CONTENTS OF THIS PART

REPORTS OF CASES : 609—712 PAGE

SUBJECT INDEX TO CASES REPORTED IN THIS PART

not justified—Reassessment not valid—Income-tax Act, 1961, ss. 68, 147, 148—BAJAJ PARIVAHAN P. LTD. *v.* ITO (Kolkata) . . . 705

Revision—Limitation—Issues subject to revision pertaining to original assessment and not reopened assessment—Period of limitation would start from original assessment—Original assessment passed on 16-1-2014 and revision could have been taken up to 31-3-2016 but revisional order passed on 26-2-2019—Revision beyond period of limitation—Income-tax Act, 1961, s. 263—JINDAL STEEL AND POWER LTD. *v.* PRINCIPAL CIT (Delhi) . . . 636

SECTIONWISE INDEX TO CASES REPORTED IN THIS PART

Income-tax Act, 1961 :

S. 32—Depreciation—Modem is an integral part of a computer—Eligible for higher rate of depreciation at 60 per cent.—DEPUTY CIT *v.* ASIANET SATELLITE COMMUNICATIONS LTD. (Cochin) . . . 695

S. 37—Business expenditure—Prior period expenses—Interest for delayed payment of pole rental charges—Not prior period expenses but compensatory in nature—Deductible—DEPUTY CIT *v.* ASIANET SATELLITE COMMUNICATIONS LTD. (Cochin) . . . 695

S. 54F—Capital gains—Long-term capital gains—Exemption—Sale of capital asset and purchase of residential property—Amount deposited in capital gains accounts scheme before filing of return under section 139(4)—Entitled to exemption—RENU JAIN *v.* ITO (Jaipur) . . . 621

S. 68—Reassessment—Notice after four years—Condition precedent—Reasons recorded vague and general—Assessee disclosing during course of original assessment proceedings details of all loan creditors—Assessee repaying loan with interest and deducting tax at source thereon—Loan repaid within same year—Addition on account of cash credit not justified—Reassessment not valid—BAJAJ PARIVAHAN P. LTD. *v.* ITO (Kolkata) . . . 705

s. 92CA—International transactions—Transfer pricing—Arm's length price—Benchmarking transactions—Comparable companies—Companies in respect of which segmental information not available—Companies whose functions in contrast with assessee's—Software testing services company—Company rendering whole basket services—Company providing software services to its clients—Not comparables—FIS SOLUTIONS (INDIA) P. LTD. *v.* DEPUTY CIT (Pune) . . . 656

S. 147—Reassessment—Notice after four years—Condition precedent—Reasons recorded vague and general—Assessee disclosing during course of original assessment proceedings details of all loan creditors—Assessee repaying loan with interest and deducting tax at source thereon—Loan repaid within same year—Addition on account of

CASES JUDICIALLY NOTICED IN THIS PART

Alcatel-Lucent India Ltd. *v.* Addl. CIT (I. T. A. No. 6979/Delhi/2017) **followed** in FIS Solutions (India) P. Ltd. *v.* Deputy CIT [2020] 79 ITR (Trib) 656 (Pune)

Avada Trading Co. (P.) Ltd. *v.* Asst. CIT [2006] 100 ITD 131 (Mum) [SB] **followed** in FIS Solutions (India) P. Ltd. *v.* Deputy CIT [2020] 79 ITR (Trib) 656 (Pune)

Avaya India (P.) Ltd. *v.* Addl. CIT [2019] 112 taxmann.com 301 (Delhi) **followed** in FIS Solutions (India) P. Ltd. *v.* Deputy CIT [2020] 79 ITR (Trib) 656 (Pune)

CIT (Dy.) *v.* Datacraft India Ltd. [2011] 9 ITR (Trib) 712 (Mumbai) [SB] **followed** in Deputy CIT *v.* Asianet Satellite Communications Ltd. [2020] 79 ITR (Trib) 695 (Cochin)

CIT (Pr.) *v.* Shankar Lal Saini [2018] 89 taxmann.com 235 (Raj) **relied on** in Renu Jain *v.* ITO [2020] 79 ITR (Trib) 621 (Jaipur)

CIT *v.* Alagendran Finance Ltd. [2007] 293 ITR 1 (SC) **relied on** in Jindal Steel and Power Ltd. *v.* Principal CIT [2020] 79 ITR (Trib) 636 (Delhi)

Dy. CIT *v.* Rohini Builders [2002] 256 ITR 360 (Guj) **relied on** in Bajaj Parivahan P. Ltd. *v.* ITO [2020] 79 ITR (Trib) 705 (Kolkata)

Haryana Acrylic Manufacturing Co. *v.* CIT [2009] 308 ITR 38 (Delhi) **relied on** in Bajaj Parivahan P. Ltd. *v.* ITO [2020] 79 ITR (Trib) 705 (Kolkata)

Hindustan Lever Ltd. *v.* R. B. Wadkar, Asst. CIT (No. 1) [2004] 268 ITR 332 (Bom) **relied on** in Bajaj Parivahan P. Ltd. *v.* ITO [2020] 79 ITR (Trib) 705 (Kolkata)

ICICI Bank Ltd. *v.* K. J. Rao [2004] 268 ITR 203 (Bom) **relied on** in Bajaj Parivahan P. Ltd. *v.* ITO [2020] 79 ITR (Trib) 705 (Kolkata)

Indira Industries *v.* Pr. CIT [2018] 12 ITR-OL 413 (Mad) **relied on** in Jindal Steel and Power Ltd. *v.* Principal CIT [2020] 79 ITR (Trib) 636 (Delhi)

ITO *v.* Lakshdweep Development Corporation Ltd. (I. T. A. No. 312/Cochin/2018 dated October 3, 2018) **followed** in Deputy CIT *v.* Asianet Satellite Communications Ltd. [2020] 79 ITR (Trib) 695 (Cochin)

L G Electronics India P. Ltd. *v.* Pr. CIT [2016] 388 ITR 135 (All) **relied on** in Jindal Steel and Power Ltd. *v.* Principal CIT [2020] 79 ITR (Trib) 636 (Delhi)

Mircrosoft Research Lab India Pvt. Ltd. *v.* Dy. CIT (I.T. (TP) A. No. 3131/Bang/2018 dated February 5, 2020) **followed** in FIS Solutions (India) P. Ltd. *v.* Deputy CIT [2020] 79 ITR (Trib) 656 (Pune)

NXP India P. Ltd. *v.* Asst. CIT (I. T. A. No. 5140/Delhi/2018) **followed** in FIS Solutions (India) P. Ltd. *v.* Deputy CIT [2020] 79 ITR (Trib) 656 (Pune)

Symantec Software India P. Ltd. *v.* Dy. CIT [2020] 114 taxmann.com 435 (Pune-Trib) **followed** in FIS Solutions (India) P. Ltd. *v.* Deputy CIT [2020] 79 ITR (Trib) 656 (Pune)

CUMULATIVE TABLE OF CASES REPORTED

PARTS 1 to 6

(*Cases reported in this part are marked with asterisks*)

CONTENTS OF SHORT NOTES CASES OF THIS PART

REPORTS OF CASES : 33—48 PAGE

SUBJECT INDEX TO SHORT NOTES CASES REPORTED IN THIS PART

Capital gains—Short-term capital gains—Transfer of property with co-owners—Assessee claiming he had not received part of consideration—In the absence of receipt of sale consideration—No capital gains could be taxed—Assessing Officer to verify non-receipt of consideration—Income-tax Act, 1961, s. 2(47)—MOHANRAO VISHWANATH GAIKWAD *v.* ITO (Pune) ... 42

Charitable purpose—Application of income—Building security deposit, canteen equipment, computer system and printer, advancing loans to staff, vehicle loan and tax deduction at source payable—Assessee not having registration when Assessing Officer passed assessment order but Tribunal later restoring registration—Expenditure incurred in the nature of application of income—Income-tax Act, 1961, s. 11—DEPUTY CIT (EXEMPTIONS) *v.* CARGO HANDLING PRIVATE WORKERS POOL TRUST (Visakhapatnam) ... 38

——Application of income—Determination of income—Computation under normal commercial principles—Income-tax payment—Allowable deduction towards income available for application to charitable purposes—Income-tax Act, 1961, s. 11—DEPUTY CIT (EXEMPTIONS) *v.* CARGO HANDLING PRIVATE WORKERS POOL TRUST (Visakhapatnam) ... 38

——Assessee following cash system of accounting for determination of income for purpose of application of income—Rejection of books of account without finding any defects in accounts not justified—Income-tax Act, 1961, s. 11—DEPUTY CIT

(*Contd. on Cover page 3*)

CIT *v.* Vatika Townships P. Ltd. (I. T. A. No. 1329 of 2010 dated September 10, 2010) (Delhi) (para 11)

Glass Lines Equipments Co. Ltd. *v.* CIT [2002] 253 ITR 454 (Guj) (para 11)

I. T. A. Nos. 5181 and 5182/Delhi/2014 (assessment year 2010-11).

Ved Jain, Advocate, for the assessee.

Ms. Pramita M. Biswas, Commissioner of Income-tax-Departmental representative, for the Department.

ORDER

The order of the Bench was pronounced by

PRASHANT MAHARISHI ***(Accountant Member)***.—These are the two appeals of two different assessees involving identical facts and circumstances including the amount of addition involved, parties also confirmed the same, put forth their arguments identically, therefore, both these appeals are disposed of by this common order. As the learned Commissioner of Income-tax (Appeals) ("the learned CIT (A)") has dealt with the facts in the case of I. T. A. No. 5181/Delhi/2014 in the case of Mr. Madhur Mittal, it is taken as lead appeal. 1

Mr. Madhur Mittal, the assessee has raised the following grounds of appeal in I. T. A. No. 5182/Delhi/2014 for the assessment year 2010-11 against the order passed by the learned Commissioner of Income-tax (Appeals) dated July 23, 2014 : 2

> "1. That the learned Commissioner of Income-tax (Appeals) was wrong in facts and in law by rejecting the ground of the appellant of not providing the grounds of approval taken for making the assessment of the appellant by the Assessing Officer before the completion of the assessment.
>
> 2. That the learned Commissioner of Income-tax (Appeals) was wrong on facts and in law to confirm the addition of Rs. 8.75 crores based on the draft unsigned document found during search operation from a laptop belonging to the appellant based on hypothetical and surmises grounds.
>
> 3. Without prejudice to the aforesaid grounds, each ground of appeal is independent to each other."

Identical grounds were raised in appeal of Mr. Sumit Mittal. 3

Briefly stated the facts shows that search and seizure on "Triveni group" of companies was carried out on September 28, 2010. The assessee was covered in that search also. The assessee filed his return of income on 4

December 10, 2012 under section 153A of the Act declaring an income of Rs. 995540 in response to the notice under section 153A of the Act dated February 7, 2012. Notice under section 143(2) of the Act was issued on December 28, 2012. Assessment under section 153A read with section 143(3) of the Act was passed on March 25, 2013 determining the total income of the assessee at Rs. 9,22,36,540 by the Deputy Commissioner of Income-tax, Central Circle – 22, New Delhi ("the learned AO "). Only addition, which has travelled before us, is an amount of Rs. 8.75 crores in the hands of the assessee with respect to alleged commission on sale of a property. The assessee contested the addition before the learned Commissioner of Income-tax (Appeals) –III, New Delhi ("the learned CIT(A)"). He passed an order dated July 23, 2014 confirming the addition. Therefore, the assessee is in appeal before us on that single issue.

5 During the course of search on the "Triveni group" of companies, annexure A 23 was seized. Based on that the learned Assessing Officer has alleged that the assessee has received a commission of Rs. 8.75 crores in respect of sale of property at 7, Sikandra Road, New Delhi purchased by three individuals from court auction which was bid by the Triveni group for purchase of the above property at Rs. 117 crores.

6 To understand the issue, it is important to look at the chronology of the events. On September 26, 2006, the honourable Delhi High Court auctioned property at 7, Sikandara Road, New Delhi. Triveni Infrastructure Development Co. Ltd. (hereinafter referred to as "TIDCO") made a bid of Rs. 117 crores, which was accepted. On October 5, 2006, the honourable High Court received 25 per cent. of the above consideration, roughly amounting to Rs. 29.25 crores and a schedule for payment of the balance instalments was drawn. As the substantial payment was not made by TIDCO, on May 5, 2009 the court directed it to deposit Rs. 90 crores in two tranches on or before December 31, 2009. The court also directed that in case of failure to deposit the above sum penalty be also to be levied of Rs. 5 crores. On June 12, 2009, the court allowed the sale deed to be executed in the name of the group concern of TIDCO, namely, Angel Infrabuild Ltd. However, as the substantial payment was outstanding, and there was a delay in payment of the balance instalments. As the bidder was facing financial crunch and in order to avoid forfeiture of the advance money paid to the tune of Rs. 29.25 crores and further penalty of Rs. 3 crores, the group decided to transfer its rights in the auction of the property. Therefore, TIDCO floated various proposals in the market. For better realisation of the property price, it wanted the property to be converted from leasehold to freehold ; it entered into a contract with M/s. Konark Care on January 24,

2007. The court appointed Commissioner has also made an effort for conversion of the above property. The matter reached the court for directions to LDO. The honourable court granted a direction on May 15, 2007. However, as per the steps taken by the Court Commissioner, TIDCO cancelled the agreement entered into with Konark Care. As nothing happened, on August 14, 2007, TIDCO re-entered into an agreement with the same company for conversion of land and expedite the process for conversion into freehold property from leasehold property. Meanwhile the agreement with Konark Care also went into litigation before the honourable Delhi High Court, Konark Care preferred an appeal for recovery of an amount of Rs. 18 crores from TIDCO and restraining it from dealing in the property. The honourable Delhi High Court disposed of the appeal of the Konark Care per order dated September 24, 2009 that was further appeal by Konark Care on November 4, 2009. On November 4, 2009 an ex parte injunction was passed restraining TIDCO from dealing with the property in any manner. For removal of the above injunction, TIDCO approached the honourable Supreme Court, the honourable Supreme Court vide order dated February 8, 2010 vacated the injunction subject to furnishing security of Rs. 18 crores. Thus, the process of such conversion was delayed substantially. For all these reasons, it floated various proposals in the market for sale of the above property. In this proposal the three gentlemen, namely, Mr. Kabul Chawla, Mr. Chetan Shabarwal and Mr. Nitin Shabarwal came to its rescue. As per the letter dated February 20, 2010, they wrote a letter to the assessee (Mr. Madhur Mittal) and his brother (Mr. Summit Mittal, another assessee) that they have agreed to buy the property bearing number 7, Sikandara Road, New Delhi and a definitive agreement is signed. In this regard, they have agreed to pay an amount of Rs. 2,18,75,000 to Mr. Madhur Mittal and an identical sum to Mr. Summit Mittal as commission for purchase of the said property. This was the communication by one of those three gentlemen. Identical communication was also received from another gentleman. The third communication was from the third gentlemen who agreed to pay an amount of Rs. 4,37,50,000 to Mr. Madhur Mittal and identical sum to Mr. Summit Mittal as commission for purchase of the said property. Thus, three gentlemen issued letter dated February 20, 2010, to pay the assessee and his brother total commission of Rs. 17.50 crores for the above property. However, on February 24, 2010, the assessee responded to them with respect to the above draft proposal and sent an e-mail communication appreciating the offer made by those persons on February 20, 2010 to pay Rs. 17.50 crores under the head of commission to comply with the order of the Supreme Court. It was stated that legal

opinion was taken in this regard from their legal team and it was advised by the advocates, that due to the pending court cases against the company and its directors, no such payment can be received in personal name as commission or otherwise. Therefore, the assessee declined to accept the offer and stated that they cannot take any amount directly in the name of the directors. Thus, they requested that the entire amount of the sale consideration be deposited with the High Court for the execution of sale deed. It was further promised that the company is making effort for vacation of the stay which would be intimated very soon. Subsequently, on April 20, 2010, the High Court permitted the execution of sale deed in favour of the purchasers, i. e., Mr. Kabul Chawla, Nitin Shabarwal and Chetan Shabarwal as they deposited bank draft of Rs. 89.75 crores with the honourable court. On April 21, 2010 sale deed was executed in favour of the purchaser for Rs. 122 crores comprising of Rs. 117 crores of sales consideration and Rs. 5 crores of penalties. Thus, the property, which was bid by TIDCO for Rs. 117 crores on September 26, 2006, was ultimately transferred on April 21, 2010 in favour of three different individuals jointly at the same price plus a penalty of Rs. 5 crores. Thus, TIDCO recovered the sum of bid money of Rs. 29.25 crores paid earlier.

7 The learned Assessing Officer referred to the document dated February 20, 2010 where all these three purchasers agreed to pay commission of Rs. 17.5 crores to Shri Madhur Mittal and Shri Summit Mittal who are the owners and promoters of TIDCO is the subject matter of dispute. Based on the above chronology of events, the learned Assessing Officer took these letters dated February 20, 2010 written by the three individuals to the assessee where they have agreed to pay commission of Rs. 17.5 crores to Mr. Madhur Mittal and Mr. Summit Mittal. The assessee was questioned.

8 The assessee explained that they are directors of "Triveni group" of companies wherein the assessee with the several parties were in negotiation for the purpose of saving the earnest money deposited for the purchase of the above properties. The main intention of the assessee was that the money that has been deposited by the assessee-company for the purpose of purchase of the above property in pursuance of the bid of Rs. 29.25 crores could be recovered. This is so because of a huge litigation involved in the property and severe financial crunch faced by TIDCO. Therefore, the main intention of the group was to save Rs. 29.25 crores paid as earnest money against the bid of the above property. It would be forfeited well as penalty could be levied further. It was further stated that the above letters stated to be have been written by the three different individuals have never been acted upon. Those documents are unsigned and did not materialise.

The assessee also referred to the e-mail communication dated February 24, 2010 written to all these three individuals amongst others, in response to their earlier communication for the payment of commission stating that the advocates have advised them that due to the pending court cases against the company and its directors, no payment can be received in personal name as commission or otherwise. Therefore, they requested that the total payment is required to be made as per the direction of the honourable High Court for the execution of the sale deed of the above property in their name. It was further explained that passports of the assessee have been deposited before the honourable High Court as per the direction of the honourable High Court and further the office of the TIDCO group were seized by the office of the official liquidator attached to the honourable Delhi High Court. Therefore, it is facing a huge financial crunch. The assessee also submitted that it has not received any such payment from these three gentlemen. The assessee submitted his bank account and the books of account for verification of the fact. Therefore, it was submitted that the assessee has not received any commission from these three gentlemen. In view of this, the assessee submitted that it has not earned any such commission and therefore it is not chargeable to tax in his hands.

9 The learned Assessing Officer was of the view that as those documents were recovered from the laptop of Mr. Madhur Mittal, promoter of the Triveni group of companies, which was subjected to search, there is good evidence. In view of this, he made an addition of Rs. 8.75 crores in the hands of the assessee and another Rs. 8.75 crores in the hands of Mr. Summit Mittal. Accordingly, assessment under section 153A read with section 143(3) of the Act was passed on March 25, 2013.

10 The assessee aggrieved with the order of the learned Assessing Officer preferred an appeal before the learned Commissioner of Income-tax (Appeals). He passed an order on July 23, 2014. On the arguments of the assessee before him that those documents are dumb documents. The learned Commissioner of Income-tax (Appeals) has held that it is not a dumb document, in view of the provisions of section 292C of the Act and presumption available under section 132(4A) of the Act. The assessee also argued that the buyers were not examined. With respect to the examination of the buyer of the property, he held that the buyer of the property could not depose against these parties as per the decision of the honourable Delhi High Court in the case of *Sonal Construction* and *Urmila Lodhi*. He was further of the view that as Triveni has deposited Rs. 30 crores for the purpose of purchase of the property before three years. The sale deed is executed in 2010. Therefore , the property is now may be valued at

Rs. 200-300 crores.Therefore, there is no reason that the assessee should forgo such a huge sum. Hence, he held that the above sum is paid by that buyers and received by the assessee as commission. Therefore, he confirmed the addition. Against that order of the learned Commissioner of Income-tax (Appeals), the assessee is in appeal before us.

11 The learned authorised representative vehemently submitted that the addition made is devoid of any merit. His arguments have following points.

(a) The main plank of the argument is that the seized documents merely say that the parties "agreed to pay the above commission to these two persons. However, it was merely a proposed transaction which was refused by the assessee on February 24, 2010 which was also prior to the date of search and the whole consideration has been received as determined by the honourable High Court. It was stated that the proposal of these three gentlemen were never accepted. Full consideration was received for the sale of the above property through the High Court registry, which was agreed to in the bid proceedings except Rs. 29.25 crores, which is received by the TIDCO group.

(b) He further submitted that the provisions of section 292C is a rebuttable presumption for which case the assessee has shown the details that the offer given by the three gentlemen was not at all accepted by the assessee. Along with the letters dated February 20, 2010 of these three gentlemen, the e-mail dated February 24, 2010 of the assessee refusing to the above offer was also in the search proceedings. Therefore those letters are accepted by the learned Assessing Officer for making addition but, immediate correspondence thereafter of the assessee also prior to the date of search was not at all accepted. Thus, the offer made by the third party is used for making addition but its rejection by the assessee is totally ignored.

(c) He further submitted that the property was sold in pursuance of the orders of the honourable High Court as well as the assessee-company who bid for the above property went in to dire financial consequences. Therefore, it wanted to get out of the whole transaction. For this assessee roped in these 3 gentlemen, who agreed to buy the property at the agreed bid price. Thus, the rebuttable presumption has been explained by declining the offer.

