1] supplied)

1. Here printed in italics.

It is, thus, trite, that when a challenge is made to the action under section 147 of the Act what the court is required to examine is whether some material exists on record for the Assessing Officer to form the requisite belief and the reasons for the belief have a rational nexus or a relevant bearing to the formation of such belief and are not extraneous or irrelevant for the purpose of the said section. But the sufficiency of the grounds, which induced the Assessing Officer to act under the said section is not a justiciable issue."

In *CIT* v. *Foramer France* [2003] 264 ITR 566 (SC), the issue relating to **11** the notice of reassessment issued beyond 7 years as well as the reassessment notice especially for failure on the part of the assessee to disclose true and full particulars necessary for assessment came up for consideration. The hon'ble apex court had dealt with the said issues in the appeal filed by the Revenue, challenging the order of the Allahabad High Court reported in *Foramer* v. *CIT* [2001] 247 ITR 436 (All) and dismissed the civil appeals with costs. It is relevant to extract the above cited decision of the Allahabad High Court which came to be confirmed by the above cited decision of the apex court as under (headnote of 264 ITR 566) :

"From the decision of the High Court (see [2001] 247 ITR 436) that (i) section 147 substituted in the Income-tax Act, 1961, by the Direct Tax Laws (Amendment) Act, 1987, had made a radical departure from the original section 147, inasmuch as clauses (a) and (b) had been deleted and under the proviso thereto notice for reassessment would be illegal if issued more than four years after the end of the assessment year, if the original assessment were made under section 143(3) ; (ii) section 153 related to the passing of an order of assessment and not to the issuing of a reassessment notice under section 147/148 ; (iii) the direction or finding contemplated by section 153(3)(ii) had to be a finding in relation to the particular assessee and the particular year and to be a finding it had to be directly involved in the disposal of the case ; (iv) on the facts, the notices issued under section 148 on November 20, 1998, to the assessee for reopening the original assessments for the assessment years 1988-89, 1989-90 and 1990-91, on the basis of the Appellate Tribunal's decision rendered in the case of *Boudier Christian* relating to the assessee's technicians deputed to India, the income of the assessee was to be treated as fee for technical services and not as business income as assessed in the original assessments for those assessment years, were without jurisdiction as they were barred by limitation in view of the proviso to section 147, as amended by the Direct Tax Laws (Amendment) Act,

1987, as that was the provision that was applicable on November 20, 1998, when the reassessment notices were issued, and admittedly there was no failure on the part of the assessee to disclose fully and truly all material facts for the assessment ; (v) on the facts, the notices were bad as they were only on the basis of a change of opinion and the law that an assessment could not be reopened on a change of opinion was the same before and after the amendment by the Direct Tax Laws (Amendment) Act, 1987, of section 147 ; and (vi) as the notices were without jurisdiction, the assessee should not be relegated to the alternative remedy, the Department preferred appeals to the Supreme Court. The Supreme Court saw no reason to differ and dismissed the appeals."

12 In *CIT* v. *A. V. Thomas Exports Ltd.* [2008] 296 ITR 603 (Mad), a Division Bench of this court had considered the challenge made to the notice issued after 4 years, vis-a-vis, sections 147 and 148 of the Income-tax Act. The Division Bench of this court has also considered the decision in *CIT* v. *Foramer France* [2003] 264 ITR 566 (SC) as well as *CIT* v. *Elgi Finance Ltd.* [2006] 286 ITR 674 (Mad) and during the course of the arguments, had also extracted the relevant portion of the judgment in *CIT* v. *Elgi Finance Ltd.* [2006] 286 ITR 674 (Mad) as under (page 605 of 296 ITR) :

"Heard the counsel. The original assessment was completed under section 143(3) of the Act. The Assessing Officer applied his mind and completed the said original assessment. There is no finding by the Assessing Officer that there is any failure on the part of the assessee resulting in the escapement of income. The Assessing Officer must give categorical finding for the purpose of initiating reassessment under the proviso to section 147 of the Act. In this case the reassessment proceedings were initiated after March 31, 1995, and hence the proceedings initiated by the issue of notice under section 148 is ab initio barred by limitation. In this case, the initiation of proceedings is after a period of four years and the finding given by the Tribunal is that no income has escaped assessment by reason of failure on the part of the assessee. Hence, there is no jurisdiction to reopen the assessment under the proviso of section 147 of the Act. The scope of the said provision has been considered by this court in the case of *CIT* v. *Elgi Finance Ltd.* [2006] 286 ITR 674 (Mad), and the same reads as follows (page 678) :