(d) It was further stated that no corroborative evidences were found during the course of search which shows that the assessee has received the above consideration. It was further submitted that the Assessing Officer did not have any corroborating material whatsoever

to support the action and the Assessing Officer has not carried out any enquiry in respect of the said matter.

(e) It was further stated that the assessee is not the seller of the property but merely a director of the company who obtained right to get the registration of the property in favour of that company. The consideration was also agreed by the honourable High Court, therefore, there was no reason or there was no purpose of paying commission to the assessee over and above agreed price.

(f) It was further stated that buyer of the property was not examined on this issue.

(g) He submitted that the addition made in the hands of the assessee only based on three unsigned letters from the buyers, which was refused by the assessee, prior to the date of search, could not result into any addition in the hands of the assessee as commission income.

(h) The learned authorised representative further submitted that only the real income is required to be taxed in his hands, the sale of the property was obtained in an auction and the whole consideration was paid by cheque. It was further submitted that the unsigned letters merely state that the said amount has been proposed to be paid, and it nowhere states that the amount has been actually paid to the assessee. Therefore, the Assessing Officer has merely based on surmises and conjectures made the impugned addition.

(i) The learned authorised representative further relied on the decision of the co-ordinate Bench in (I. T. A. No. 7089/Mum/2011 as well as in I. T. A. No. 1551/Bang/2012).

(j) It was further submitted that a document cannot be used selectively against the assessee and portion of the document which are in favour of the assessee cannot be ignored just at the option of the Assessing Officer. He therefore submitted that the learned Assessing Officer should have given due weightage to the word used "agreed" in the document as well to consider that the amount was merely proposed to be paid as against "actually" paid. The learned Assessing Officer simply ignored. He further referred to the decision of the honourable Delhi High Court in *CIT* v. *Vatika Townships P. Ltd.* (I.T. A. No. 1329 of 2010 dated September 10, 2010) and the honourable Gujarat High Court in the case of *Glass Lines Equipments Co. Ltd.* v. *CIT* [2002] 253 ITR 454 (Guj) .

(k) The assessee further submitted that the observation of the learned Commissioner of Income-tax (Appeals) in holding that the

remaining infrastructure or to sell the property at higher rate to compensate for rise of prices is devoid of any manner. TIDCO would have in fact lost Rs. 29.75 crores, if such settlement would not have been made. He further referred to the several litigations entered into in the above property and stated that at each stage the assessee was having risk of forfeiture of above amount.

(l) In the end, he submitted that even otherwise, the Assessing Officer himself in its order has stated that the series of events that the sale deed was executed on April 20, 2010 that is relevant to the assessment year 2011-12 and not to the assessment year 2010-11 for which the appeals are filed. He submitted that even otherwise, the commission cannot be, if at all, is required to be taxed in the year under appeal as the transaction of the sale of the property has not taken place during the year.

(m) In view of this, it was submitted that the order passed by the learned Assessing Officer and confirmed by the learned Commissioner of Income-tax (Appeals) of the addition of Rs. 8.75 crores in the hands of the assessee is devoid of any merit.

12 The learned Departmental representative vehemently supported the orders of the lower authorities. She submitted the copies of the three letters, namely, Kabul letter doc, Nitin letter doc and Chetan letter doc available in the working copy of annexure A 23 of the seized documents. The learned Departmental representative vehemently supported the argument by the decision of the honourable Delhi High Court in *CIT* v. *Sonal Construction* [2013] 359 ITR 532 (Delhi) ; [2012–HC–851–Del–IT] (Delhi).

13 In rejoinder, the learned authorised representative submitted that the facts in the case of *Sonal Constructions* (supra) are quite distinct where certain figures were found with respect to the four projects that the assessee had undertaken in the course of his business. The seized documents in fact contain figures relating to the four projects, which were admittedly undertaken by the assessee. One of the partners in that case admitted. He referred to para No. 15 of that judgment and tried to distinguish the same. However, in the present case, the assessee himself denies that it has not accepted any commission and written an e-mail prior to the date of search to these three parties that the above transaction cannot take place. Therefore, the reliance placed by the learned Departmental representative on the above decision of the honourable Delhi High Court is incorrect.

14 We have carefully considered the rival contentions and perused the orders of the lower authorities. The facts of the whole transaction has already been narrated, therefore, the sake of brevity they are not repeated

here. The crux of the issue and evidence based on which these appeals rotate are three letters found during the course of search from the laptop of the assessee. Admittedly, the addition has been made only on those documents. All these three letters are dated February 20, 2010. For the purposes of examination we reproduce the contents of Nitin letter doc which is as under :

"Dated February 20, 2010

To

Madhur Mittal and Sumit Mittal

Regarding : Payment of commission

Dear Madhur and Sumit,

I have agreed to buy the property bearing No. 7, Sikandara Road, New Delhi and a definitive agreement is signed today. In regard to this I have agreed to pay an amount of Rs. 2,18,75,000 to Madhur Mittal and Rs. 2,18,75,000 to Sumit Mittal as commission for purchase of the said property.

Thanking you

Sincerely your

Nitin Sabharwal."

Identically worded of even date letter was one documents, namely, **15** Chetan letter doc where the same amount was mentioned and another even dated letter was of Kabul Chawla as Kabul letter doc, however, in that letter the amount of commission mentioned was Rs. 4,37,50,000. Thus, the total commission amount mentioned in these three letters was Rs. 17.50 crores. All these are word documents. Property (word document property) of these three letters was not obtained by the Revenue and, therefore who prepared those letters and how the assessee came in to possession of these documents was not known. There is also no reference by the Assessing Officer about when these documents were prepared. In the absence of these properties of the documents, it is difficult to ascertain the veracity of those documents. However, undoubtedly these documents were found in the laptop of the assessee. Be that it may be, the assessee has also not denied that the above letters were found from his possession. Therefore, according to the provision of section 292C of the Income-tax Act, where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search under section 132 or survey under section 133A, it may, in any proceeding under this Act be presumed (i) that such books of account, other documents, money, bullion, jewellery or other

valuable article or thing belong or belongs to such person ; (ii) that the contents of such books of account and other documents are true ; and (iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested. Therefore, the assessee in the present case cannot deny that those documents belong to the assessee, the contents of such documents are true. The assessee is also not denying the same but trying to submit that such documents must be read in the proper perspective. He is further saying that there is another electronic evidence in the form of e-mail dated Wed, February 24, 2010 communicated at 14:36:24 sent by Nivedita Bisht from e-mail id *enquiry@triveni.net* to many persons which is placed at page No. 5 of the paper book which reads as under :

"Subject : Re : Draft proposal

Dear Sir,

While appreciating the offer made by you on February 20, 2010 to pay Rs. 17.50 crores to Mr. Madhur Mittal and Mr. Sumit Mittal under the head of commission to comply with the order of the Supreme Court of the total sales consideration. The legal opinion was taken in this regard from our legal team.

It is advised by the advocates that due to pending court cases against the company and its directors , no payment can be received in personal name as commission or otherwise.

Thus, we cannot accept your offer nor can take any amount directly in the name of the directors. Thus, you are requested to make the entire amount of the sale consideration before the High Court only for the execution of sale deed.

The company is making legal efforts for vacation of stay, which will be intimated to you.

Thanks and regards

Nivedita Bisht."

16 Therefore, it is apparent that, in the absence of any other evidence, it was an offer by the buyers to the assessee for taking commission of Rs. 17.50 crores for giving only the solvent guarantee of Rs. 18 crores before the honourable Supreme Court in terms of the order dated February 8, 2010. The assessee subsequently settled the case with Konark Care in

terms of the order of the honourable Delhi High Court April 13, 2010. Therefore, it is apparent that the assessee was not to deposit cheque of Rs. 18 crores but only to provide solvency guarantee before the hon'ble Supreme Court to release the property, which is already agreed to be transferred to the parties by the agreement dated December 7, 2009. Subsequently, this agreement was terminated and a new agreement was entered in to on April 19, 2010. The Revenue did not show that there is any change in the consideration. Therefore, the assessee accepted that he received such offer from buyers. However, he also says that by e-mail he refused to accept that offer. Therefore, the content of the documents were accepted to be true. Therefore, the assessee did not dispute applicability of section 292C of the Act but says that there is rebuttable presumption and the assessee has rebutted the presumption by producing reliable explanation. However, the real issue is that whether from these documents there is any income received by the assessee or not. If the letters of the three buyers and the reply correspondence of the assessee is looked as a compendium of correspondence as "one", the assessee has clearly shown that yes as per those documents the assessee received an offer and by another document, which is totally ignored by the Revenue authorities, the assessee refused to accept that offer. Both receipt of offer and refusal to accept that offer rejection both were prior to the search and both the electronic evidence were available with the Assessing Officer. However, the learned Assessing Officer made an addition based on offer received by the assessee for those three parties completely ignoring the refusal to accept such offer by the assessee. Therefore, in the present case, we do not find that part of the records found during search can be used against the assessee for taxing his income, where in other documents clearly suggest that there is no such income accruing to the assessee. The assessee has also brought on record all possible evidence which the assessee could have to show that there was no immediately, therefore, there cannot be any income in the hands of the assessee on that rejected offer. Thus, the assessee has rebutted the presumption available to the Revenue under section 132(4A) and 292C of the Act.

With respect to the arguments of the learned authorised representative **17** that there should also be some corroborative material available with the learned Assessing Officer to make the addition, the honourable Delhi High Court in *Sonal Construction* (supra) that case has held in para No. 17 as under (page 545 of 359 ITR) :

> "As to the corroboration sought by the Tribunal in support of the seized documents, it is not an inviolable rule applicable to all

situations and to all cases that every seized document should be corroborated before any addition can be made based on it. If calculations and computations have been made in the seized documents in such a manner that its probative value and genuineness cannot be doubted, nothing prevents the Assessing Officer from making additions on the basis of such documents despite the absence of any corroboration. It must be remembered that in such cases it is difficult to obtain corroboration, particularly of the type contemplated by the Tribunal. The Tribunal observed that corroboration could have come in the form of a valuation of the property by the Departmental Valuation Officer or from the purchasers of the property who could have said that they did pay consideration over and above what has been recorded by the assessee in the books of account. The valuation of properties can at best be only an estimate. It may not be practical to expect the purchasers of the property to depose against the seller since both of them are party to the same transaction in which on-money is allegedly involved. When documents which are not meant for the eyes of the Revenue are unearthed after undertaking an exercise which involves an intrusion into the privacy of the assessee, it is not permissible to discount the veracity, genuineness and truthfulness of the contents therein for the flimsiest of reasons. It would be proper to insist upon strong evidence in rebuttal of the contents of the documents, particularly after the introduction of section 292C with retrospective effect from October 1, 1975."

18 Therefore, if there is income element in those documents seized from the possession of the assessee, then there was no requirement of bringing any corroborative material on record. However, there has to be existence of income in the documents seized. If the documents seized does not show any income earned by the assessee, then the learned Assessing Officer cannot rest on the provision of section 292C without bringing any corroborative material on record. Further, the learned Assessing Officer did not examine the buyers of the property with respect to the commission paid by them to the assessee. Even the assessee was also not questioned during the course of search with respect to these three letters. As we have already held that there is no income accrues to the assessee based on these three documents, without bringing any corroborative material, it could not have been taxed in the hands of the assessee.

19 Further, while confirming the addition, the learned Commissioner of Income-tax (Appeals) was of the view that TIDCO has won bid for the property in 2006 for Rs. 117 crores, TIDCO sold that property in 2010,

therefore, market value of the property would have gone up to Rs 200 -300 crores and the assessee, therefore, would have received the commission. Sale deed of the property shows consideration of Rs. 122 crores only. There was no corroboration of the valuation presumed by the learned Commissioner of Income-tax (Appeals). He did not bring on record even the circle rate of the property to show that the market value of the property has increased so much. Alleged commission was only Rs. 17.50 crores. Had the property price would have gone up by assuming at the lowest estimate of the learned Commissioner of Income-tax (Appeals) of Rs. 200 crores then the property is appreciated by Rs. 83 crores (Rs. 200 -117) crores. Had the appreciation been so much, nobody would have forgone the profit of Rs. 83 crores for Rs. 17.50 crores. Therefore, such reason given by the learned Commissioner of Income-tax (Appeals) cannot be the basis for confirming the addition.

In view of this, we reverse the orders of the lower authorities and direct 20
the learned Assessing Officer to delete the addition of commission income in the hands of Mr. Madhur Mittal and Mr. Sumit Mittal of Rs. 8.75 crores.

Accordingly, both these appeals of the assessee are allowed. 21

Order pronounced in the open court on May 18, 2020.

[2020] 79 ITR (Trib) 621 (Jaipur)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — JAIPUR "A" BENCH]

RENU JAIN

v.

INCOME-TAX OFFICER

VIJAY PAL RAO *(Judicial Member)* and **VIKRAM SINGH YADAV *(Accountant Member)***

March 6, 2020.

SS ▸ ITA 1961, s 54F
AY ▸ 2011-12
HF ▸ Assessee

CAPITAL GAINS—LONG-TERM CAPITAL GAINS—EXEMPTION—SALE OF CAPITAL ASSET AND PURCHASE OF RESIDENTIAL PROPERTY—AMOUNT DEPOSITED IN CAPITAL GAINS ACCOUNTS SCHEME BEFORE FILING OF RETURN UNDER SECTION 139(4)—ENTITLED TO EXEMPTION—INCOME-TAX ACT, 1961, s. 54F.

On the basis of information received during the course of assessment proceedings for the assessment year 2013-14, notice under section 148 of the

Income-tax Act, 1961 was issued stating that the assessee had wrongly claimed deduction under section 54F as the assessee had deposited a sum of Rs. 22,50,000 under the Capital Gains Accounts Scheme on December 3, 2011 after the due date for filing of the return of income, i. e, July 31, 2011, and that therefore, the income of the assessee had escaped assessment within the meaning of section 147. In response, the assessee submitted his return and thereafter, after considering the submissions of the assessee, the assessment was completed wherein the Assessing Officer had denied the claim of the assessee under section 54F amounting to Rs. 17,09,798. The Commissioner sustained the addition. On appeal :

Held, *that the whole of the sale consideration was deposited in the Capital Gains Accounts Scheme and was utilised in purchase of another property and was not used for any other purposes. In terms of the time frame of depositing in the Capital Gains Accounts Scheme, the deposits were made on December 3, 2011 and thereafter, the assessee filed her return on December 14, 2011 within the time limit prescribed under section 139(4) wherein she claimed exemption under section 54F. Where the amount was deposited in the capital gain accounts scheme before filing the return under section 139(4) the amount would be eligible for deduction under section 54F.*

PR. CIT *v.* SHANKAR LAL SAINI [2018] 89 taxmann.com 235 (Raj) *relied on*.

Cases referred to :

CIT *v.* Gangadhar Banerjee and Co. (P.) Ltd. [1965] 57 ITR 176 (SC) (para 10)

CIT *v.* Jagtar Singh Chawla [2013] 33 taxmann.com 38 ; 215 Taxman 154 (P&H) (para 10)

CIT *v.* Jagriti Aggarwal (Ms.) [2011] 339 ITR 610 (P&H) (paras 8, 10)

CIT *v.* J. H. Gotla [1985] 156 ITR 323 (SC) (para 10)

CIT *v.* Rajesh Kumar Jalan [2006] 286 ITR 274 (Gauhati) (para 10)

CIT (Pr.) *v.* Shankar Lal Saini [2018] 89 taxmann.com 235 (Raj) (paras 8, 10)

CIT *v.* T. V. Sundaram Iyengar and Sons (P.) Ltd. [1975] 101 ITR 764 (SC) (para 10)

CIT *v.* Vrinda P. Issac (Smt.) [2012] 24 taxmann.com 131 ; [2013] 212 Taxman 101 (Mag.) (Karn) (para 10)

Fathima Bai *v.* ITO [2009] 32 DTR 243 (Karn) (para 10)

Goverdhan Singh Shekhawat *v.* ITO [2019] 102 taxmann.com 50 (Jaipur) (paras 4, 5)

ITC Ltd. *v.* CCE [2004] 3 RC 337 ; [2004] 7 SCC 591 (para 10)

Jagan Nath Singh Lodha *v.* ITO [2005] 148 Taxman 1 (Jodhpur) (Mag) (para 6)

Keshavji Ravji and Co. *v.* CIT [1990] 183 ITR 1 (SC) (para 10)

Oxford University Press *v.* CIT [2001] 247 ITR 658 (SC) (para 7)

Sanjeev Lal *v.* CIT [2014] 365 ITR 389 (SC) (para 7)

Satish P. Malhotra *v.* ITO (I. T. A. No. 6877/Mum/2014, dated November 29, 2017) (para 6)

Satyavati Arvind Kotian *v.* ITO (I. T. A. No. 5036/Mum/2017) (para 6)

I. T. A. No. 96/Jaipur/2020 (assessment year 2011-12).

Akshay Shah, Chartered Accountant, for the assessee.

Miss Chanchal Meena, Joint Commissioner of Income-tax, for the Department.

ORDER

The order of the Bench was pronounced by

VIKRAM SINGH YADAV ***(Accountant Member)***.—This is an appeal filed by the assessee against the order of the learned Commissioner of Income-tax (Appeals)-II, Jaipur, dated November 29, 2019 for the assessment year 2011-12 wherein the assessee has taken the following ground of appeal : **1**

> "1. The learned Commissioner of Income-tax (Appeals) erred in law as well as on the facts of the case in upholding the addition of INR 17,09,798 without considering and appreciating the intent and purpose of the provisions of section 54F of the Act. The addition so confirmed by the Commissioner of Income-tax (Appeals), being totally contrary to the provisions of law and facts of the case, therefore the same may be deleted."

Briefly the facts of the case are that the assessment in this case was completed under section 143(3) read with section 147 of the Act dated October 8, 2016. On the basis of the information received during the course of assessment proceedings for the assessment year 2013-14, the notice under section 148 of the Act was issued on January 27, 2016 stating that the assessee has wrongly claimed deduction under section 54F of the Act as the assessee has deposited a sum of Rs. 22,50,000 under the Capital Gains Account Scheme on December 3, 2011 after due date of filing of return of income, i. e., July 31, 2011, therefore, the income of the assessee has escaped assessment within the meaning of section 147 of the Act. In response, the assessee submitted his return of income on March 24, 2016 and thereafter, after considering the submissions of the assessee, the assessment was completed wherein the Assessing Officer has denied the **2**

claim of the assessee under section 54F of the Act amounting to Rs. 17,09,798. Being aggrieved, the assessee carried the matter in appeal before the learned Commissioner of Income-tax (Appeals) who has sustained the addition and against the said findings, the assessee is in appeal before us.

3 During the course of hearing, the learned authorised representative submitted that the assessee has earned long-term capital gain of Rs. 17,09,798 from sale of plots at a consideration of INR 22,50,000 on February 10, 2011. The sale consideration of the plots sold was received by the assessee on January 18, 19, 2011. In order to avail of the benefit of deduction under section 54F of the Act the assessee has set aside the entire funds for purchase of residential property by opening an FDR with Bank of Rajasthan (now ICICI Bank) on January 20, 2011, i. e., well before the due date of filing the return under section 139 of the Act for the assessment year 2011-12. Later on, the appellant came to know that as per the provisions of section 54F, the FDR is required to be made under the Capital Gains Accounts Scheme ("CGAS"). Therefore, in order to rectify the procedural mistake, the appellant on December 3, 2011 encashed the FDR with ICICI bank and deposited such amount on very same day into Capital Gains Accounts Scheme FDR with Canara Bank without utilising the same for any other purpose.

4 It was submitted that the Assessing Officer disallowed the deduction claimed under section 54F of the Act stating that the appellant have deposited the amount under the Capital Gains Accounts Scheme after the due date of filing return of income and the same was upheld by the learned Commissioner of Income-tax (Appeals). It was submitted that while making such addition, the learned Assessing Officer and the learned Commissioner of Income-tax (Appeals) have not appreciated the following facts and legal interpretation of various judicial pronouncements :

• The learned Commissioner of Income-tax (Appeals) have failed in not considering the essence of the judgment pronounced by the jurisdictional Tribunal in one of the similar issues in the case of *Goverdhan Singh Shekhawat* v. *ITO* [2019] 102 taxmann.com 50 (Jaipur) thereby violating the doctrine of precedent ;

• Both the authorities have failed in considering and appreciating the fact that the entire funds have been utilised only for purchase of residential house and have not been utilised for any other purpose ;

• Both the authorities have failed in considering and appreciating the intent and purpose of the provisions of section 54F of the Act ;

• There was no mala fide intention on the part of the appellant to have deposits the amount under a FDR account and not under the Capital

Gains Accounts Scheme. It was just a bona fide mistake which was corrected as soon as it came to the knowledge of the assessee ;

• The whole idea of opening a Capital Gains Accounts Scheme is to delineate the funds from other funds regularly maintained by the assessee and has to ensure that the benefit which has been availed of by an assessee by depositing the amount in the said account is ultimately utilised for the purposes for which the exemption has been claimed, i. e., for purchase of the residential house. The appellant have solely utilised such funds for purchase of residential property and the same has not been rebutted by the learned Assessing Officer ;

• The appellant have duly disclosed such information in the return of income filed ;

• It is a well-settled law that an incentive provision has to be construed liberally with the intent of law.

It was further submitted that the Jaipur Bench of the Tribunal in the case of *Goverdhan Singh Shekhawat* v. *ITO* reported in [2019] 102 taxmann.com 50 (Jaipur) has held as under : 5

> "Thus, it is viewed that the assessee's claim will qualify for exemption under section 54F as he has, in substance, complied with the requirements of sub-section (4) for the impugned assessment year as the whole of the compensation has been deposited in the said bank account and the withdrawals are limited to purchase of plot of land and construction thereof and are monitored closely by the assessee himself . . .
>
> In the instant case, even though the savings bank account technically speaking is not a capital gain account, the essence and spirit of opening and maintaining a separate capital gains account has been achieved as well as demonstrated by the assessee. Therefore, merely because the savings bank account is technically not a capital gains account, it cannot be said that there is violation of the provisions of sub-section (4) in terms of not opening a Capital Gains Accounts Scheme. The Revenue has not disputed that the deposits in the said account are from the compensation received by the assessee from compulsory acquisition of his land by RIICO and the Revenue has equally not disputed that there are any withdrawals other than for the purposes of purchase of plot of land and construction thereon."

Moreover, the hon'ble Tribunal Members discussed the scheme that has been framed by the Central Government referred to as the Capital Gains Accounts Scheme, 1988 which has been notified for the purposes of

availing exemption under section 54F(4) and at para 40 discussed about the intent of the sub-section (4) of section 54F as under :

"The whole purpose and scheme of deposit so envisaged is thus to closely monitor the utilisation of the amount for the purposes of purchase or construction of the residential house. The whole idea is to delineate the funds from other funds regularly maintained by the assessee and has to ensure that the benefit which has been availed by the assessee by depositing the amount in the said account is ultimately utilised for the purposes for which the exemption has been claimed, i. e., for purchase or construction of a residential house."

6 It was accordingly submitted that the assessee has followed the provisions in its true spirit and have kept the intent of section 54F for availing of the deduction as :

(a) The sale proceeds was kept separately by opening an FDR ;

(b) Later on, when it came to the notice of the appellant that the FDR is required to be made under the Capital Gains Accounts Scheme, the appellant in order to rectify the procedural mistake encashed the FDR deposited with ICICI Bank and deposited such amount into the Capital Gains Scheme FDR with Canara Bank on the same date ;

(c) Ultimately the appellant utilised the funds kept under the Capital Gains Accounts Scheme account for purchase of property. The similar judgment was pronounced by the different Benches of the Income-tax Appellate Tribunal in the following cases :

• The Income-tax Appellate Tribunal Jodhpur in the case of *Jagan Nath Singh Lodha* v. *ITO* [2005] 148 Taxman 1

• The Income-tax Appellate Tribunal Mumbai in the case of *Satish P. Malhotra* v. *ITO* (I. T. A. No. 6877/Mum/2014)

• The Income-tax Appellate Tribunal Mumbai in the case of *Satyavati Arvind Kotian* v. *ITO* (I. T. A. No. 5036/Mum/2017)

7 It was further submitted that the intention or bona fide is neither under doubt nor it is doubted. Moreover, it is a settled law that an incentive provision has to be construed liberally as held the hon'ble Supreme Court in the case of *Sanjeev Lal* v. *CIT* [2014] 365 ITR 389 (SC) as under (page 399) :

"The intention of the Legislature or the purpose with which the said provision has been incorporated in the Act, is also very clear that the assessee should be given some relief. Though it has been very often said that common sense is a stranger and an incompatible partner to the Income-tax Act and it is also said that equity and tax are

strangers to each other, still this court has often observed that purposive interpretation should be given to the provisions of the Act. In the case of *Oxford University Press* v. *CIT* [2001] 247 ITR 658 (SC) this court has observed that a purposive interpretation of the provisions of the Act should be given while considering a claim for exemption from tax. It has also been said that harmonious construction of the provisions which subserve the object and purpose should also be made while construing any of the provisions of the Act and more particularly when one is concerned with exemption from payment of tax. Considering the above stated observations and the principles with regard to the interpretation of statute pertaining to the tax laws, one can very well interpret the provisions of section 54 read with section 2(47), i. e., definition of 'transfer', which would enable the assessee to get the benefit under section 54 of the Act."

As per the above judgment of the hon'ble Supreme Court, purposive interpretation of the provisions of the Act should be given while considering a claim for exemption from tax. Basis the same, section 54F of the Act was inserted by the Finance Act, 1982, with a view to encourage house construction and later sub-section (4) was inserted by the Finance Act, 1987 to ensure that unutilised amount should be kept deposited in the bank or institution and should be utilised in accordance with the scheme. This legislative intent was duly met by the appellant.

8 It was submitted that the jurisdictional High Court in the case of *Pr. CIT* v. *Shankar Lal Saini* [2018] 89 taxmann.com 235 (Raj) has held that even amount deposited in the Capital Gains Accounts Scheme before filing of return under section 139(4) shall also be allowed for deduction as per provisions of sub-section (4) of section 54F of the Act. In this case also, FDR made with Canara Bank under the Capital Gains Accounts Scheme on December 3, 2011 is also well before the filing of return of income, i. e., on December 14, 2011. Accordingly investment made of Rs. 22,50,000.00 made in FDR under the Capital Gains Accounts Scheme is an allowable deduction under section 54F of the Act. The similar judgment was pronounced by the Punjab and Haryana High Court in the case of *CIT* v. *Ms. Jagriti Aggarwal* [2011] 339 ITR 610 (P&H) ; [2011] 15 taxmann.com 146.

9 Per contra, the learned Departmental representative submitted that firstly the amount has been deposited in the Capital Gains Accounts Scheme after the due date of filing the return of income under section 139(1) of the Act. It was further submitted that even the subsequent purchase of residential property has not been made within the prescribed period of 2 years from the date of transfer of the original asset and

therefore, there is no infirmity in the order of the Assessing Officer in denying the claim of exemption under section 54F of the Act.

10 We have considered the rival submissions and perused the material available on record. From a perusal of the reasons recorded by the Assessing Officer before issuance of notice under section 148 of the Act, the undisputed facts which are emerging that the assessee sold a plot of land on January 10, 2011 for a consideration of Rs. 22,50,000 and the said amount was deposited in FDRs maintained with ICICI Bank on January 21, 2011. The FDRs were encashed and the maturity proceeds of Rs. 23,66,223 so received were deposited in Canara Bank on December 3, 2011. On the same day, out of the maturity proceeds of FDRs, the assessee has made fresh deposits of FDRs of Rs. 22,50,000 and this time, these FDRs were maintained with Canara Bank under the Capital Gains Accounts Scheme. These facts are also corroborated by the bank statement of the assessee appearing at APB page 66 and the certificate issued by the Canara Bank dated October 27, 2015 available at APB page 89. Thereafter on May 21, 2012, three FDRs matured/encashed and the amount credited in the assessee's bank with maturity value of Rs. 15,32,232 and on the very next date, i.e, May 22, 2012, the said maturity proceeds were utilised for making payment of Rs. 18,00,000 to Shri Arvind Kumar Khurana, the person from whom the assessee has purchased a property. Thereafter the remaining FDRs matured on July 25, 2012 with the matured value of Rs. 8,95,788 which was utilised for making further payment of Rs. 9,00,000 to the seller of the property on July 31, 2012. These facts are also corroborated by the sale deed wherein out of the total consideration of Rs. 1,13,00,000, an amount of Rs. 27,00,000 has been paid through cheques drawn on the Canara Bank out of the maturity proceeds of FDRs maintained under the Capital Gains Accounts Scheme. We, therefore, find that the whole of the sale consideration has been deposited in the Capital Gains Accounts Scheme and has been utilised in purchase of another property and has not been used for any other purposes. In terms of time frame of depositing in the Capital Gains Accounts Scheme, as we have noted above, the deposits were made on December 3, 2011 and thereafter, the assessee has filed her return of income on December 14, 2011 within time limit prescribed under section 139(4) of the Act wherein she has made the claim under section 54F of the Act and therefore, the question arises as to whether the same is in compliance with the provisions of section 54F(4) of the Act. We find that the said issue has arisen for consideration before the hon'ble jurisdictional High Court in the case of *Sankar Lal Saini* (supra) wherein the substantial question of law framed for consideration was as under :

"Whether, the Tribunal was justified in allowing the deduction of Rs. 1,60,00,000 under section 54B and Rs. 52,00,000 under section 54F of the Act ignoring the specific provisions of section 54B(2) and 54F(4) which refers to the due date of section 139(1) and not section 139(4) of the Act ?"

And the hon'ble High Court referred to the decisions of other High Courts as under :

"15. He has relied upon the following decisions :

CIT v. *Jagtar Singh Chawla* [2013] 33 taxmann.com 38 ; 215 Taxman 154 (P&H) :

8. A Division Bench of the Gauhati High Court in a case reported as *CIT* v. *Rajesh Kumar Jalan* [2006] 286 ITR 274 (Gauhati) held that only section 139 of the Act is mentioned in section 54(2) of the Act in the context that the unutilised portion of the capital gain on the sale of property used for residence should be deposited before the date of furnishing the return of the income-tax under section 139 of the Act and that it would include extended period to file return in terms of sub-section (4) of section 139 of the Act. It was held as under (page 282 of 286 ITR) :

'From a plain reading of sub-section (2) of section 54 of the Income-tax Act, 1961, it is clear that only section 139 of the Income-tax Act, 1961, is mentioned in section 54(2) in the context that the unutilised portion of the capital gain on the sale of property used for residence should be deposited before the date of furnishing the return of the income-tax under section 139 of the Income-tax Act. Section 139 of the Income-tax Act, 1961, cannot be meant only section 139(1), but it means all sub-sections of section 139 of the Income-tax Act, 1961. Under sub-section (4) of section 139 of the Income-tax Act any person who has not furnished a return within the time allowed to him under sub-section (1) of section 142 may furnish the return for any previous year at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment year whichever is earlier.'

9. The said judgment was relied upon by a Division Bench of the Karnataka High Court in *Fathima Bai* v. *ITO* (I. T. A. No. 435 of 2004 decided on October 17, 2008) [2009] 32 DTR 243 (Karn) wherein it was held to the following effect :

11. The extended due date under section 139(4) would be March 31, 1990. The assessee did not file the return within the extended due date, but filed the return on February 27, 2000. However, the assessee

had utilised the entire capital gains by purchase of a house property within the stipulated period of section 54(2), i. e., before the extended due date for return under section 139. The assessee technically may have defaulted in not filing the return under section 139(4). But, however, utilised the capital gains for purchase of property before the extended due date under section 139(4). The contention of the Revenue that the deposit in the scheme should have been made before the initial due date and not the extended due date is an untenable contention.'

10. A Division Bench of this court in which one of us (Hemant Gupta J.) was a Member, had an occasion to consider the provisions of section 54(2) of the Act, wherein it has been held that sub-section (4) of section 139 of the Act is in fact a proviso to section 139(1) of the Act. Therefore, since the assessee has invested the sale proceeds in a residential house within the extended period of limitation, the capital gain is not payable. The judgments in *Rajesh Kumar Jalan*'s case and *Fathima Bai*'s case (supra) were referred to. It has been held as under :

Having heard learned counsel for the parties, we are of the opinion that sub-section (4) of section 139 of the Act is, in act, a proviso to sub-section (1) of section 139 of the Act. Section 139 of the Act fixes the different dates for filing the returns for different assessees. In the case of assessee as the respondent, it is 31st day of July, of the assessment year in terms of clause (c) of *Explanation 2* to sub-section (1) of section 139 of the Act, whereas sub-section (4) of section 139 provides for extension in period of due date in certain circumstances. It reads as under :

'(4) Any person who has not furnished a return within the time allowed to him under sub-section (1), or within the time allowed under a notice issued under sub-section (1) of section 142, may furnish the return for any previous year at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment whichever is earlier :

Provided that where the return relates to a previous year relevant to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year, the reference to one year aforesaid shall be construed as a reference to two years from the end of the relevant assessment year.'

A reading of the aforesaid sub-section would show that if a person has not furnished the return of the previous year within the time allowed under sub-section (1), i. e., before 31st day of July of the

assessment year, the assessee can file return before the expiry of one year from the end of every relevant assessment year.

3. *Fathima Bai* v. *ITO* [2009] 32 DTR 243 (Karn) it has been held as under :

'8. Section 54(2) declares that within one year from the date of transfer if the capital gain is not invested in purchase of building, he should deposit the amount in the Capital Gains Accounts Scheme or else the assessee should invest the capital gains before filing of return within the permitted period under section 139. In which event, the assessee will not be liable to pay capital gain tax.

9. Section 139(4) declares that the assessee should file returns within the time prescribed, if he fails to file returns, he may file returns for any previous year at any time before expiry of one year from the end of the relevant assessment year.'

4. *CIT* v. *Jagriti Aggarwal* [2011] 339 ITR 610 (P&H) ; [2011] 15 taxmann.com 146 ; 203 Taxman 203, it has been held as under (page 612 of 339 ITR) :

Section 54 of the Act contemplates that the capital gain arises from the transfer of a long-term capital asset, but if the assessee within a period of one year before or two years after the date on which the transfer took place purchases residential house, then instead of the capital gain, the income would be charged in terms of provisions of sub-section (1) of section 54. As per sub-section (2), if the amount of capital gains is not appropriated by the assessee towards the purchase of new asset within one year before the date on which the transfer of the original asset took place, or which is not utilised by him for the purchase or construction of the new asset before the date of furnishing the return of income under section 139, the amount shall be deposited by him before furnishing such return not later than due date applicable in the case of the assessee for furnishing the return of income under sub-section (1) of section 139 in an account in any such bank or institution as may be specified. The relevant sub-section (2) of section 54 of the Act reads as under :

"(2) The amount of the capital gain which is not appropriated by the assessee towards the purchase of the new asset made within one year before the date on which the transfer of the original asset took place, or which is not utilised by him for the purchase or construction of the new asset before the date of furnishing the return of income under section 139, shall be deposited by him before furnishing such return such deposit being made in any case not later than the due

date applicable in the case of the assessee for furnishing the return of income under sub-section (1) of section 139 in an account in any such bank or institution as may be specified in, and utilised in accordance with, any scheme which the Central Government may, by notification in the Official Gazette, frame in this behalf and such return shall be accompanied by proof of such deposit ; and, for the purposes of sub-section (1), the amount, if any, already utilised by the assessee for the purchase or construction of the new asset together with the amount so deposited shall be deemed to be the cost of the new asset :

Provided that if the amount deposited under this sub-section is not utilised wholly or partly for the purchase or construction of the new asset within the period specified in sub-section (1), then,—

(i) The amount not so utilised shall be charged under section 45 as the income of the previous year in which the period of three years from the date of the transfer of the original asset expires ; and

(ii) The assessee shall be entitled to withdraw such amount in accordance with the scheme aforesaid." . . . .

A reading of the aforesaid sub-section would show that if a person has not furnished the return of the previous year within the time allowed under sub-section (1), i. e., before 31st day of July of the assessment year, the assessee can file return before the expiry of one year from the end of the relevant assessment year . . .

In view of the above, we find that due date for furnishing the return of income as per section 139(1) of the Act is subject to the extended period provided under sub-section (4) of section 139 of the Act.

Consequently, the question of law is answered against the Revenue and in favour of the assessee. Thus, the present appeal is dismissed.'

5. In *CIT* v. *Smt. Vrinda P. Issac* [2012] 24 taxmann.com 131 (Karn) ; [2013] 212 Taxman 101 (Mag.) (Karn), it has been held as under :

'3. The Tribunal in coming to the said conclusion that the investment made by the assessee being within the time specified under sub-section (4) of section 139 of the Act relied on the judgment of this court in the case of *Fathima Bai v. ITO* [2009] 32 DTR (Karn) 243. Even if two views are possible, the revisional authority had no jurisdiction to initiate proceedings under section 263 of the Act. It was held that the order passed by the High Court is incorrect, which

decision cannot be accepted. The Tribunal has followed the judgment of this court as the decision of the High Court is binding on the subordinate courts. If the judgment passed by this court is erroneous, the Revenue should have challenged the said order. At any rate that cannot be a ground for invoking section 263 of the Act in the facts of this case. In that view of the matter, we do not see any merit in this appeal. Accordingly, no substantial question of law arises for consideration. Hence, the appeal is dismissed.'

6. *CIT* v. *Rajesh Kumar Jalan* [2006] 286 ITR 274 (Gauhati) ; [2006] 157 Taxman 398 it has been held as under (page 282 of 286 ITR) :

'From a plain reading of sub-section (2) of section 54 of the Income-tax Act, 1961, it is clear that only section 139 of the Income-tax Act, 1961, is mentioned in section 54(2) in the context that the unutilised portion of the capital gain on the sale of property used for residence should be deposited before the date of furnishing the return of the income-tax under section 139 of the Income-tax Act. Section 139 of the Income-tax Act, 1961, cannot be meant only section 139(1) but it means all sub-sections of section 139 of the Income-tax Act, 1961. Under sub-section (4) of section 139 of the Income-tax Act any person who has not furnished a return within the time allowed to him under sub-section (1) of section 142 may furnish the return for any previous year at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment year whichever is earlier. Such being the situation, it is the case of the respondent/assessee that the respondent/assessee could fulfil the requirement under section 54 of the Income-tax Act for exemption of the capital gain from being charged to income-tax on the sale of property used for residence up to March 30, 1998, inasmuch as the return of income-tax for the assessment year 1997-98 could be furnished before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment whichever is earlier under sub-section (4) of section 139 of the Income-tax Act, 1961.'

7. *ITC Ltd.* v. *CCE* [2004] 3 RC 337 ; [2004] 7 SCC 591, it has been held as under :

'23. Presumably the phrase "badly drafted" was used to mean that the language of the entry was ambiguous. In case of such ambiguity "close reasoning" will be employed—but without stretching the language to arrive at the only reasonable construction. These decisions exemplify the general rule of statutory construction that words

have to be construed strictly according to their ordinary and natural meaning, particularly when the statute is a fiscal one irrespective of the object with which the provision was introduced. Of course if there is ambiguity in the statutory language, reference may be made to the legislative intent to resolve the ambiguity. But if the statutory language is unambiguous then that must be given effect to. The Legislature is deemed to intend and mean what it says. The need for interpretation arises only when the words used in the statute are, on their own terms ambivalent and do not manifest the intention of the Legislature *Keshavji Ravji and Co.* v. *CIT* [1990] 183 ITR 1 (SC) . . . .

25. But there are exceptions to this rule. The first is that the rule of strict construction does not apply to a provision which merely lays down the machinery for the calculation or procedure for the collection of tax. . . . .

27. The second exception is: If two constructions are possible and a strict construction would lead to an absurd result then the construction which is in keeping with the object of the statutory provision or in keeping with equity could be accepted. This was the view expressed in *CIT v. J. H. Gotla* [1985] 156 ITR 323 (SC) while interpreting section 24(2) of the Income-tax Act, 1922 (page 339 of 156 ITR) :

"'. . . . if strict literal construction leads to an absurd result, i. e., result not intended to be subserved by the object of the legislation found in the manner indicated before, and if another construction is possible apart from strict literal construction then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers, attempts should be made that these do not mean always so and if a construction results in equity rather than in injustice ; then such construction should be preferred to the literal construction."'

8. *CIT* v. *T. V. Sundaram Iyengar and Sons (P.) Ltd.* [1975] 101 ITR 764 (SC) ; [1976] 1 SCC 77, it has been held as under (page 773 of 101 ITR) :

'In considering whether the company is liable to pay additional super-tax on the entire balance of distributable profits, it has to be borne in mind that section 23A is clearly penal in nature ; for, in the circumstances mentioned therein, if a private company fails to distribute by way of dividends the statutory percentage of its distributable profits, it becomes liable to pay, apart from the sum determined as payable by it on the basis of the assessment under section 23,

super-tax at 50 per cent. or 37 per cent., as the case may be, on the undistributed balance of its distributable profits. In the first place, this provision being penal, the burden would lie on the revenue to prove that the conditions laid down by the section are satisfied. *CIT v. Gangadhar Banerjee and Co. (P.) Ltd.* [1965] 57 ITR 176 (SC), 184. Secondly, penal statutes have to the construed strictly in the sense that if there is a reasonable interpretation which will avoid the penalty, that interpretation ought to be adopted : 'When the Legislature imposes a penalty, the words imposing it must be clear and 'distinct'."

16. He contended that interpretation which has been given by the Tribunal is just and proper and the decision of co-owner has not been challenged by the Department and the judgment of *Nand Lal* (supra) is also not challenged."

And the relevant findings of the hon'ble High Court read as under :

"17. We have heard counsel for the parties.

18. The first contention of Mr. Pathak regarding interpretation of prosecution and the exemption benefit is required to be accepted. Admittedly, while considering the prosecution, the provisions are to be very strictly construed whereas in the case of exemption and other benefits, it is to be construed from the statute very liberally.

19. The contention of Mr. Singhi that under section 139, investment is to be made before the return is filed otherwise it will render the provision nugatory is to be considered in the light that while considering the case, the Karnataka High Court in para Nos. 6 and 7 (supra) has considered the provisions and interpreted the same. Even the same is accepted by the Punjab and Haryana High Court and Gauhati High Court which has taken the view contrary to the Kerala High Court decision.

20. In that view of the matter, three High Courts have taken the view and the Tribunal has followed the Karnataka High Court which has followed the earlier Gauhati judgment which has been independently supported by the Punjab Harayana High Court.

21. In that view of the matter, the issue is required to be answered in favour of the assessee and against the Department.