'The law relating to reassessment has undergone a change from April 1, 1989. The change was brought in by the Direct Tax Laws (Amendment) Act, 1987. Two sets of provisions were available under

section 147 in clause (a) and clause (b). This distinction has now been taken away by the amendment Act. Previously, the line of distinction was a limitation period of four years and the limitation period exceeding four years. The Assessing Officer would reopen a back assessment within a period of four years as long as he had reason to believe in consequence of any information, that income has been under assessed or income has escaped assessment. In the case of limitation, providing for a period exceeding four years, there should have been a failure on the part of the assessee to disclose fully and truly all material facts leading to the escapement of income. But as a result of the amendment brought with effect from April 1, 1989, the above distinction had been obliterated and the Assessing Officer could reassess the income as long as he had reason to believe that income chargeable had escaped assessment. The new law has inserted a proviso to section 147 in the following words :

"Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year."

In addition to the time-limits provided for under section 149, the law has provided another limitation of four years under the proviso to section 147. As far as the above proviso to section 147 is concerned, the law prescribes a period of four years to initiate reassessment proceedings, unless the income alleged to have escaped assessment was made out as a result of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment'."

In the said judgment, the Division Bench of this court has dealt with the issue relating to mere change of opinion and relied upon the decision rendered by a Division Bench of this court in *CIT* v. *Annamalai Finance Ltd.* [2005] 275 ITR 451 (Mad), wherein it was held that "section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate reassessment proceedings upon a mere change of opinion. It is incumbent on the Assessing Officer to prove that there was a failure to

disclose material facts necessary for the assessment for the issuance of notice beyond the period of four years".

13 Let this court consider the decisions cited by the learned counsel appearing for the contesting party/assessee.

14 In *CIT* v. *P. V. S. Beedies (P.) Ltd.* [1999] 237 ITR 13 (SC), it was held that reopening of case on factual errors pointed out by the audit party is permissible in law and therefore, reopening of the case under section 147(b) of the Income-tax Act, in the facts and circumstances of the case, found to be justified.

15 The said issue was also considered in the judgment in *Larsen and Toubro Ltd.* v. *State of Jharkhand* (judgment dated March 21, 2017 made in Civil Appeal No. 5390 of 2007) [2017] 103 VST 1 (SC) and the hon'ble apex court after taking into consideration para 23 of the *P. V. Beedies* case (cited supra) and its earlier decisions, observed as follows in para 27 (page 14 of 103 VST) :

> "The expression 'information' means instruction or knowledge derived from an external source concerning facts or parties or as to law relating to and/or after hearing on the assessment. We are of the clear view that on the basis of information received and if the Assessing Officer is satisfied that reasonable ground exists to believe, then in that case the power of the assessing authority extends to reopening of the assessment, if for any reason, the whole or any part of the turnover of the business of the dealer has escaped assessment or has been under-assessed and the assessment in such a case would be valid even if the materials, on the basis of which the earlier assessing authority passed the order and the successor assessing authority proceeded, were same. The question still is as to whether in the present case, the assessing authority was satisfied or not."

It was also observed from the materials that the Assessing Officer had to issue notice on the ground of directions issued by the audit party and not on his personal satisfaction which is not permissible under law and accordingly, allowed the appeal filed by the assessee.

16 In *ICICI Home Finance Co. Ltd.* v. *Asst. CIT* [2012] 25 taxmann.com 241 (Bom), the order passed by the Assessing Officer under section 143(3) of the Income-tax Act as well as the scope of section 147 of the Income-tax Act came up for consideration and on facts found that the reasons for reopening of the assessment are identical to the objections raised by the audit party and in para 7 had dealt with the law on the said subject and it is relevant to extract the same :