22. The appeal stands dismissed."

In the instant case, where the amount was deposited in the Capital Gains Accounts Scheme before filing of return under section 139(4) of the Act, respectfully following the decision of the hon'ble Rajasthan High Court (supra), the same be eligible for deduction under section 54F of the

Act. In the result, the matter is decided in favour of the assessee and against the Revenue and the sole ground of appeal is allowed.

In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on March 6, 2020.

[2020] 79 ITR (Trib) 636 (Delhi)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — DELHI "C" "H"-1 BENCH]

JINDAL STEEL AND POWER LTD.

v.

PRINCIPAL COMMISSIONER OF INCOME-TAX

PRASHANT MAHARISHI *(Accountant Member)* and
K. N. CHARRY *(Judicial Member)*

May 14, 2020.

SS ▶ ITA 1961, s 263
AY ▶ 2009-10
HF ▶ Assessee

REVISION—LIMITATION—ISSUES SUBJECT TO REVISION PERTAINING TO ORIGINAL ASSESSMENT AND NOT REOPENED ASSESSMENT—PERIOD OF LIMITATION WOULD START FROM ORIGINAL ASSESSMENT—ORIGINAL ASSESSMENT PASSED ON 16-1-2014 AND REVISION COULD HAVE BEEN TAKEN UP TO 31-3-2016 BUT REVISIONAL ORDER PASSED ON 26-2-2019—REVISION BEYOND PERIOD OF LIMITATION—INCOME-TAX ACT, 1961, S. 263.

The assessee filed its return for the assessment year 2009-10. The Assessing Officer passed a draft assessment order. The assessee filed objections before the Dispute Resolution Panel and thereafter the order of assessment was passed. This order was challenged before the Tribunal and the Tribunal passed an order on the appeal. Subsequently, the Assessing Officer issued notice under section 148 of the Income-tax Act, 1961 to examine the deductions under sections 80-IA and 80-IB as the assessee had claimed deduction in respect of the power from the plant used for captive consumption but was not maintaining separate books of account. The Assessing Officer passed an order under section 147. The order passed by the Assessing Officer was subject to revision by the Principal Commissioner under section 263. On appeal :

Held, *that the issue of production of coal mines was not an issue in the reopened assessment proceedings. The precise issues for which action under*

section 263 was initiated were for assessing the income of the assessee on account of showing the incorrect production according to the report of a commission of inquiry. Action under section 263 was not initiated in respect of the deduction of the assessee under section 80-IA or 80-IB. Therefore, the issue for which revision under section 263 was proposed was not the issue for which the case of the assessee was reopened under section 147. Action under section 263 was initiated on issues which had already been decided in the original assessment and not in the reopened assessment. Therefore, the time limit for passing the order under section 263 would run from the date of the original order and not that of the subsequently reopened assessment order under section 147. The original assessment order was passed on January 16, 2014, and revision thereof could have been taken up to March 31, 2016. The order under section 263 was passed on February 26, 2019, and therefore it was clearly beyond the limitation prescribed under section 263(2).

CIT *v.* ALAGENDRAN FINANCE LTD. [2007] 293 ITR 1 (SC), INDIRA INDUSTRIES *v.* PR. CIT [2018] 12 ITR-OL 413 (Mad) *and* L G ELECTRONICS INDIA P. LTD. *v.* PR. CIT [2016] 388 ITR 135 (All) *relied on.*

Cases referred to :

Asoka Buildcon Ltd. *v.* Asst. CIT [2010] 325 ITR 574 (Bom) (para 9)

CIT *v.* Alagendran Finance Ltd. [2007] 293 ITR 1 (SC) (paras 9, 16)

CIT *v.* Bharati Airtel Ltd. [2013] 218 Taxman 112 (Delhi) (Mag) (para 9)

CIT *v.* ICICI Bank Ltd. [2012] 343 ITR 74 (Bom) (para 9)

CIT *v.* Lark Chemicals Ltd. [2014] 368 ITR 655 (Bom) (para 9)

CIT *v.* Nova Promoters Finlease (P.) Ltd. [2012] 342 ITR 169 (Delhi) (para 8)

CIT *v.* Sriram Engineering Construction Co. Ltd. [2011] 330 ITR 568 (Mad) (para 9)

Gee Vee Enterprises *v.* Addl. CIT [1975] 99 ITR 375 (Delhi) (para 8)

Harjit Kaur *v.* Asst. CIT (I. T. A. No. 280 of 2013 (P&H), dated November 11, 2013) (para 8)

Indira Industries *v.* Pr. CIT [2018] 12 ITR-OL 413 (Mad) (paras 9, 17)

Jindal Steel and Power Ltd. *v.* Asst. CIT (I. T. A. No. 893/Delhi/2014, dated April 29, 2019) (para 12)

L G Electronics India P. Ltd. *v.* Pr. CIT [2016] 388 ITR 135 (All) (paras 9, 18)

Majinder Singh Kang *v.* CIT [2012] 344 ITR 358 (P&H) (paras 6, 8)

Narayan Tatu Rane *v.* ITO [2016] 70 taxmann.com 227 (Mum-Trib) (para 9)

Rampyari Devi Saraogi *v.* CIT [1968] 67 ITR 84 (SC) (para 8)
Sesa Sterlite Ltd. *v.* Asst. CIT [2019] 417 ITR 334 (Bom) (para 9)
Sumati Dayal *v.* CIT [1995] 214 ITR 801 (SC) (para 8)
Tara Devi Aggarwal (Smt.) *v.* CIT [1973] 88 ITR 323 (SC) (para 8)

I. T. A. No. 4607/Delhi/2019 (assessment year 2009-10).

Salil Kapoor, Sunit Lal and *Ms. Chandani* and *Ms. Ananya Kapoor*, Advocates, for the assessee.

Raman Chopra, Commissioner of Income-tax-Departmental representative, for the Department.

ORDER

The order of the Bench was pronounced by

1 PRASHANT MAHARISHI ***(Accountant Member)***.—This appeal is filed by the assessee, M/s. Jindal Steel and Power Ltd. (assessee, appellant) against the order under section under section 263 of the Income-tax Act, 1961 ("the Act") dated March 30, 2019 for the assessment year 2009-10 passed by the Principal Commissioner of Income-tax, Gurgaon, holding that the assessment order passed under section 143(3) read with section 147 of the Act dated December 30, 2016 passed by the Deputy Commissioner of Income-tax, Circle-1 (1), Gurgaon (the learned Assessing Officer) is erroneous and prejudicial to the interests of the Revenue.

2 The assessee raised the following grounds of appeal :

"1. That on the facts and in the circumstances of the case and in law, the impugned order dated March 30, 2019 passed by the Principal Commissioner of Income-tax ('PCIT') under section 263 of the Income-tax Act, 1961 ('the Act') is beyond jurisdiction, illegal and bad in law and is liable to be quashed.

2. That the Principal Commissioner of Income-tax erred in initiating proceedings under section 263 of the Act on the basis of an draft order which was passed in contravention of the mandate as per the High Court direction vide order dated December 6, 2016 and hence was void ab initio and as such no proceedings could have been initiated on the basis of an invalid/illegal order.

3. That on the facts and in the circumstances of the case and in law, the order passed by the Principal Commissioner of Income-tax under section 263 of the Act is a premature order inasmuch as was is no order capable of being revised.

4. That without prejudice to the above grounds the Assessing Officer ought to have considered that once a reference under section

92CA(1) of the Act was made in the original proceedings to the Transfer Pricing Officer, it was incumbent upon him to pass a draft assessment order instead of passing a final assessment order dated March 30, 2019 failing which the entire assessment proceedings and all consequential proceedings are invalid, non est and void ab initio.

5. That on the facts and in the circumstances of the case and in law, the impugned order passed by the Principal Commissioner of Income-tax is illegal and bad in law, being barred by limitation prescribed under section 263(2) of the Act.

6. That on the facts and in the circumstances of the case in law since the reassessment order dated December 30, 2016 sought to be revised was patently without jurisdiction, the impugned revisionary proceedings were also without jurisdiction, illegal and bad in law.

7. That on the facts and in the circumstances of the case and in law, the impugned order passed under section 263 of the Act without appreciating that the twin conditions of that section, viz., assessment order being erroneous as well as prejudicial to the interests of the Revenue were not satisfied, is illegal and bad in law.

8. That on the facts and in the circumstances of the case, the impugned order passed by the Principal Commissioner of Income-tax without considering the reply and objections of the assessee, is illegal and bad in law.

9. That on the facts and in the circumstances of the case and in law, the Principal Commissioner of Income-tax erred in holding that reassessment order dated December 30, 2016 passed under section 147/143(3), was erroneous and prejudicial to the interests of the Revenue on the issue of examination of quantum of production/ mined quantities of iron ore recorded in the books of account, having regard to some report of Justice M. B. Shah Commission on illegal mining issued in June, 2013.

10. That the Principal Commissioner of Income-tax exceeded his jurisdiction in setting aside the reassessment order on the issue of examination of quantum of production/mined quantities of iron ore, despite the fact that the said issue was not at all subject matter of reassessment proceedings.

11. That the Principal Commissioner of Income-tax erred in setting aside the reassessment order on the aforesaid issue on vague/general ground for examination of quantum of production/mined quantities of iron ore, without pointing out the error, much less prejudice, in the earlier assessments.

12. That on the facts and in the circumstances of the case the impugned order is illegal and bad in law as no independent inquiry has been carried out by the Principal Commissioner of Income-tax."

3 The brief facts of the case show that the assessee is a company. It filed its original return of income at INR 1,00,66,79,810 on September 30, 2009. This was later revised at INR 9,87,31,15,970. The draft assessment order under section 144C read with section 143 (3) of the Act was passed on January 29, 2013. On objections filed before the learned Dispute Resolution Panel-III, (the learned DRP) the same were disposed of by issuing direction under section 144C(5) of the Income-tax Act 1961 on December 31, 2013. Final order under section 144C read with section 143(3) of the Act was passed on January 16, 2014 with an assessed income of INR 13,22,13,35,445.

4 Subsequently, reasons were recorded by the learned Assistant Commissioner of Income-tax, Circle-1, Gurgaon and the case was reopened. The assessee sought reasons recorded. The same were provided on June 29, 2016. Against which the assessee filed an objection on September 19, 2016. Objections were disposed of on November 25, 2016. The assessee aggrieved with the initiation of reassessment proceedings filed the petition before the honourable Punjab and Haryana High Court in Civil Writ Petition No. 25150 of 2016. Per order, the honourable High Court held that reassessment proceedings may continue and if the order passed by the Assessing Officer is adverse to the petitioner, it shall not be implemented till further orders. The honourable High Court clarified that passing of the order would not prejudice the maintainability of the petition including any of the contentions raised therein.

5 Based on this, the learned Assessing Officer passed an order under section 143(3) read with section 147 of the Act on December 30, 2016 determining the total taxable income of the assessee at INR 15,92,51,32,093 against the original assessed income under section 143(3) read with section 144C of the Act dated January 16, 2014 of INR 1,32,21,34,35,445. The learned Assessing Officer disallowed two deductions : (1) deduction under section 80-IA of the Income-tax Act of Rs. 2,52,63,31,398, and (2) deduction under section 80-IB of the Act of INR 17,75,65,250.

6 Thereafter, the learned Principal Commissioner of Income-tax examined the records. On examination, he issued a notice under section 263 of the Income-tax Act on February 26, 2019 asking the assessee to show cause why the order passed under section 143(3) on December 30, 2016 passed by the learned Assessing Officer is not "erroneous and prejudicial to the interests of the Revenue". The reasons for the such error was that as per

the volume II-A of the justice M. B. Shah Commission of enquiry report on illegal mining of iron ore manganese dated June 13, page number 35, the production of the assessee for the financial year 2008-09 (relevant to the assessment year 2009-10) has been 2205780 metric tonne from TRB iron ore mines. During the assessment proceedings, the Assessing Officer did not make specific enquiries to ascertain whether the production as mentioned in the justice Shah commission of enquiry report from the TRB mines has been duly incorporated in the books of account of the assessee for the relevant assessment year as per the judgment of the honourable Punjab and Haryana High Court in *Majinder Singh Kang* v. *CIT* [2012] 344 ITR 358 (P&H). So it was stated in the show-cause notice that it is clear that the order passed by the Assessing Officer in this case is "erroneous and prejudicial" to the interests of the Revenue. Therefore, the assessee was provided an opportunity to show cause as to why the assessment order passed by the Deputy Commissioner of Income-tax, Circle-1(1), Gurgaon dated December 30, 2016 for the impugned assessment year should not be revised under section 263 of the Income-tax Act.

7 The assessee submitted its reply by letter dated March 18, 2019 stating that present revision of the proceedings are barred by limitation having regard to the time limit prescribed under section 263 of the Act. It was also stated that the revision order, if at all, should be confined only to the issues arising out of the reassessment order dated January 16, 2014 and not beyond that. It was further stated that since the assessment order dated December 30, 2016 was neither "erroneous not prejudicial to the interests of the Revenue" the issues raised in the present revision proceeding initiated under section 263 of the Act are without jurisdiction, illegal and bad in law. Since the reassessment proceedings under section 147 of the Act itself are only without jurisdiction, illegal and bad in law, the consequential revision of the proceedings under section 263 of the Act is also without jurisdiction, illegal and bad in law. It was further stated that since the reassessment order under section 147 sought to be revised, itself is pending before the Punjab and Haryana High Court for adjudication and as per the interim order of the honourable High Court the same should not be "implemented". Therefore, the order which cannot be implemented cannot be held to erroneous and prejudicial to the interests of the Revenue as it does not exist at all.

8 Thereafter, on March 30, 2019, the learned Principle Commissioner of Income-tax passed order under section 263 of the Income-tax Act, 1961, as under :

"Order under section 263 of the Income-tax Act, 1961.

In this case, the assessee furnished its return for the assessment year 2009-10, and completed at an income of Rs. l5,92,51,32,093. The case was selected for scrutiny through CASS. The assessment in this case was completed under section 143(3) read with section 147 of the Income-tax Act, 1961 vide order dated December 30, 2016.

On a perusal of the case records, it is seen that the Assessing Officer failed to make a specific inquiries about the finding of justice M. B. Shah Commission of Inquiry report. As per page number 35 of volume 11-A of the justice M. B. Shah Commission of Inquiry report on Illegal Mining of Iron ore and Manganese dated June 2013 (enclosed as annexure 2). the production of assessee for the financial year 2008-09 (relevant to the assessment year 2009-10 has been 22,05,780 MT from TRB iron ore mines whereas the assessee shown the sake as 22,01,870 MT.

As per the judgment of the honourable Punjab and Haryana High Court in *Majinder Singh Kang* v. *CIT* [2012] 344 ITR 358, 363 (P&H).

'A plain reading of *Explanation 3* to section 147 clearly depicts that the Assessing Officer has power to make additions even on the ground on which reassessment notice might not have been issued during the reassessment proceedings, he arrives at a conclusion that such other income has escaped assessment which comes to his notice during course of proceedings of reassessment under section 148. The provision nowhere postulates or contemplates that it is only when there is some addition on the ground on which reassessment had been initiated, that the Assessing Officer can make additions on any other ground on the basis of which income may have escaped assessment.'

The Assessing Officer failed to make specific inquiry to ascertain whether the production mentioned in the Justice M. B. Shah Commission of Inquiry report from TRB iron ore mines has been incorporated in the books of the assesses for the relevant assessment year. As the point was not verified by the Assessing Officer, the order passed by the Assessing Officer has been erroneous and prejudice to the interests of the Revenue. The assessment records of the aforesaid assessee for the assessment year 2009-10 were examined. On a perusal the order made by the Assessing Officer under section 143(3) read with section 147 dated December 30, 2016 it was found that the assessment order passed by the Assessing Officer is erroneous and prejudicial to the interests of the Revenue.

Accordingly, the assessee was issued with a notice under section 263 of the Income-tax Act, 1961 dated February 27, 2019 as to why the assessment order of the Assessing Officer should not be set aside being erroneous and prejudicial to the Revenue. Mr. Sanjay Jain attended the proceedings on March 20, 2019 and submitted reply which has been considered with due care.

In the reply, it is also submitted that the assessment order is neither erroneous nor prejudicial to the interests of the Revenue and therefore the notice is invalid, illegal. The reply also contains various case law, which have been considered carefully, it is found that the facts of the case law are not exactly the same as that of the instant case.

Hence, having considered the case law ; reply of the assessee and having gone through the record of the assessee regarding the legal and factual contentions on the validity of taking action under section 263 of the Income-tax Act, 1961. In this regard, it is pertinent to keep in view the following issues and observation on the basis of which findings are being made.

On going through the provisions of section 263(1) of the Income-tax Act, 1961, it is clear that any order passed by the Assessing Officer can be revised if it is found to be erroneous in so far as it is prejudicial to the interests of the Revenue. It is, therefore, clear that the provisions of the Income-tax Act, 1961 gives authority under section 263 of the Income lax Act, 1961 to revise any order passed by the Assessing Officer.

With regard to the issue of examining of records, on the basis of which the revision can be undertaken under section 263 of the Income-tax Act, 1961, as para under *Explanation 1B,* the following provisions have been made :

'record (shall include and shall be deemed always to have included) all records relating to any proceeding under this Act available at the time of examination by the Principal Commissioner or the Commissioner ;'. It is, therefore, clear that the revision can take place on the basis records available at the time of examination by the Principal Commissioner or Commissioner.

The counsel/authorised representative filed the reply wherein the authorised representative submitted that the shares were issued and received the share premium as discussed above. It is also submitted that the assessee-company had furnished all necessary details and documents in respect of the share capital raised by it such as name,

address, permanent account number of the share applicants, etc., there was no need of further enquiry. The Assessing Officer has made inquiries and accepted the same. The learned authorised representative submitted that in the light of his discussion, the provisions of section 263 should not be invoked, as it was accepted by the learned Assessing Officer after verifying necessary documents.

I have considered the various case law quoted by the learned authorised representative it is found that the case law are not exactly related to the instant case. A perusal of the assessment records shows that the Assessing Officer has not made any independent inquiries have been made and questioned about the incorporation of the above facts in the books of account of the assessee for the relevant assessment year. Since the Assessing Officer has failed to verify the inquiry report recommendations ; the order so passed by the Assessing Officer has been erroneous and prejudicial to the Revenue.

The apex court in the case of *Sumati Dayal* v. *CIT* [1995] 214 ITR 801 (SC) held that the true nature of a transaction has to be ascertained in the light of surrounding circumstances. Thus, it is now well settled that the tax authorities are entitled to look into surrounding circumstances to find out the reality of a transaction by applying the test of human probability. Reliance is also placed on the hon'ble Punjab and Haryana High Court in the case of *Harjit Kaur* v. *Asst. CIT* (I. T. A. No. 280 of 2013). Relying upon the case of *Chandigarh Theatres Pvt. Ltd.* (I. T. A. No. 715/Chandi/2007) and *CIT* v. *Nova Promoters Finlease (P.) Ltd.* [2012] 342 ITR 169 (Delhi) the Assessing Officer is to check whether the transaction is merely accommodation entries and whether it is non-genuine.

In this regard, it may also be noted that the hon'ble Delhi High Court in *Gee Vee Enterprises* v. *Addl. CIT* [1975] 99 ITR 375 (Delhi) has observed as under (page 386) :

'The reason is obvious. The position and function of the Income-tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts slated in the return when the circumstances of the case are such as to provoke

an inquiry. The meaning to he given to the word 'erroneous' in section 263 emerges out of this context. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word 'erroneous' in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry not been made and not because there, is anything wrong with the order if all the facts staled therein are assumed to be correct.'

In the said judgment, the Delhi High Court had referred to earlier decisions of the Supreme Court in *Rampyari Devi Saraogi* v. *CIT* [1968] 67 ITR 84 (SC) and *Smt. Tara Devi Aggarwal* v. *CIT* [1973] 88 ITR 323 (SC), wherein it has been held that where the Assessing Officer has accepted a particular contention/issue without any enquiry or evidence whatsoever, the order is erroneous and prejudicial to the interests of the Revenue. After reference to these two decisions, the Delhi High Court observed (page 386 of 99 ITR) :

'These two decisions show that it is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income-tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-lax Officer should have made further inquiries before accepting the statements made by the assessee in his return.'

In view of the above facts and circumstances of the case. I am of the confirmed view that the Assessing Officer by not pursued the inquiries to their logical end has made the order erroneous and prejudicial to the interests of the Revenue. Hence the same deserves to be revised under section 263 of the Income-tax Act, 1961. Therefore, the said order passed by the Assessing Officer is set aside on this particular issue only. The Assessing Officer is directed to pass a fresh assessment order after making thorough and detailed inquiries on this particular issue only. The Assessing Officer should pass a speaking order after providing adequate opportunity to the assessee.

(Krinwant Sahay)

Principal Commissioner of Income-tax, Gurgaon"

(Bold supplied by us)

Thus, this order is under challenge before us. The arguments of the assessee are culled out as under : 9

I. The learned authorised representative submitted that the order passed by the learned Principal Commissioner of Income-tax is not

sustainable in law for the reason that the assessment under section 143(3) of the Act, which was subject matter of revision by the learned Principal Commissioner of Income-tax is barred by limitation under section 263 of the Act. He submitted that notice dated February 27, 2019 was issued under section 263 of the Act culminated into the order under section 263 of the Act on March 30, 2019 and the impugned order which was revised was passed under section 147 of the Act on December 30, 2016. He submitted that reassessment proceedings were initiated for separate reasons. He referred to the reasons recorded under section 148 of the Act dated June 29, 2016 and submitted that the claim of deduction under sections 80-IA and 80-IB which talks that captive power plant does not qualify as an 'industrial undertaking'. Further, no separate books of account were maintained. He, therefore, submitted that reopening of the assessment was made for these purposes, whereas the revision is proposed of the reassessment order on altogether different grounds, which were not part of the reasons for reopening of the assessment. He submitted that as the issues on which revision is sought were not at all the reasons for which assessment was reopened. Therefore, the limitation for passing order under section 263 of the Act on the issues which were not part of reassessment proceedings, should run from the original order passed under section 143(3) of the Act dated December 31, 2013. He submitted that the above issue is squarely covered by the decision of the hon'ble Supreme Court in *CIT* v. *Alagendran Finance Ltd.* [2007] 293 ITR 1 (SC). He further relied upon the decision of the honourable Delhi High Court in the case of *CIT* v. *Bharati Airtel Ltd.* [2013] 218 Taxman 112, *CIT* v. *Sriram Engineering Construction Co. Ltd.* [2011] 330 ITR 568 (Mad), *L G Electronics India P. Ltd.* v. *Pr. CIT* [2016] 388 ITR 135 (All) and *Indra Industries* v. *Pr. CIT* [2018] 12 ITR-OL 413 (Mad) ; [2018] 95 taxmann.com 103 (Mad).

II. His main plank was that the Principal Commissioner of Income-tax under section 263 could not have sought to revise an order passed under section 147 read with section 143(3) of the Act on an issue which was not a subject matter of the reassessment proceedings under section 147 at the first place and it is beyond jurisdiction under section 263 of the Act. The impugned order loses its validity on this count itself. He further relied on the decision of the honourable Bombay High Court in the case of *Asoka Buildcon Ltd.* v. *Asst. CIT* [2010] 325 ITR 574 (Bom), *CIT* v. *Lark Chemicals Ltd.* [2014] 368 ITR 655 (Bom) ; [2015] 230 Taxman 305 and *CIT* v. *ICICI Bank Ltd.* [2012]

343 ITR 74 (Bom). He further submitted that on the issues raised in the present revisionary proceedings, limitations to pass revisionary order has to be, if at all, should be counted from the original assessment order dated January 16, 2014 passed under section 143(3) of the Act which already expired on March 31, 2016. Therefore, he submitted that the order passed under section 263 of the Act is barred by limitation and thus the present proceedings are liable to be dropped on this preliminary ground itself.

III. He further stated that since the 'implementation' of the reassessment order itself stands stayed by the honourable High Court vide an interim order dated December 6, 2016, any proceeding arising there from is premature, illegal, bad in law and without jurisdiction.

IV. He submitted that even otherwise the reassessment order is neither erroneous and nor prejudicial to the interests of the Revenue as the twin conditions are not satisfied. He also relied upon several judicial precedents for the same.

V. He relied upon the fact that merely because of the reason that the learned Assessing Officer did not carry out the inquiries as envisaged by the learned Commissioner, it cannot make the order erroneous. He relied upon the decision of the co-ordinate Bench in the case of *Narayan Tatu Rane* v. *ITO* [2016] 70 taxmann.com 227 (Mum-Trib).

VI. He further submitted that even otherwise the reliance on reference to the justice Shah Commission report in the notice is improper and not want warranted for the reason that Commission

(i) did not issue any notice to the assessee,

(ii) giving it a reasonable opportunity of hearing ; or

(iii) to produce evidence in their defence ; or

(iv) to cross-examine witnesses before the Commission ; or

(v) put forth the representation of the assessee.

Therefore, the Commissioner violated the principles of natural justice. For this proposition he referred to the decision of the honourable High Court in the order dated July 9, 2019 in the case of *Sesa Sterlite Ltd.* v. *Asst. CIT* [2019] 417 ITR 334 (Bom) where a similar position has been taken and held that issuance of notice under section 147 read with section 148 on the basis of the Shah Commission report is illegal.

VII. Even otherwise, he submitted that the notice issued by the learned Principal Commissioner of Income-tax did not grant proper

opportunity of hearing to the assessee. He stated that the notices were issued on February 27, 2019 which was revised on March 8, 2019, for which the time limit was expiring on March 31, 2019, where the assessee was asked to furnish its reply by March 6, 2018. He submitted that while passing the order under section 263 of the Income-tax Act there is no reference on the issue raised by the Principal Commissioner of Income-tax while issuing the revision proceedings order.

VIII. He further referred to the page number 3 of the order wherein the learned Principal Commissioner of Income-tax has mentioned that some Mr. Sanjay Jain has filed the reply stating that the assessee has furnished all necessary details and documents in respect of share capital raised by it such as name and address and permanent account number of share applicants. He submitted that there is no such issue involved in this matter and therefore the order passed by the Principal Commissioner of Income-tax is patently illegal, bad in law and the same is liable to be quashed.

IX. He further submitted that the Principal Commissioner has not given any finding as to how and in what manner the order of the learned Assessing Officer on the various issues noted in its order under section 263 was erroneous and prejudicial to the interests of the Revenue. Thus, he stated that the order passed by the learned Principal Commissioner of Income-tax is premature, illegal, and bad in law and without jurisdiction.

10 The learned Commissioner of Income-tax-Departmental representative vehemently supported the order of the learned Principal Commissioner of Income-tax. He submitted that :

(i) He referred to the notice dated February 26, 2019 which clearly mentions that the production of the assessee for the financial year 2008-09 has been 2205780 metric ton from TRB iron ore mines and during the course of assessment proceedings no specific inquiries were made to ascertain whether the production as mentioned in the enquiry committee report has been duly incorporated in the books of account of the assessee. He therefore submitted that the order passed by the learned Assessing Officer is correctly held to be an erroneous and prejudicial to the interests of the Revenue.

(ii) He further referred that in the impugned order the learned Principal Commissioner has applied his mind which is clearly demonstrated at paragraph number 3 of the page number 3 of the order where he has considered the various judicial precedent quoted

before him and found that the content and facts of those case law are not exactly related to the instant case.

(iii) Further, he submitted that the learned Principal Commissioner of Income-tax on a perusal of the assessment records clearly held that records show that the Assessing Officer has not made any independent inquiries and questioned about the incorporation of the above facts in the books of account of the assessee for the relevant assessment year. It has been categorically held that since the Assessing Officer has failed to verify the enquiry report recommendations the order so passed by the Assessing Officer has been erroneous and prejudicial to the interests of the Revenue.

(iv) He submitted though in certain paragraph there are certain references which do not relate to the case of the assessee but that does not invalidate the order passed by the learned Principal Commissioner of Income-tax. He submitted that there may be some typographical errors, but clear-cut finding in the order about lack of inquiry by the Assessing Officer shows that there is proper application of mind by the Principal Commissioner of Income-tax.

(v). He further referred to the introduction of Explanation 2 to section 263 of the Income-tax Act with effect from June 1, 2015 wherein it has been held that when an order is passed without making enquiries or verification which should have been made is an order erroneous in so far as it is prejudicial to the interests of the Revenue. He, therefore, submitted that in the present case there is no enquiry made by the learned Assessing Officer on the Commission's report and, therefore, there is no infirmity in the order of the learned Principal Commissioner of Income-tax and revising that order.

(vi) With respect to the issue not raised in section 147 proceedings, he submitted that it does not bar the Principal Commissioner of Income-tax in revising the issue as when the assessment is reopened, the whole assessment becomes open and it cannot be said that in section 263 proceedings any other issue which is not covered in section 147 proceedings cannot be touched upon by the Principal Commissioner. Thus, the limitation of passing order under section 263 of the Act cannot be from the original order passed under section 143 (3) of the Act but from the date of order passed under section 147 read with section 143(3) of the Act.

(vii). He also submitted that issues even otherwise, in section 147 proceedings are related to the computation of deduction under sections 80-IA and 80-IB of the Act, the lesser productions shown by the

assessee as the Shah Commission's report also deals with the same. He also submitted that the assessee has not maintained separate books of account, therefore, it cannot be said that what the actual production is shown by the assessee on which deduction is claimed. Thus, the issue in reopened proceedings as well as revisionary proceedings is the same and both relate to the computation of income of the assessee.

11 In the end, he vehemently supported the order of the Principal Commissioner of Income-tax passed under section 263 of the Income-tax Act.

12 We have carefully considered the rival contentions. In the present case, the assessee filed its return of income on September 30, 2009. The learned Assessing Officer passed a draft assessment order on March 28, 2013. The assessee filed objections before the Dispute Resolution Panel and thereafter the order under section 143(3) of the Act was passed on January 16, 2014. This order was challenged before the Income-tax Appellate Tribunal and the order in *Jindal Steel and Power Ltd.* v. *Asst. CIT* (I. T. A. No. 893/Delhi/2014 was passed on April 29, 2019). Subsequently, the learned Assessing Officer issued notice under section 148 of the Act on March 31, 2016 recording the following reasons.

"Annexure A

The assessee, M/s. Jindal Steel and Power Ltd. furnished the return of income for the assessment year 2009-10 on November 29, 2011 under section 139(1) of the Income-tax Act, 1961, showing a total income at Rs. 1,006,66,79,810. Further, the assessee filed a revised return under section 139(5) of the Income-tax Act 1961 showing the total taxable income at Rs. 987,31,790 March 29, 2013. The draft assessment order under section 144C read with section 143(3) of the Income-tax Act, 1961 was passed by the Assessing Officer on January 29, 2013. The final order under section 144C read with section 143(3) of the Income-tax Act, 1961 was passed by the Assessing Officer on January 16, 2014 determining the total income at Rs. 13,22,13,35,445.

2. From a perusal of the records for the assessment year 2009-10, it has been observed that the assessee-company has claimed deduction under section 80-IA of the Income Act, 1961 to the extent of Rs. 419,30,71,772 and under section 80-IA of the Income-tax Act, 1961 to the extent of Rs. 16,16,10,227. In the assessment order under section 144C read with section 143(3) of the Income-tax Act, 1961 was passed on January 16, 2014 the claim of deduction has been allowed to the extent of Rs. 270,37,96,655. However, during assessment proceedings for the assessment year 2011-12 the Assessing Officer found that the assessee does not qualify for deduction under

sections 80-IA and 80-IB of the Income-tax Act, 1961. Similarly during the proceedings under section 263, the Commissioner of Income-tax, Hissar also noted that on the merits the assessee-company does not qualify for deduction under sections 80-IA and 80-IB of the Income-tax Act, 1961.

3. During the assessment proceedings for the assessment year 2011-12, it has been noticed that the assessee owns a captive power plant at Raigarh. This captive power plant has been established for the sole purpose of uninterrupted supply of electricity to the other manufacturing units. There has been no intention of earning profits from the captive power plant. This fact has been ascertained from the applications filed by the assessee to the Chhattisgarh State Government, for taking exemption from electricity duty, etc. Even, the auditor of the assessee does not consider it as profit oriented enterprise. It must be noted that deduction under section 80-IA is not available to a unit or new unit unless the unit is in the nature of an 'undertaking'. Hence, the captive power plant does not qualify for an undertaking.

4. Section 80-IA(7) specifically provides for audit of books of account to arrive at the profit derived from the undertaking. But, in the instant case, during the proceedings under section 263 of the Income-tax Act for the assessment year 2005-06 the counsels of the assessee admitted (in writing) before the Commissioner of Income-tax, Hissar that the assessee-company does not maintain separate unit-wise books of account in conventional form say cash book, bank book, party leader, stock register, etc.

4.1 Similarly during the assessment proceedings for the assessment year 2011-12 the counsels of the assessee also admitted (in writing) before the Assessing Officer that the assessee-company does not maintain separate unit-wise books of account in conventional form say cash book, bank book, party ledger, stock register, etc., it was explained that the assessee keeps consolidated books of account on SAP Computer System.

4.2 From the facts as admitted by the counsel of the assessee it is evident that the condition of separate books of account is not fulfilled by the company. In view of the factual position it is apparent that the balance-sheet and profit and loss account, etc., of the units claiming sections 80-IA and 80-IB are made on estimated basis only. It is also beyond understanding how the auditors the transactions of the units. Separately when no separate record is maintained and no separate details are kept.

5. In respect of claim of deduction under sections 80-IA and 80-IB of the Income-tax Act for the assessment year 2009-10 also the assessee did not produce unit-wise books of account along with cash book, profit and loss account, balance-sheet, separate unit-wise audit report, ledgers of sundry debtors and creditors and details of assets and liabilities of the eligible units. The assessee has also not explained how value of coal mines, rejected coal, cost of steam, direct and overhead expenses had been computed. There are no details and bills/vouchers (with costing) in respect of coal and iron-ore purchases and unit-wise use. Also tax audit report, profit and loss account, balance-sheet and details of loan funds have to be separate from the rest of the units.

6. It is worth mentioning that the Commissioner of Income-tax, Hissar and the Assessing Officer in the assessment year 2005-06 and the assessment year 2011-12, respectively, conducted detailed enquiries and reached the conclusion that the assessee is not entitled to deduction under sections 80-IA and 801B of the Income-tax Act, 1961.

7. In view of the factual position deduction under sections 80-IA and 80-IB of the Income-tax Act is not allowable to the assessee in this year also. Excess claim of deduction under sections 80-IA and 80-IB of the Income-tax Act has been wrongly claimed and allowed. Hence, I have reason to believe that the income of the assessee to the extent of Rs. 270,37,96,648 chargeable to tax has escaped assessment because of the failure on the part of the assessee do disclose its fully and truly and all the material facts necessary for its assessment. Notice under section 148 of the Income-tax Act is required to be issued.

Sd/-
(Zahid Parvez)
Assistant Commissioner of
Income-tax Circle-1, Gurgaon.

13 Consequently, the learned Assessing Officer passed order under section 147 read with section 143(3) of the Act dated December 30, 2016. The impugned order passed by the learned Assessing Officer was subject to revision in the order passed by the learned Principal Commissioner of Income-tax dated March 30, 2019 under section 263 of the Act.

14 Admittedly, in the present case, the case of the assessee which was earlier assessed by the order passed by under section 143(3) of the Income-tax

Act on January 16, 2014 which was passed in pursuance of the draft assessment order subject to the direction of the Dispute Resolution Panel. Therefore if any issue which is found not have been dealt with or erroneously dealt with by the learned Assessing Officer and if it is subject to revision under section 263 of the Act, then the requisite action should have been concluded by March 31, 2016 (i. e., within two years from the end of the year in which the order was passed) as in the impugned case assessment order was passed in the financial year 2013-14. The impugned order under section 263 of the Act was passed on February 26, 2019.

Subsequently, the learned Assessing Officer recorded the reason for **15** reopening of the assessment which is provided to the assessee on June 29, 2016 by the Deputy Commissioner of Income-tax. Such reasons captioned are already reproduced above. It is apparent that the case of the assessee was reopened to examine the deduction under sections 80-IA and 80-IB of the Act as the assessee claimed the same on power plant used for captive consumption and further it was not maintaining allegedly separate books of account of the eligible undertaking. Thus, the issue of production of coal mines was not at all an issue in the reopened assessment proceedings. The precise issues for which an action under section 263 is initiated are for assessing the income of the assessee on account of showing the alleged incorrect production as per the M. B. Shah Report. Actions under section 263 of the Act is not initiated for claim of deduction of the assessee under section 80-IA or 80-IB of the Act. Therefore the issue for which revision under section 263 is proposed is not the issue for which the case of the assessee was reopened under section 147 of the Act. Thus it is apparent that action under section 263 of the Act is initiated for the issues which are already decided in the original assessment under section 143(3) of the Act and not in the reopened assessment. Therefore, in such circumstances, if the learned Principal Commissioner of Income-tax wants to touch any issue of the original assessment order, the time limit for passing the order under section 263 of the Act should run from the date of the original order passed under section 143(3) of the Act and not the subsequently reopened assessment order under section 147 of the Act.

The hon'ble Supreme Court in *CIT* v. *Alagandrean Finance Ltd.* [2007] **16** 293 ITR 1 (SC) ; [2007] 75 CCH 720 ; [2007] 211 CTR 69 ; [2007] 162 Taxman 465 has held that (page 12 of 293 ITR) :

> "We, therefore, are clearly of the opinion that keeping in view the facts and circumstances of this case and, in particular, having regard to the fact that the Commissioner of Income-tax exercising its revisional jurisdiction reopened the order of assessment only in relation

to lease equalisation fund which being not the subject of the reassessment proceedings, the period of limitation provided for under subsection (2) of section 263 of the Act would begin to run from the date of the order of assessment and not from the order of reassessment. The revision jurisdiction having, thus, been invoked by the Commissioner of Income-tax beyond the period of limitation, it was wholly without jurisdiction rendering the entire proceeding a nullity."

17 Recently the hon'ble Madras High Court in *Indira Industries* v. *Pr. CIT* [2018] 12 ITR-OL 413 (Mad) ; [2018] 102 CCH 78 (Mad); [2018] 169 DTR 171 (Mad) ; [2018] 305 CTR 314 (Mad) has also held that when the reopened assessment was for the disallowance of diversion of interest and subsequent revision proposed is for other issues such as bad debts written off to the tune of Rs. 33.06 lakhs and administrative, selling and distribution expenses claimed by the assessee to the tune of Rs. 3.23 crores, the limitation runs from the original assessment order passed and not the reassessment order.

18 The honourable Allahabad High Court in *L G Electronics India Pvt. Ltd.* v. *Pr. CIT* [2016] 388 ITR 135 (All) ; [2016] 96 CCH 284 All HC ; [2016] 143 DTR 105 (All) ; [2016] 290 CTR 283 (All) has also concurred with the above view. In that case, the return for the assessment year 2007-08 was filed by the petitioner on October 31, 2007 declaring an income of Rs. 2,68,82,20,341. It was selected for scrutiny and after verification/examination draft assessment order under section 143(3)/144C(1) of Act, 1961 was passed on December 27, 2010 proposing some disallowances and addition of income of Rs. 61,00,79,579 being subsidy by way of sales tax incentive received under the scheme formulated by the Government of U. P. The Assessing Officer suggested that it is "revenue receipt" and not "capital receipt" as claimed by the petitioner though in Maharashtra a similar incentive was treated as "capital receipt". Aggrieved by the draft assessment order dated December 27, 2010 the petitioner filed objection before the Dispute Resolution Panel whereupon direction under section 144C(5) was issued on September 27, 2011 to the Assessing Officer to pass final order. The Assessing Officer thereafter made final assessment on October 31, 2011 assessing the total income to Rs. 5,83,91,17,785 after making addition of Rs. 61,00,79,579 on account of sales tax incentive treating it as revenue receipt. The petitioner preferred an appeal before the Income-tax Appellate Tribunal, New Delhi under section 253(1)(d) of the Act, 1961. The Tribunal allowed the appeal partly vide order dated December 8, 2014. It confirmed the addition of Rs. 61,00,79,579 towards sales tax subsidy treating it as "revenue receipt". Against this order the petitioner

filed further appeal before the honourable High Court which is pending. The Assessing Officer reopened the assessment under section 147 and issued notice dated March 21, 2014 under section 148 alleging that in the assessment year in question there is an escaped assessment on account of failure to disallow expenditure on purchases from overseas in terms of section 40(a)(i) of the Act, 1961 for non-deduction of tax at source from such payment. Reassessment order was passed on March 26, 2015 after making disallowance of purchase of Rs. 13,89,59,995. Aggrieved thereto the petitioner has filed an appeal before the Commissioner of Income-tax (Appeals) under section 246A(1)(b), which is pending. Now, the Principal Commissioner of Income-tax has issued the impugned notice dated June 8, 2016 under section 263 on the ground that the assessment order dated March 26, 2015 passed under section 143(3) was erroneous and prejudicial to the interests of the Revenue inasmuch as sales tax subsidy of Rs. 20,58,34,234 accruing to the petitioner under the scheme of the Government of Maharashtra had not been brought to tax as "revenue receipt". It is contended that the aforesaid notice dated June 8, 2016 is barred by limitation under section 263 of Act, 1961. As the issue of taxability of sales tax subsidy as per the Maharashtra Government was not at all an issue of reopening of the assessment, the hon'ble court held that limitation for section 263 proceedings will start from the original assessment order.

As in the present case before us, the issues subject to revision were pertaining to the original assessment and not the reopened assessment ; the limitation should also start from the original assessment. In this case as the original assessment order under section 143(3) of the Act was passed on January 16, 2014, the revision thereof could have been taken up to March 31, 2016. The impugned order under section 263 of the Act was passed on February 26, 2019, therefore it is clearly beyond the limitation prescribed under section 263(2) of the Act. Thus, the impugned order is barred by limitation and hence quashed. **19**

In the result the appeal of the assessee is allowed on the issue of the impugned order passed beyond the prescribed time, other issues are left open. **20**

Order pronounced in the open court on May 14, 2020.

[2020] 79 ITR (Trib) 656 (Pune)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — PUNE "C" BENCH]

FIS SOLUTIONS (INDIA) P. LTD.

(formerly known as SunGard Solutions (India) P. Ltd.)

v.

DEPUTY COMMISSIONER OF INCOME-TAX

R. S. SYAL *(Vice-President)* and
PARTHA SARATHI CHAUDHURY *(Judicial Member)*

March 4, 2020.

SS ▸ ITA 1961, ss 92CA, 244A
AY ▸ 2014-15
HF ▸ Assessee

INTERNATIONAL TRANSACTIONS—TRANSFER PRICING—ARM'S LENGTH PRICE—BENCHMARKING TRANSACTIONS—COMPARABLE COMPANIES—COMPANIES IN RESPECT OF WHICH SEGMENTAL INFORMATION NOT AVAILABLE—COMPANIES WHOSE FUNCTIONS IN CONTRAST WITH ASSESSEE'S—SOFTWARE TESTING SERVICES COMPANY—COMPANY RENDERING WHOLE BASKET SERVICES—COMPANY PROVIDING SOFTWARE SERVICES TO ITS CLIENTS—NOT COMPARABLES—INCOME-TAX ACT, 1961, S. 92CA.

INTEREST—REFUND—INTIMATION—ASSESSABLE IN YEAR GRANTED—IF INTEREST ADJUSTED WITH PRIOR TAX LIABILITY OF EARLIER YEARS AND PAID TO GOVERNMENT ACCOUNT—NO NEED OF SEPARATE INTIMATION TO ASSESSEE AS INTEREST PAID TO ASSESSEE—INCOME-TAX ACT, 1961, S. 244A.

The Transfer Pricing Officer applied the modified filter of one-tenth to 10 times the assessee's turnover and held that P qualified as a comparable company, since the turnover of P was Rs. 1,184 crores whereas the turnover of the assessee was Rs. 353.13 crores. P had been held by the Commissioner (Appeals) in the assessee's case to be comparable and thereafter the annual report of the assessee was taken into consideration where the segment reporting and the segment information were looked into by the Transfer Pricing Officer. Thus, the Transfer Pricing Officer held P comparable to the assessee. This was confirmed by the Dispute Resolution Panel. On appeal :

Held, *that P was a product development services provider. The segmental details were not given separately. In the absence of segmental details or information the company could not be taken into account for comparable analysis, P had to be omitted from the set of comparables for the instant year.*

Symantec Software India P. Ltd. *v.* Dy. CIT [2020] 114 taxmann.com 435 (Pune-Trib) *followed*.

The assessee contended that T was engaged in diversified business activity and separate business segments were not reported in the financials. The Transfer Pricing Officer held that the revenue of T was mainly from software services and retained it in the final list of comparables. The Dispute Resolution Panel upheld the finding of the Transfer Pricing Officer. On appeal :

Held, *that the functions of T were in contrast with those of the assessee which only provided software development services in the finance domain as per the instruction of its associated enterprises. Also T had incurred expenses towards import of software services, evidencing outsourcing of software services unlike the assessee. Since it was also engaged in outsourcing it was functionally not comparable and could not be treated as a comparable to assessee.*

Symantec Software India P. Ltd. *v.* Dy. CIT [2020] 114 taxmann.com 435 (Pune-Trib) *followed*.

The Tribunal held that the assessee had requested for rejection of C from the final set of comparables on the basis that it was engaged in providing independent software testing services. C's test offerings included quality engineering, advisory and transformation, digital assurance and quality assurance solutions. However, the assessee had not provided any material impact in support of its claim and therefore, the contention of the assessee was rejected. Furthermore, C had been held as comparable by the Commissioner (Appeals) for the assessment year 2012-13 to be comparable. Thus, C stood selected for comparable set. The Dispute Resolution Panel upheld the findings of the Transfer Pricing Officer and rejected the objection raised by the assessee. On appeal :

Held, *that C was involved exclusively in software testing and had created innovations in software testing. C had acquired hundred per cent. shares in a U. S. based software testing service company. C had been listed on the Bombay Stock Exchange, Bangalore Stock Exchange and Madras Stock Exchange with a paid-up capital of Rs. 22.92 crores. The entire revenue had been generated by C from software testing services rendered to its independent clients as against simple testing carried out by the assessee of integrated circuits along with designing, customer support of integrated circuits related ancillary services provided by the assessee only to its associated enterprises. C could not be held a good comparable with the assessee. Therefore the Assessing Officer was directed to exclude C from the final list of comparables.*

AVAYA INDIA (P.) LTD. *v.* ADDL. CIT [2019] 112 taxmann.com 301 (Delhi) *and* MIRCROSOFT RESEARCH LAB INDIA PVT. LTD. *v.* DY. CIT (I.T. (TP) A. No. 3131/Bang/2018 dated February 5, 2020) *followed*.

The assessee had raised objections stating that the M was not functionally comparable. The Dispute Resolution Panel dismissed the objections raised by the assessee. On appeal :

Held, *that the services rendered by M were not limited to software development but also were in the field of consulting and technical support, management, etc. The software development services rendered by the assessee could not be compared with a whole basket of services of consulting, technical support or management services rendered by M. As there was no separate segment of software development services available in the financial statement of M, the company at entity level could not compare functionally with the computer software development segment of the assessee and accordingly, the Assessing Officer was directed to exclude M from the final set of the comparables.*

ALCATEL-LUCENT INDIA LTD. *v.* ADDL. CIT (I. T. A. No. 6979/Delhi/2017) *and* NXP INDIA P. LTD. *v.* ASST. CIT (I. T. A. No. 5140/Delhi/2018) *followed*.

The Dispute Resolution Panel confirmed the findings of the Transfer Pricing Officer holding that the software services were actually out of providing skilled manpower related to software to the clients as per their requirements. Part of this was also for the SAP solution, i. e., ERP related work. However income out of sale of software licences was only Rs. 27,28,760, i. e., miniscule compared to professional services. The director's report said that about 85 per cent. revenue was out of professional services. Therefore, A could not be held an appropriate comparable as it did not match the assessee's functional profile. On appeal :

Held, *that the software services were actually out of proving skilled manpower related to software to clients as per their requirements. Part of this was also for the SAP solution, i. e., ERP related work. However income out of sale of software licences was only Rs. 27,28,760, i. e., miniscule compared to professional services. The director's report said that about 85 per cent. revenue was out of professional services. Therefore, A could not be held an appropriate comparablee as it did not match the assessee's functional profile.*

The Transfer Pricing Officer held that over the years, RS had distinguished itself by emerging as one of the specialised payment service providers in the world. This specialisation had been derived from the institutionalisation of various competencies. This institutionalisation, in turn, had been

driven by RS institutions with the objective to develop domain-based and technology-based payment solutions. These institutions had strengthened the company's global brand, not just as a competent service provider but as a thought leader. RS also engaged in product and specialised services. However in the profit and loss account the entire revenue was shown under the head software services only. RS was engaged in predominantly in software services. On appeal :

Held, *that the matter was remanded for fresh consideration as per the principles of natural justice whether RS was to be included in the final list of comparables or not.*

The assessee submitted that working capital adjustment always had to be positive and working capital adjustment could not be negative.

Held, *that the matter was restored to the Assessing Officer to consider the decisions relied on by the assessee vis-a-vis the facts and circumstances of the case and adjudicate the issue in compliance with the principles of natural justice.*

The assessee contended that the Dispute Resolution Panel directed the Assessing Officer in adding amount of Rs. 25,84,042 appearing in the income-tax system database as interest on income-tax refund granted to the assessee and ignoring the assessee's submission that the amount was not taxable in the year in question since no intimation was received by the assessee qua the refund adjustment :

Held, *that interest on refund whenever it is granted, is assessable in that year itself and if it is adjusted with any prior tax liability of earlier years and such interest is in turn paid to the Government account that also is payment of interest to the assessee. In such case, there is no need for any intimation separately.*

Avada Trading Co. (P.) Ltd. *v.* Asst. CIT [2006] 100 ITD 131 (Mum) [SB] *followed*.

Cases referred to :

Adaptec (India) P. Ltd. *v.* Asst. CIT (I. T. A. No. 206/Hyd/2014 dated March 25, 2015) (para 28)

Agilis Information Technologies India (P.) Ltd. *v.* Asst. CIT [2018] 89 taxmann.com 440 (Delhi-Trib.) (para 6)

Alcatel-Lucent India Ltd. *v.* Addl. CIT (I. T. A. No. 6979/Delhi/2017 dated May 9, 2019) (paras 6, 18)

Avada Trading Co. (P.) Ltd. *v.* Asst. CIT [2006] 100 ITD 131 (Mum) [SB] (para 32)

Avaya India (P.) Ltd. *v.* Addl. CIT [2019] 112 taxmann.com 301 (Delhi) (para 14)

Cash Edge India (P.) Ltd. *v.* ITO (I. T. A. No. 64/Delhi/2015 dated September 23, 2015) (para 6)

CGI Information Systems and Management Consultants Pvt. Ltd. *v.* Asst. CIT [2018] 94 taxmann.com 97 (para 6)

CIT *v.* Agnity India Technologies (P.) Ltd. [2013] 219 Taxman 26 (Delhi) (para 6)

CIT (Pr.) *v.* Saxo India P. Ltd. [2017] 397 ITR 160 (Delhi) (para 6)

CIT *v.* Shri Goverdhan Ltd. [1968] 69 ITR 675 (SC) (para 32)

EMC Software and Services India P. Ltd. *v.* Jt. CIT (I. T. (T.P.) A. No. 3375/Bang/2018, dated December 18, 2019) (para 6)

GXS India Technology Centre P. Ltd. *v.* ITO (I. T. (T.P.) A No. 1444/Bang/2012 dated July 31, 2015) (para 6)

Hyundai Motors India Engineering P. Ltd. *v.* Dy. CIT (I. T. A. No. 255/Hyd/2014 dated July 31, 2014) (para 14)

Intoto Software India P. Ltd. *v.* ITO (I. T. A. No. 1810/Hyd/2012 dated December 9, 2015) (para 28)

ION Trading India P. Ltd. *v.* ITO (I. T. A. No. 1035/Delhi/2015 dated December 7, 2015) (para 10)

John Deere India Pvt. Ltd. *v.* Asst. CIT (I. T. A. No. 518/Pune/2015 dated April 25, 2019) (para 10)

Kedarnath Jute Mfg. Co. Ltd. *v.* CIT [1971] 82 ITR 363 (SC) (para 32)

Lam Research (India) P. Ltd. *v.* Dy. CIT (I. T. A. Nos. 1437 and 1385/Bang/2014) (para 28)

LG Software India Pvt. Ltd. *v.* Dy. CIT (I. T. (TP) A. No. 3122/Bang/2018 dated May 28, 2019) (para 10)

Lime Labs (India) Pvt. Ltd. *v.* ITO [2019] 101 taxmann.com 201 (Delhi-Trib.) (para 10)

Marwell India Pvt. Ltd. *v.* Dy. CIT (I. T. (T.P.) A. No. 3082/Bang/2018 dated October 23, 2019) (para 14)

Mercedes-Benz Research and Development P. Ltd. *v.* Dy. CIT (I. T. (T.P.) A. No. 1645/Bang/2016) (para 14)

MetricStream Infotech (India) Pvt. Ltd. *v.* Dy. CIT (I. T. (TP) A. Nos. 1418 and 2735/Bang/2017 dated February 27, 2019) (para 6)

Mircrosoft Research Lab India Pvt. Ltd. *v.* Dy. CIT (I. T. A. (TP) A. No. 3131/Bang/2018 dated February 5, 2020) (para 14)

NXP India P. Ltd. *v.* Asst. CIT (I. T. A. No. 5140/Delhi/2018 dated February 28, 2019) (para 18)

Pope The King Match Factory *v.* CIT [1963] 50 ITR 495 (Mad) (para 32)

Saxo India (P.) Ltd. *v.* Asst. CIT [2016] 67 taxmann.com 155 (Delhi-Trib.) (para 6)

Symantec Software and Services India (P.) Ltd. *v.* Dy. CIT [2017] 79 taxmann.com 208 (Chennai-Trib) (para 6)

Symantec Software India P. Ltd.. *v.* Dy. CIT [2020] 114 taxmann.com 435 (Pune-Trib) (para 6)

Telcordia Technologies India P. Ltd. *v.* Asst. CIT [2013] 23 ITR (Trib) 364 (Mum) (para 6)

3DPLM Software Solutions Ltd. *v.* Dy. CIT [2014] 3 ITR (Trib)-OL 305 (Bang) (para 6)

Trilogy E-Business Software India P. Ltd. *v.* Dy. CIT [2013] 23 ITR (Trib) 464 (Bang) (para 21)

US Technology International P. Ltd. *v.* Asst. CIT (I. T. (T. P.) A. No. 592/Coch/2018 dated December 11, 2019) (para 6)

I. T. A. No. 1695/Pune/2018 (assessment year 2014-15).

Gautam Jain for the assessee.

T. V. Bhaskar Reddy, Commissioner of Income-tax, for the Department.

ORDER

The order of the Bench was pronounced by

Partha Sarathi Chaudhury ***(Judicial Member)***.—This appeal preferred by the assessee emanates from the directions of the learned Dispute Resolution Panel (DRP) dated June 29, 2018 for the assessment year 2014-15 under section 144C(5) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") as per the grounds of appeal on record. 1

At the very outset, the learned counsel for the assessee appraised the Bench that grounds raised in the appeal memo by the assessee are with regard to "transfer pricing adjustment" as well as "corporate tax". That apart there are certain additional grounds also raised by the assessee which have to be adjudicated. 2

That so far as the "transfer pricing adjustment" is concerned, the submissions of the learned counsel for the assessee is that there are four comparables, i. e., (i) Persistent Systems Ltd., (ii) Thirdware Solutions Ltd., (iii) Cigniti Technologies Pvt. Ltd., and (iv) Mindtree Ltd. taken by the learned Transfer Pricing Officer (TPO) which the assessee pleads that they should 3

be excluded from the final list of comparables since they are functionally or segmental-wise not comparable company.

That apart, the assessee has also prayed for inclusion of one company, i. e., Akshay Software Technologies Ltd. With regard to the company, i. e., R. S. Software Ltd. the learned counsel for the assessee submitted that this company was initially taken by the assessee as comparable company which is accepted by the Transfer Pricing Officer but now the assessee wants this company to be excluded from the final list of comparables and therefore, this issue also will be adjudicated.

First, we would take up the "transfer pricing adjustment" ground regarding exclusion of certain comparable companies, i. e., (i) Persistent Systems Ltd., (ii) Thirdware Solutions Ltd., (iii) Cigniti Technologies Pvt. Ltd., and (iv) Mindtree Ltd.

Exclusion of companies as comparables to software development service segment

(A) Persistent Systems Limited

4 The Transfer Pricing Officer has applied the modified filter of one-tenth to 10 times of the assessee's turnover. Therefore, this company qualifies the turnover filters since the turnover of the company is 1,184 crores whereas the turnover of the assessee is 353.13 crores. Further, the company is upheld by the learned Commissioner of Income-tax (Appeals) in the assessee's own case and thereafter, the annual report of the assessee-company was taken into consideration where the segment reporting and the segment information were looked into by the Transfer Pricing Officer. Thus, the Transfer Pricing Officer held this company as comparable to that of the assessee-company.

5 Similarly, the learned Dispute Resolution Panel at page 45 para. (iii) has dismissed the objection of the assessee regarding exclusion of this company from the final list of comparables by holding as follows :

> "This entity qualifies for the turnover filter applied by the Transfer Pricing Officer and is upheld by the learned Commissioner of Income-tax (Appeals) in the assessee's own case. Further, the employee cost is around 62 per cent. of the total cost and therefore, apparently, it is a software services provider. The assessee however, contends that this company is specialising in software products, services and technology innovation and is excluded as a comparable in the case of the assessee in the assessment year 2008-09. However, as noted by the Transfer Pricing Officer, the entire revenue as per details

is from software services only. Inventory is nil. Looking to the facts, therefore, this objection is dismissed."

The learned counsel for the assessee submitted that for the very fact of **6** the relevant assessment year 2014-15, in the case of *Symantec Software India P. Ltd.* v. *Dy. CIT* [2020] 114 taxmann.com 435 (Pune-Trib), the question of comparability of this company, i. e., Persistent Systems Limited was considered and it was held by the Tribunal as follows :

"11. We have perused the case records and heard the rival contentions. We observe that the company, i. e., Persistent Systems Limited is functionally different as it is engaged in rendering information technology services and in the development of software products without there being support segmental information. During the year the company made acquisitions. We observe that the hon'ble Delhi High Court in the case of *Pr. CIT* v. *Saxo India P. Ltd.* I. T. A. No. 682 of 2016 — [2017] 397 ITR 160 (Delhi) has held as follows (page 164) :

'10. On a comparison with the data available and made available undoubtedly, the object of the statute is to "pull in transactions which otherwise escaped the radar of tax assessment under one head or the other. The transfer pricing methodology shorn of its details is an attempt by each nation to locate the incidents of income which would be subjected to levy within its jurisdiction where international transactions are involved. This exercise does not compare with other income assessments where the methodology adopted in their domestic jurisdiction will differ". The transactional net margin method depends on accurate data with respect to all the three elements-wherever they apply. In the comparable uncontrolled price (CUP) method-which is premised upon the elements in rule 10B(1)(a), the methodology adopted in the price charged or paid for property transfer or services provided in the comparable uncontrolled transaction. Therefore, the nature of the transaction and the appropriate filter determines the elements that are to be considered in the transactional net margin method. Therefore, the costs, sales and assets employed wherever relevant are to be applied. From this perspective, the Revenue's contention that segmental data was available cannot be accepted. The mere availability of proportion of the turnover allocable for software product sales per se cannot lead to an assumption that segmental data for relevant facts was available to determine the profitability of the concerned comparable.'

12. We further find in the case of *EMC Software and Services India P. Ltd.* v. *Jt. CIT* (I. T. A. No. 3375/Bang/2018), the co-ordinate

Bench of the Tribunal, Bangalore has directed the Assessing Officer to exclude the Persistent Systems Limited from the final list of comparable for determination of arm's length price by observing as follows :

'(iii) *Persistent Systems Ltd.* : The company is functionally different as it is engaged in rendering information technology services and in the development of software products without there being support segmental information and engaged in IP led solutions and undertakes significant research and development activities, owns IP. During the year the company made acquisitions. The company has made significant investment in IP and their solutions and has a dedicated team for research and IP development. The learned authorised representative relied on the decision of the Tribunal in the case of *CGI Information and Management Systems Pvt. Ltd.* v. *Asst. CIT* [2018] 94 taxmann.com 97 and *Pr. CIT* v. *Saxo India P. Ltd.* [2017] 397 ITR 160 (Delhi) ; 74 taxmann.com 88 (Delhi). We relied on the decision of *CGI Information and Management Systems Pvt. Ltd.* v. *Asst. CIT* (supra) at paras 28 to 30 as under :

"28. The learned counsel for the assessee submitted before us that the comparability of the three companies out of the aforesaid four companies which the assessee seeks to exclude from the list of comparable companies chosen by the Transfer Pricing Officer viz., Infosys Ltd., Larsen and Toubro Infotech Ltd. and Persistent Systems Ltd. were considered by the Income-tax Appellate Tribunal, Delhi Bench in the case of *Agilis Information Technologies India (P.) Ltd.* v. *Asst. CIT* [2018] 89 taxmann.com 440 (Delhi-Trib.) for the same assessment year 2012-13. In this regard it was submitted that the functional profile of the assessee is the same as that of the assessee in the case of *Agilis Information Technologies India (P.) Ltd.* (supra), is identical inasmuch as the said company was also involved in providing SWD services to its associated enterprises and the Transfer Pricing Officer had chosen 16 comparable companies out of which six companies chosen by the Transfer Pricing Officer in the case of the assessee for the purpose of comparability were the same. This submission was that the decision rendered by the Tribunal in the case of *Agilis Information Technologies India (P.) Ltd.* (supra) would be equally applicable to the assessee in the present case also. The learned Departmental representative submitted that the Dispute Resolution Panel in its directions has merely accepted with the reasoning of the Transfer Pricing Officer and therefore the issue of

exclusion of these companies should be directed to be examined afresh by the Dispute Resolution Panel.

29. We have considered the rival submissions. In the case of *Agilis Information Technologies India (P.) Ltd.* (supra), this Tribunal considered the comparability of the three companies which the assessee seeks to exclude from the final list of comparable companies chosen by the Transfer Pricing Officer. The functional profile of the assessee and that of the assessee in the case of *Agilis Information Technologies India (P.) Ltd.* (supra), is identical inasmuch as the said company was also involved in providing SWD services to its associated enterprises and the Transfer Pricing Officer had chosen some comparable companies which were also chosen by the Transfer Pricing Officer in the case of the assessee for the purpose of comparability. In the aforesaid decision the Tribunal held on the comparability of the 3 companies which the assessee seeks to exclude as follows :

'(a) Infosys Ltd. was excluded from the list of comparable companies by following the decision of the hon'ble Delhi High Court in the case of *CIT* v. *Agnity India Technologies (P.) Ltd.* [2013] 36 taxmann.com 289 (Delhi) ; [2013] 219 Taxman 26 (Delhi). The discussion is contained in paragraphs 4.5 to 4.7 of the Tribunal's order. The Tribunal accepted that Infosys Ltd. is a giant risk taking company and engaged in development and sale of software products and also owns intangible assets and therefore not comparable with a software development service provider such as the assessee in that case.

(b) Larsen and Toubro Infotech Ltd. was excluded from the list of comparable companies by relying on the decision of the Delhi Bench of the Income-tax Appellate Tribunal in the case of *Saxo India (P.) Ltd.* v. *Asst. CIT* [2016] 67 taxmann.com 155 (Delhi-Trib.). The discussion is contained in paragraphs 4.8 to 4.10 of the Tribunal's order. The Tribunal held that L and T Infotech Ltd. was a software product company and segmental information on SWD services was not available. The Tribunal also noticed that the appeal filed by the Revenue against the Tribunal's order was dismissed by the hon'ble Delhi High Court in I. T. A. No. 682 of 2016 (*Pr. CIT* v. *Saxo India P. Ltd.* [2017] 397 ITR 160 (Delhi)).

(c) Persistent Systems Ltd. was excluded from the list of comparable companies on the ground that this company was a software product company and segmental information on SWD services was not available. The Tribunal in coming to the above conclusion referred to the decision rendered by the Income-tax Appellate

Tribunal, Delhi Bench in the case of *Cash Edge India (P.) Ltd.* v. *ITO* (I. T. A. No. 64/Delhi/2015 order dated September 23, 2015) and the decision of the hon'ble Delhi High Court in the case of *Saxo India P. Ltd.* (supra). The findings in this regard are contained in paragraphs 4.14 to 4.16 of its order.'

30. Respectfully following the decision of the Tribunal we hold that the aforesaid three companies be excluded from the final list of comparable companies for the purpose of arriving at the arithmetic mean of comparable companies for the purpose of comparison with the profit margins. In this regard we are also of the view that the plea of the learned Departmental representative for a remand of the issue to the Dispute Resolution Panel on the ground that the Dispute Resolution Panel has not given any reasons in its directions cannot be accepted. The Dispute Resolution Panel has endorsed the view of the Transfer Pricing Officer in its directions and therefore the reasons given by the Transfer Pricing Officer should be regarded as the conclusions of the Dispute Resolution Panel.

We rely on the judicial decisions and facts in respect of comparable Persistent Systems Ltd. and direct the Assessing Officer to exclude from the final list of comparable for determination of arm's length price."

13. The co-ordinate Bench of the Tribunal, Cochin in the case of *US Technology International P. Ltd.* v. *Asst. CIT* in I. T. (T.P.) A. No. 592/Coch/2018 has held as follows :

"10. Persistent Systems Ltd. The Transfer Pricing Officer obtained information under section 133(6) based on which it was concluded that the comparable is predominantly engaged in the business of rendering software development to various customers world wide. The Transfer Pricing Officer observed that the company is engaged in developing products which have been outsourced by clients and the company does not own IP to these products and the product development is nothing but software development services. With respect to the intangibles of the comparable company, it was found that overseas subsidiary companies have acquired certain IP products and that the comparable is predominantly engaged in the software development services. Further, the intangibles with the comparable are in the nature of software license acquired for use in the operation of the company and they are not the software products generating revenue. The disclosure in the annual report regarding the acquisition of the products relate to the group as a whole and not to the stand alone as

entity whose financials are compared. The research and development expenditure of the comparable relates to cross improvements and not to innovate on new products or earning additional revenue. Hence, the research and development is not affecting the margin of the company. The Transfer Pricing Officer had applied related party filter of greater than 25 per cent. and clearly this company passed the filters. Hence, the Transfer Pricing Officer rejected the contentions of the assessee and held the company as comparable. The Dispute Resolution Panel held that the company is functionally similar to the assessee.

10.1 Against this, the assessee is in appeal before us. The learned authorised representative submitted that it was not functionally comparable as it was engaged in significant product development. The learned authorised representative relied on the order of the Income-tax Appellate Tribunal, Chennai in the case of *Symantec Software and Services India (P.) Ltd.* v. *Dy. CIT* [2017] 79 taxmann.com (Chennai-Trib.) wherein it was held as follows :

"10. We heard the rival submissions, perused the material on record. We found that the company is engaged in product development and cannot be comparable to the software development services and has income from license fee. The revenue recognition policy in notes of accounts and segmental information is available in respect of infrastructure and systems, telecom and wireless life sciences and Health care. Further, it renders services in cost plus to its Associate Enterprise and sail with partnership and alliances, intellectual property led solutions and end-to-end solutions, strategic acquisitions and financial year 2010-11 is an exceptional year of operation of Persistent Systems. We find support from the decision of *3DPLM Software Solutions Ltd.* v. *Dy. CIT* [2014] 3 ITR (Trib)-OL 305 (Bang) at para 17 page 13 of the paper book as under (page 316) :

'17. Persistent Systems Ltd.

17.1.1 This company was selected by the Transfer Pricing Officer as a comparable. The assessee objected to the inclusion of this company as a comparable for the reason that this company being engaged in software product designing and analytic services, it is functionally different and further that segmental results are not available. The Transfer Pricing Officer rejected the assessee's objections on the ground that as per the annual report for the company for the financial year 2007-08, it is mainly a software development company and as per the details furnished in reply to the notice under section

133(6) of the Act, software development constitutes 90 per cent. of its revenue. In this view of the matter, the Assessing Officer included this company, i. e., Persistent Systems Ltd. in the list of comparables as it qualified the functionality criterion.

17.1.2 Before us, the assessee objected to the inclusion of this company as a comparable submitting that this company is functionally different and also that there are several other factors on which this company cannot be taken as a comparable. In this regard, the learned authorised representative submitted that :

(i) This company is engaged in software designing services and analytic services and therefore it is not purely a software development service provider as is the assessee in the case on hand.

(ii) Page 60 of the annual report of the company for the financial year 2007-08 indicates that this company is predominantly engaged in "outsourced software product development service" for independent software vendors and enterprises.

(iii) Website extracts indicate that the company is in the business of product design services.

(iv) The Income-tax Appellate Tribunal, Mumbai Bench in the case of *Telcordia Technologies India P. Ltd.* v. *Asst. CIT* [2013] 23 ITR (Trib) 364 (Mum) while discussing the comparability of another company, namely, Lucid Software Ltd. had rendered a finding that in the absence of segmental information, a company be taken into account for comparability analysis. This principle is squarely applicable to the company presently under consideration, which is into product development and product design services and for which the segmental data is not available. The learned authorised representative prays that in view of the above, the company, i. e., Persistent Systems Ltd. be omitted from the list of comparables.

17.2 Per contra, the learned Departmental representative support the action of the Transfer Pricing Officer in including this company in the list of comparables.

17.3 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the details on record that this company, i. e., Persistent Systems Ltd. is engaged in product development and product design services while the assessee is a software development services provider. We find that, as submitted by the assessee, the segmental details are not given separately. Therefore, following the principle enunciated in the decision of the

Mumbai Tribunal in the case of *Telecordia Technologies India Pvt. Ltd.* (supra) that in the absence of segmental details/information a company cannot be taken into account for comparability analysis. We hold that this company, i. e., Persistent Systems Ltd. ought to be omitted from the set of comparables for the year under consideration. It is ordered accordingly.'

We rely on the above facts and the Tribunal decision and we direct the Transfer Pricing Officer to exclude Persistent Systems Ltd. from the list of comparable companies."

10.2 Further, the learned authorised representative relied on the order of the Income-tax Appellate Tribunal, Delhi in the case of *Alcatel-Lucent India Ltd.* v. *Addl. CIT* in I. T. A. No. 6979/Delhi/2017 dated May 9, 2019 wherein it was held as under :

"We are of the view that a company engaged in development of the software products cannot be compared with the assessee who is engaged in contract software development services. Accordingly, we direct the learned Assessing Officer/Transfer Pricing Officer to exclude the company from the final set of the comparables."

10.3 Further, the learned authorised representative relied on the order of the Income-tax Appellate Tribunal, Bangalore in the case of *GXS India Technology Centre* v. *ITO* in I. T. A. No. I.T.(T.P.)A. No. 1444/Bang/2012 dated July 31, 2015 wherein it was held as follows :

'13.2 We have considered the rival submissions as well as the relevant material on record. As pointed out by the learned authorised representative of the assessee that the functional comparability of the company has been examined by the co-ordinate Bench of this Tribunal in the case of *3DPLM Software Solutions* (supra) in para 17.3 as under :

"17.3 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the details on record that this company, i. e., Persistent Systems Ltd. is engaged in product development services provider. We find that, as submitted by the assessee, the segmental details are not given separately. Therefore, following the principle enunciated in the case of *Telecordia Technologies India Pvt. Ltd.* (supra) that in the absence of segmental details/information a company cannot be taken into account for comparable analysis, we hold that this company, i. e., Persistent Systems Ltd. ought to be omitted from the set of comparables for the year under consideration. It is ordered accordingly."

13.3 It is clear from the finding of this Tribunal that this company is engaged in the product developing and product design services which is similar with the software development services provided by the assessee.

Accordingly, following the decision of the co-ordinate Bench of this Tribunal (supra) we direct the Transfer Pricing Officer/Assessing Officer to exclude this company from the list of comparables.

10.4 The learned authorised representative relied on the order of the Income-tax Appellate Tribunal, Bangalore in the case of *Metric-Stream Infotech (India) Pvt. Ltd.* v. *Dy. CIT* in I. T. (TP) A. Nos. 1418 and 2735/Bang/2017 dated February 27, 2019 which we have discussed in earlier para.

10.5 We have heard the rival submissions and perused the material on record. In view of the above orders of the Income-tax Appellate Tribunal cited in paras 10.1 to 10.4 of this order, we direct the Assessing Officer/Transfer Pricing Officer to exclude this company from the list of comparables on the same reason given by the co-ordinate Bench of Bangalore.'

14. In view of the matter and following the decisions of the hon'ble Delhi High Court as well as various Tribunals, Persistent Systems Limited cannot be treated as comparable company and the Assessing Officer/Transfer Pricing Officer is directed to exclude Persistent Systems Limited from final list of comparable companies with regard to its software development service segment."

7 We observe that the findings of the Pune Bench of the Tribunal pertains to the assessment year 2014-15 which is relevant to the assessment year under consideration before us as well and therefore, the facts, circumstances and reasons given by our earlier decision with regard to this company shall mutatis mutandis apply. Thus, following our earlier decision, the Assessing Officer/Transfer Pricing Officer is directed to exclude Persistent Systems Limited from the final list of comparable companies.

(B) Thirdware Solutions Limited

8 The assessee before the Transfer Pricing Officer has raised the following objections stating that the company, i. e., Thirdware Solutions Limited is not functionally comparable to that of the assessee-company and the same are extracted as follows :

"Thirdware offers comprehensive application implementation services (AIS), application development services (ADS) and application management support services (AMS) in enterprise application space.

Application implementation services includes implementation services and implementation methodology. Application management services include training and education and on demand and maintenance and enhancement services. Application development services include application portfolio rationalisation, legacy modernisation, rapid development and photo-typing and service enabling the enterprise. Thirdware serves various industries and verticals as manufacturing, automotive, industrial electronics, pharmaceuticals, consumer packaged goods (CPG), chemicals, BFSI, public sector units (PSUs), retail and travel.

The company is engaged in diversified business activity as per the website and separate business segments are not reported in the financials."

Thereafter, the Transfer Pricing Officer at para (vii) of his order held that revenue of this company is mainly from software services and hence, the assessee's contention is not acceptable and this company is retained in the final list of comparables.

Similarly, the learned Dispute Resolution Panel at running pages 42 to 45 of its order had upheld the findings of the Transfer Pricing Officer while rejecting the objection raised by the assessee. **9**

The learned counsel for the assessee invited our attention again to the decision of the co-ordinate Bench of the Tribunal, Pune in the case of *Symantec Software India P. Ltd.* v. *Dy. CIT* (supra.), wherein the Tribunal regarding this company has held as follows : **10**

"16. We have perused the case records and heard the rival contentions. We observe that Thirdware Solutions Limited is functionally dissimilar and is engaged in rendering software development implementation and support services and engaged in the development of software products and earns revenue from sale of user licences. Further, the margins of the company fluctuate year on year basis due to different revenue recognition model which the company has adopted. We find in the case of *EMC Software and Services India Pvt. Ltd.* v. *Jt. CIT* (supra), the co-ordinate Bench of the Tribunal, Bangalore exclude Thirdware Solutions Limited from the list of comparable for determining the arm's length price by observing as follows :

'(iv) Thirdware Solutions Ltd. the company is functionally dissimilar and is engaged in rendering software development implementation and support services and engaged in the development of software products and earns revenue from sale of user licences and purchase stock-in-trade during the year and has intangibles. Further

the margins of the company fluctuate year on year basis due to different revenue recognition model which the company has adopted. The above comparable was excluded in the assessee's own case on functional dissimilarity in the assessment years 2005-06 and 2007-08 and the learned authorised representative also relied on *Lime Labs (India) Pvt. Ltd.* v. *ITO* [2019] 101 taxmann.com 201 (Delhi-Trib.). We found the co-ordinate Bench of the Tribunal in the case of *LG Software India Pvt. Ltd.* v. *Dy. CIT* in I. T. (TP) A. No. 3122/Bang/ 2018 dated May 28, 2019 for the assessment year 2014-15 has excluded the comparable as observed at paras 8 and 8.1 at page 4 as under :

"8. We also notice that in the assessment year 2008-09, the co-ordinate Bench has excluded M/s. Thirdware Solutions Ltd. also by following the decision rendered in the case of *3DPLM Software Solutions Ltd.* (supra), where in it was held that M/s. Thirdware Solutions Ltd. is engaged in product development and earns revenue from sale of licences and subscription. Further, the segmental details were not available.

8.1 It was stated that there is no change in facts. Accordingly, following the decision rendered in the assessee's own case in the assessment year 2008-09, we direct exclusion of M/s. Thirdware Solutions Ltd."

The comparable Thirdware Solutions Ltd. has to be excluded as it is predominant in activity and segmental details are not available.

Accordingly we direct the Transfer Pricing Officer/Assessing Officer to exclude this comparable from the list of comparables for determining the arm's length price.'

17. We further find the same view has been taken by the co-ordinate Bench of the Tribunal, Pune in the case of *John Deere India Pvt. Ltd. Cybercity* v. *Asst. CIT* (supra) wherein the co-ordinate Bench of the Tribunal has exclude Thirdware Solutions Limited from the list of comparable for determining the arm's length price by observing as follows :

'10. We have heard the rival submissions and gone through the relevant material on record. The annual report of this company is available at page 415 onwards of the paper book. Profit and loss account of this company shows sales of Rs. 67,56,06,505. Break-up of such sale has been given in schedule 12, which records export from SEZ units – Rs. 47,58,40,447 ; export from STPI units – Rs. 11,20,90,633 ; revenue from subscription – Rs. 1,53,13,736 ; sale of licence - Rs. 1,51,38,618 ;

and software services – Rs. 5,72,23,072. This company has segments only on geographical basis and not on functional level. As such, there is no bifurcation of operating profit from software services and others including sale of licence and revenue from subscription, etc. Even the first two major items of exports from SEZ units and export from STPI units do not show as to whether these were exports of software products or software services. In the absence of the availability of any concrete information in respect of software services, we fail to comprehend as to how this company, also having software products in its portfolio, can be construed as comparable. The same is accordingly directed to be excluded.'

18. We also observed in the case of *ION Trading India P. Ltd.* v. *ITO* (supra.) wherein the co-ordinate Bench of the Tribunal, Delhi has exclude Thirdware Solutions Limited from the list of comparable for determining the arm's length price by observing as follows :

'56. We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the details on record that the functions of Thirdware are in contrast with the assessee which only provides software development in the finance domain as per the instruction of its associated enterprises. Also, Thirdware has incurred expenses towards import of software services, evidencing outsourcing of software services unlike the assessee. Since it is also engaged in outsourcing its activities as it has incurred expenses towards imports of software services, evidencing outsourcing of software services unlike the appellant company. Hence, it is functionally not comparable and cannot be treated as a comparable to assessee. We order accordingly.'

Respectfully, following the plethora of decisions of various Tribunals as referred to hereinabove, Thirdware Solutions Limited cannot be treated as comparable company and the Assessing Officer/Transfer Pricing Officer is directed to exclude Thirdware Solutions Limited from the final list of comparable companies with regard to its software development service segment'."

We observe again that our aforesaid findings pertains to the assessment **11**
year 2014-15 which is the relevant assessment year under consideration before us at this present moment. It is therefore, natural that all parameters regarding this company would be the same and respectfully, following our findings in *Symantec Software India P. Ltd.* v. *Dy. CIT* (supra), we direct the Transfer Pricing Officer/Assessing Officer to exclude this company, i. e., Thirdware Solutions Limited from the final list of comparables.

(C) Cigniti Technologies Limited

12 Before the Transfer Pricing Officer, the assessee has raised the following objections stating that this company, i. e., Cigniti Technolgies Limited is functionally not comparable and the same is extracted as follows :

> "The company is engaged in providing independent software testing services. Cigniti's test offering include quality engineering, advisory and transformation, digital assurance and quality assurance solutions.
>
> The review of the annual report of Cigniti Technologies Ltd. shows that no segmental data is available pertaining to the software development activity due to which the margins cannot be drawn up."

Thereafter, the Transfer Pricing Officer vide para (ii) of his order has rejected the contentions of the assessee by observing as follows :

> "The assessee has requested for rejection of Cigniti from the final set of comparable on the basis that the company is engaged in providing independent software testing services. Cigniti's test offerings include quality engineering, advisory and transformation, digital assurance and quality assurance solutions. However, the assessee has not provided any material impact in support of its claim and therefore, the contention of the assessee is rejected.
>
> Furthermore, the company was upheld as comparable by the learned Commissioner of Income-tax (Appeals) for the assessment year 2012-13 also. Thus, the company stands selected for comparable set."

13 The learned Dispute Resolution Panel similarly at running pages 39 to 40 as per the reasons appearing in that order upheld the findings of the Transfer Pricing Officer and rejected the objection raised by the assessee.

14 The learned counsel for the assessee submitted that this issue is also decided in favour of the assessee by the co-ordinate Bench of the Tribunal, Delhi in the case of *Avaya India (P.) Ltd.* v. *Addl. CIT* [2019] 112 taxmann.com 301 (Delhi-Trib) wherein the Tribunal has held and observed as follows :

> *"11. Cigniti Technologies Ltd.*
>
> 11.1 The learned Dispute Resolution Panel observed that the company was included by the Dispute Resolution Panel in the assessment year 2012-13 and, therefore, should be retained in the year under consideration also for the same reasons. The learned counsel of the assessee referred to page No. 293 of the paper book and submitted that the company has acquired 'Gallop Solutions Inc., USA' during the year under consideration and due to which, total revenue has

increased by 72 per cent. by way of addition of more than 50 new clients. He submitted that in view of this extraordinary event, the company is liable to be excluded from the set of the comparables. He also referred to page 295 of the paper book and submitted that the company was engaged in software testing business. The learned counsel relied on the decision of the Tribunal in the case of *Mercedes-Benz Research and Development India P. Ltd.* in I. T. (TP) A. No. 1645/Bang/2016, wherein it is held that software testing company cannot be compared with software development company.

11.2 The learned Departmental representative, on the other hand, submitted that the ground of acquisition and an extraordinary event was not contested before the learned Dispute Resolution Panel.

11.3 We have heard the rival submission and perused the relevant material on record. The fact that of extraordinary event resulted into rise in revenue of the company, has not been disputed. In our opinion, if any fact, which is evident from the record, then any party cannot be prohibited to present the said fact in pleading to support its claim. The Tribunal in the case of *Hyundai Motors India Engineering P. Ltd.* in I. T. A. No. 255/Hyd/2014 has excluded the company from the set of the comparables on account of extraordinary event of acquisition. Respectfully, following the same ratio, in view of the extraordinary event during the year under consideration, we direct the learned Assessing Officer/Transfer Pricing Officer to exclude the company from the set of the comparables."

14.1 The learned counsel for the assessee further placed reliance on the decision of the co-ordinate Bench of the Tribunal, Bangalore in the case of *Mircrosoft Research Lab India Pvt. Ltd.* v. *Dy. CIT* in I. T. (TP) A. No. 3131/Bang/2018 for the assessment year 2014-15 decided on February 5, 2020 wherein the Tribunal has held as follows :

'(vi) Cignity Technologies Limited, the comparable is engaged in software development services and is a captive service provider to its associated enterprises on cost plus basis. Further, the company has applied for global patents for its igenerate test, scenarios tool part which is a part of SMART tools portfolio and has specialised services in the field of software testing. We found this comparable was excluded by the co-ordinate Bench of the Tribunal in the case of *Marwell India Pvt. Ltd.* v. *Dy. CIT*(I. T. (T.P.) A. No. 3082/Bom/2018, dated October 23, 2019) at page 18 para 4.2 (a) of the order as under :

4.2(a) *Cignity Technologies Ltd.* : The learned Transfer Pricing Officer held this company to be comparable as it is engaged in software

development services. The learned counsel submitted that the learned Transfer Pricing Officer treated this company to be comparable assessee, irrespective of different verticals of SWD. He submitted that the assessee before us was a captive service provider rendering exclusive services to its associated enterprises and works on a cost plus mark-up basis. He submitted that the assessee renders services under SWD segment on the basis of the specifications provided by the associated enterprises. Whereas this comparable for the year under consideration as the learned counsel placed before us the annual report of this company in support of his submissions to establish that this company has outgrown independently in software testing and has been awarded automated software testing services by Frost and Sullivan. He also submitted that this company has applied global/U. S. patents for its iGenerate Test Scenarios tool part which is a part of SMART tools portfolio. Whereas the assessee before us has been submitted to be providing various services in which testing of integrated circuit is one of the small activity carried out by the assessee for its associated enterprises. The learned counsel submitted that from the profile of the comparable in the annual report one can hold this company to be a pioneer in software testing market catering to clients all over the world in different geographies. On the contrary, the learned Commissioner of Income-tax-Departmental representative submitted that this is no different function than what the assessee has been carrying out for its associated enterprises and therefore is a perfect comparable. We have perused submissions advanced by both sides in the light of the records placed before us. We have also perused the annual report very carefully and is observed that this company is involved exclusively into software testing and has created innovations in the software testing. It is also observed that this company is acquired hundred per cent. shares in a U. S. based software testing service company called Gallop Solutions Inc based in Texas USA. It is also observed that this company has been listed on the Bombay Stock Exchange, Bangalore Stock Exchange and may be Madras Stock Exchange with a paid-up capital of Rs. 22.92 crores. It is an undisputed fact that the entire revenue has been generated by this company from software testing services rendered to its independent clients as against simple testing carried out by the assessee of integrated circuits along with designing, customer support of integrated circuits related ancillary services provided by the assessee only to its associated enterprises. Considering the holistic approach having

regard to the annual reports of this company and the specialised services provided by this company to its own clients in the field of software testing as against captive service provided by the assessee exclusively to its associated enterprises, we are of considered opinion that this company cannot be held as a good comparable with that of the assessee. Therefore we direct the learned Assessing Officer/Transfer Pricing Officer to exclude this company from the final list of comparables.'

Following the judicial precedence, we found the company is in specialised area and has to be excluded. Accordingly, we direct the Transfer Pricing Officer/Assessing Officer to exclude from the final list of comparables."

We have heard the rival contentions and perused the case records. We **15** have also analysed the facts and circumstances in this case. We find that this company, i. e., Cignity Technologies Ltd. has been directed to be excluded from the final list of comparables by our decisions of the co-ordinate Bench of the Tribunal, Delhi/Bangalore pertaining to the assessment year 2014-15 which is the relevant assessment year under consideration before us. Respectfully following the decisions of the co-ordinate Bench of the Tribunal referred to hereinabove, we direct the Transfer Pricing Officer/ Assessing Officer to exclude this company, i. e., Cignity Technologies Ltd. from the final list of comparables.

(D) Mindtree Limited

The assessee has raised the following objections stating that the Mind- **16** tree Limited is not functionally comparable and the same is extracted as under :

"Mindtree Limited is structured into five verticals- Manufacturing, BFSI, Hitech, travel and transportation and others. It offers services in the area of agile, analytics and information management, application development and maintenance, business process management, business technology consulting, cloud, digital business, independent testing infrastructure management services, mobility, product engineering and SAP services.

Mindtree Limited is engaged in diversified business activities. As per the annual report, the company operates in four business segments.

Further the company has a high turnover of INR 3,031.60 crores which is 8.58 times the turnover of the assessee and companies having varied turnovers cannot be compared to each other as the difference in their size and scale of operations have a direct impact on their profitability."

Thereafter, the Transfer Pricing Officer has given his findings at para (v) of his order which reads as follows :

"Mindtree Limited

The assessee has requested for rejection of Mindtree Limited from the final set of comparable on the basis that the company is structured into five verticals- manufacturing, BFSI Hitech, Travel and transportation and others. It offers services in the areas of agile, analytics and information management, application development and maintenance, business process management, business technology consulting, cloud, digital business, independent testing, infrastructure management services, mobility, product engineering and SAP services. Further, the company has a high turnover of INR 3,031.60 crores which is 8.58 times the turnover of the assessee and companies having varied turnovers cannot be compared to each other as the difference in their size and scale of operations have a direct impact on their profitability.

The objection of the assessee is not acceptable. The assessee-company and its group IS basically engaged in the business of information technology consulting and implementation group that which delivers the business solutions through global software development. However this company has restructured its above business into five verticals from the financial year 2013-14. However the main business is remained the same, i. e., software development. The relevant portion in the annual report is reproduced as under :

'Background

Mindtree Limited ("Mindtree" or "the company") together with its subsidiary Mindtree Software (Shanghai) Co. Ltd. collectively referred to as "the group" is an international information technology consulting and implementation group that delivers business solutions through global software development. The group is structured into five verticals-manufacturing, BFSI Hitech, travel and transportation and others. It offers services in the areas of agile, analytics and information management, application development and maintenance, business process management, business technology consulting, cloud, digital business, independent testing, infrastructure management services, mobility, product engineering and SAP services.'

Further from the notes to account, the details of revenue recognition are as under :

Revenue recognition

2.8.1 The company derives its revenues primarily from software services. Revenue from software development on time and material basis is recognised as the related services are rendered. Revenue from fixed price contracts is recognised using the proportionate completion method which is determined by relating actual project cost of work performed to date to the estimated total project cost for each contract. Unbilled revenue represents cost and earnings in excess of billings while unearned revenue represents the billing in excess of cost and earnings. Provision for estimated losses, if any, on incomplete contracts are recorded in the period in which such losses become probable based on the current contract estimates.

Further it is noticed that the employee cost of this company is 1782.00 crores out of total expenses of Rs. 2502.30 crores. In terms of percentage it comes to 71.21 per cent.

From the above it is clear that this company is engaged in providing software development services the client base of this company has been divided into five verticals which does not mean that this company doing business in those five segments.

In view of the above, the contention of the assessee is not acceptable."

17 Similarly, the learned Dispute Resolution Panel at page 41 vide para (iv) of his order as per its findings on record had upheld the decision of the Transfer Pricing Officer and dismissed the objection raised by the assessee by holding as follows :

(iv) Mindtree Ltd.

The contents that this entity is structured in five different verticals. However, the Transfer Pricing Officer found that the employee cost is around 71.21 per cent. of the total cost and through from the assessment year 2013-14 the client base of the company is divided into five verticals, the notes to the account on the details of revenue recognition says that the company derives its revenues primarily from software services. Therefore, looking to the facts, this objection is dismissed."

18 The learned counsel for the assessee referred to the decision of the co-ordinate Bench of the Tribunal, Delhi in the case of *Alcatel-Lucent India Ltd.* v. *Addl. CIT* in I. T. A. No. 6979/Delhi/2017 for the assessment year 2013-14 wherein the Tribunal directed the Transfer Pricing Officer/

Assessing Officer to exclude this company from the final set of the comparables by observing as follows :

"3. Mindtree Ltd.

(i) The learned counsel submitted that the company is engaged in diverse business activities like information technology consulting, data warehousing, product architecture design engineering embedded software, technical support testing and infrastructure management services. He submitted that company is also engaged in providing software delivery platform. He submitted that the company was engaged in research and development activities and owns significant intangibles and has applied for several patents, whereas the assessee is engaged in contract software development at low-level. Accordingly, he submitted that company might be excluded from the set of the final comparables.

(ii) The learned Departmental representative, on the other hand, relied on the order of the learned Dispute Resolution Panel and submitted that under transactional net margin method, broad functional similarity should be seen and a small variation should be ignored as it is difficult to find exact replica of the assessee as comparable. He also submitted that the assessee failed to demonstrate effect of the intangibles on the net margin of the comparable.

(iii) We have heard the rival submissions and perused the relevant material on record. Inclusion of the comparable was not challenged by the assessee before the learned Transfer Pricing Officer. The assessee first time challenged the inclusion of the company before the learned Dispute Resolution Panel. The learned Dispute Resolution Panel on the grounds, firstly, that there is no effect of intangibles and research and development expenses on the margins of the company, secondly, that the broad nature of transactional net margin method would cover a small variation of functions and, thirdly, that not disputed before the Transfer Pricing Officer, approved the company as one of the valid comparable. However, we find from the pages 434 of the annual report compendium that the company offers services which includes information technology strategy consulting, data warehousing, business intelligence, technical support, infrastructure management services, etc. The relevant part of the director's report is reproduced as under :

'We have developed a comprehensive range of services allowing us to offer end-to-end information technology services to our clients. With delivery centers in India and overseas, we offer information

technology strategy consulting, application development and maintenance, data warehousing and business intelligence, package implementation, product architecture, design and engineering, embedded software, technical support, testing infrastructure management services, etc., to our customers. We believe that our comprehensive portfolio of service offerings helps our customers achieve their key business objectives.'

(iv) Further, on a perusal of the page 442 of the annual report compendium, we find that the company has used expertise in research and development to provide technology consulting services to its customers.

(v) On page, 480 of the annual report compendium under significant accounting policies and notes to account for the year ended March 31, 2013, the company has been treated as consulting and implementation company. The relevant part of the notes to account is reproduced as under :

'Mindtree Limited ("Mindtree" or "the company") is an international information technology consulting and implementation company that delivers business solutions through global software development. The company is structured into two business units-information technology ('IT') services and product engineering ('PE') services. Information technology services offer consulting and implementation and post-production support for customers in manufacturing financial services, travel and leisure and other industries, in the areas of e-business, data warehousing and business intelligence, supply chain management, ERR and maintenance and re-engineering of legacy mainframe applications product engineering services provides full life cycle product engineering, professional services and sustained engineering services. It also enables faster product realisation by leveraging the expertise in the areas of hardware design, embedded software, middleware and testing and through Mindtree's own IP building blocks in the areas of Bluetoot/VOIP, IVP6, iSCSI and others in datacom, telecom, wireless, storage, industrial automation, avionics, consumer products and computing.'

(v) In view of the above observation, it is evident that the services rendered by the company are not limited to software development, but also are in the field of consulting and technical support, management, etc. In our opinion the software development services rendered by the assessee cannot be compared with a whole basket of services of consulting, technical support or management services

rendered by the company. As there is no separate segment of software development services available in the financial statement of the company, the company at entity level cannot compare functionally with the CSD segment of the assessee and accordingly, we direct the learned Assessing Officer/Transfer Pricing Officer to exclude the company from the final set of the comparables."

18.1 The learned counsel for the assessee further drew our attention to the another decision of the co-ordinate Bench of the Tribunal, Delhi in the case of *NXP India P. Ltd.* v. *Asst. CIT* I. T. A. No. 5140/Delhi/2018 for the assessment year 2014-15 which is also relevant assessment year under consideration before us wherein regarding the company, i. e., Mindtree Limited, the Tribunal has held as follows :

"13.6 We have heard the rival submissions and perused the relevant material on record. Page 90 of the compendium of annual reports, which is annexed to the director's report. We find that the company along with software development services, carried out research and development in a specific areas, viz., social, mobile, analytics and cloud (SMAC) computing. The company has developed mobile apps for retail/CPG and transport and logistics, which were adjudged the best in their category at the SAP mobile apps challenge at Techd Las Vegas, October 2013. The company achieved capabilities in Hadoop, NoSQL and allied big data technologies and also focusing on memory databases. This annexure further mention this focused HANA services offering now will include consulting services to identify HANA use-cases.

13.7 In this annexure 2 to the director's report, on page 91 of the annual report compilation it is mentioned that in the financial year 2013-14, i. e., previous year corresponding to the assessment year under consideration, the company filed a patent application for integrated radio-frequency front-end circuit. Thus the thrust of the company on the research and development activities and earning from mobility apps in retail/CPG and transport and logistics, makes its functionally different from the assessee who is a low-end chip designing software developer. Accordingly, we direct the Assessing Officer/Transfer Pricing Officer to exclude the company from the final set of the comparable being functionally not comparable even at the segment level."

Respectfully, following our decisions referred to hereinabove pertaining to the same assessment year, i. e., 2014-15 with regard to this company, i. e., Mindtree Limited, we direct the Transfer Pricing Officer/Assessing Officer

to exclude this company, i. e., Mindtree Limited from the final list of comparables.

The assessee in the "transfer pricing adjustment" ground has also **19** prayed for inclusion of one comparable, i. e., Akshay Software Technologies Ltd. in the final set of comparables.

Inclusion of company as comparables to software development service segment

(E) Akshay Software Technologies Ltd.

The Transfer Pricing Officer has not considered this company as com- **20** parable at running page 214 para (i) by observing as follows :

> *"(i) Akshay Software Technologies Ltd.*
>
> The submission of the assessee is considered but not acceptable. As per the notes to the financial statements it is mentioned that Akshay Software Solutions Limited ('the parent') is engaged in providing professional services, procurement, installation, implementation, support and maintenance of ERP products and services in India and overseas. During the course of transfer pricing proceedings for the assessment years 2012-13 and 2013-14 the hon'ble Dispute Resolution Panel observed that professional services being rendered by the assessee are clearly in the nature of staffing services by which the company employs information technology professionals and provides them to various clients in the information technology industry on a contract staffing/permanent staffing basis. Hence, it was then held that the revenues of the company derived from professional services cannot be categorised as revenue from software services. There is no change in facts for the assessment year 2014-15 as compared to the assessment years 2012-13 and 2013-14 and therefore the finding of the Dispute Resolution Panel is applicable to the assessment year 2014-15 also. Further it is also held by the hon'ble Dispute Resolution Panel during transfer pricing proceedings for the assessment years 2012-13 and 2013-14 that the business model of the assessee is onsite service provider which is not comparable with offshore software development service provider. There is no change in the facts for the assessment year 2014-15 as compared to the assessment years 2012-13 and 2013-14 and therefore the finding of the Dispute Resolution Panel is applicable to the assessment year 2014-15 also. Since the directions of the hon'ble Dispute Resolution Panel are now binding on the Assessing Officer/Transfer Pricing Officer, the contention of the assessee cannot be accepted. Therefore Akshay Software Technologies Ltd. is not considered as comparable."

21 Similarly, the learned Dispute Resolution Panel at running pages 34 to 38 of its order upheld the findings of the Transfer Pricing Officer by holding as follows :

"(i) *Akshay Software Technologies Ltd.*

It was noted that there is no change in the functions performed by this entity in the assessment year 2014-15, compared to the assessment years 2012-13 and 2013-14, wherein the Dispute Resolution Panel rejected this company as a comparable. It was found that the professional services rendered by the assessee-company were definitely not in the nature of software services, as the assessee as basically providing professionals to the clients on contract staffing/ permanent staffing basis. Further, the assessee, being an on-site service provider, is not comparable with offshore software development service provider.

We have considered the submission and also examined the financials of this entity for the assessment year 2014-15.

The profit and loss account shows that revenue from operations is Rs. 22,75,79,199 and in note 19, this income is shown from software services. There is a reference to note 28 as well which says export of software services (earning in foreign exchange) is Rs. 21,05,20,116. Thus evidently almost the entire revenue from the software services is out of export.

Now coming to the expenses part, the major expense is on employee benefit amounting to Rs. 20,02,82,870 out of total expense of Rs. 22,73,59,827, i. e., almost 88 per cent. The operational expense is only Rs. 2,43,57,929. In note 27 the foreign branch expense incurred on accrual basis (net of recovery) stands at Rs. 19,31,86,280, i. e., 85 per cent. Thus the picture that emerges is that 88 per cent. is manpower expenses and 85 per cent. expense is in foreign exchange. It is therefore clear that that substantial revenue is generated onsite. Even assuming that all expenses other than manpower expenses, (i. e., 12 per cent.) is incurred in foreign exchange, then also 73 per cent. of manpower expense is incurred in foreign exchange. So the business model of revenue generation is surely from onsite. In the case of *Trilogy E-Business Software India P. Ltd.* v. *Dy. CIT* [2013] 23 ITR (Trib) 464 (Bang); [TS 748 ITAT 2012 (Bang.) TP], the hon'ble Bangalore Income-tax Appellate Tribunal upheld the onsite revenue filter adopted by the Transfer Pricing Officer and held that the said company which had onsite revenue of more than 75 per cent. of the total revenue cannot be considered as a comparable with the assessee who

was an offshore service provider. However, without prejudice, we have further examined the annual accounts and the website of the company.

In this connection, extract of the director's report is reproduced as under :

'Operating results and business operations

Revenue from services and sale of products on standalone basis grew by 14.12 per cent. to Rs. 2275.79 lakhs compared to Rs.1994.14 lakhs during the previous year. Like in the previous year, export income from professional services business continued to maintain its share of 85 per cent. of operating revenue. During the year, the company however witnessed pricing pressure in export business as billing rates remained stagnant.'

In the director's report, the company is stated to be a service provider.

Now the question arises as what is the nature of professional services rendered by the assessee. In this connection, the website of the company is also examined. The reporting under home button is as under :

'Akshay's solutions and services are focused on the principle of enabling the customer to focus on core business activities. Thus, for small and medium enterprises, Akshay offers SAP Business One ERP along with the associated services, which will ensure higher growth and profits for these organisations without the need for an in-house software team. Akshay's Staffing Solutions for Organisations across the spectrum, ensure, timely availability of resources, thereby eliminating the need to have in-house recruitment teams.' . . .

In today's rapidly changing times, a key challenge that all organisation's face is in building an organisation that is "future-ready". Such an organisation can only be possible through the people who make up the organisation-its human capital. Thus talent acquisition becomes one of the most important factors in ensuring enduring success of an organisation. And finding the appropriate resource possessing the desired skills at the right time is highly critical. Akshay partners with its clients in this process of building future-ready organisations by facilitating acquisition of talent, which is not only competent to address the present challenges but which will also upgrade its skillsets to address potential challenges in the future. With over 200 man-years of recruitment experience across multiple domains and technologies in UAE and India, combined with a robust

recruitment process, Akshay through its team of recruiters is better placed to understand diverse requirements.

Akshay understands that sourcing and recruiting the right talent is tough—its like finding a needle in a haystack. We believe in Ken Robinson's quote—'Human resources are like natural resources ; they are often buried deep. You have to go looking for them, they are not just lying around on the surface. You have to create the circumstances whereby they show themselves'.

In line with this philosophy, our recruitment process is based on a structured and systematic approach, which while being proactive, detailed and target oriented also ensures short. Turn-around-time (TAT). This process begins with understanding the client's need, mapping position specific requirements, devising a sourcing strategy, designing a recruitment message, establishing contact with potential candidates, validation, negotiation and assisting in hiring/deployment formalities. This can also be customised based on the client specific needs. Thus our recruiters are focused and aligned to deliver the best talent to our client organisations.

Our track record in this business is evidenced by the long-term relationships that we enjoy with our clients whose requirements we have been servicing since the last several years. Akshay has delivered more than 1,000 man-years of services to its various clients in the last 20+ years and many consultants who were on our pay-roll and deputed to client locations on-site were later absorbed by the clients on their payroll. This is a testimony to the quality of our recruitment process. Presently we have about 200 consultants placed with various prestigious clients in India and UAE.

Akshay's services in talent acquisition includes recruitment process outsourcing, contract staffing and permanent placement.

We offer.

Contract staffing and permanent staffing

When it comes to staffing needs count on Akshay. Here are a few reasons why ?

- 25+ years of experience across diverse technologies and domains
- Robust recruitment process leading to identification of appropriate talent
- Involvement in technical evaluation before CV submission by qualified HR professionals well trained in various HR skills, recruiting tools and techniques

- Faster turn-around time
- Proven information technology staffing methodology
- 90 per cent. repeat business from prestigious clients who rely on us to deliver top talent and services
- Akshay offers skilled personnel the opportunity to flourish in an open, entrepreneurial culture that encourages teamwork and personal contribution
- Low attrition rate
- Objective yearly appraisal of depute consultant
- Motivation, mentoring, training, empathetic HR managers who carefully manage the consultants
- Financially stable company with adequate reserves ensuring timely payout of salaries.

Thus, on a detailed examination it appears that the software services is actually out of proving skilled manpower related to software to the clients as per their requirements. Part of this is also for the SAP Solution, i. e., ERP related work. However income out of sale of software licenses is only Rs. 27,28,760, i. e., miniscule compared to professional services. The director's report also says that about 85 per cent. revenue is out of professional services. Therefore, we hold that Akshay Technologies cannot be held as a appropriate comparable in this case as it does not match the assessee functional profile."

We have perused the case records and heard the rival contentions. The **22** learned counsel for the assessee submitted that for the assessment year 2011-12 in the assessee's own case, it was held by the Tribunal that this company should be included in the final list of comparables. However, for the assessment year 2014-15 before us, the facts demonstrates as appearing in the order of the learned Dispute Resolution Panel where after detailed examination, the learned Dispute Resolution Panel held that the software services is actually out of proving skilled manpower related to software to the clients as per their requirements. Part of this is also for the SAP solution, i. e., ERP related work. However income out of sale of software licences is only Rs. 27,28,760, i. e., miniscule compared to professional services. The director's report also says that about 85 per cent. revenue is out of professional services. Hence, the learned Dispute Resolution Panel held that Akshay Software Technologies Ltd. is not an appropriate comparable and hence, the said company cannot be included in the final list of comparables. We do not find any infirmity with the findings of the learned

Dispute Resolution Panel and the same is, therefore, upheld. Thus, this ground of appeal raised by the assessee is dismissed.

23 The learned counsel for the assessee further submitted that another company, i. e., R. S. Software Ltd. was originally taken by the assessee as it is a comparable which was accepted by the Transfer Pricing Officer. But, now the assessee objected that this company should not be in the list of final comparables company or companies with that of the assessee.

(F) R. S. Software Ltd.

24 The observation of the Transfer Pricing Officer with regard to the company, i. e., R. S. Software Limited is as follows :

"(a) R. S. Software

This comparable company is selected by the assessee and retained by the Transfer Pricing Officer in the final set of comparable. It is observed from the page 30 of the annual report of this company for the financial year 2013-14 as under :

Financial institutions, payment network providers, payment processors and software companies providing products to the payment industry need a development partner who understands the complexities of their industry.

RS Software is the leading custom software development house for the payments industry. With more than 20 years in the payments industry, we have participated in and helped create the products and services that have transformed this marketplace.

Our proven RS GEM™™, comprehensive set of services and continuing innovation are focused specifically on the needs of the space we have served exclusively since we opened our doors in 1991.

No other provider in our space can deliver more industry knowledge and experience.

Page 52 of the annual report for the financial year 2013-14 gives the following description :

Over the years, RS Software has distinguished itself by emerging as one of the specialised payment service providers in the world. This specialisation has been derived from the institutionalisation of various competencies. This institutionalisation, in turn, has been driven by the RS School of Payments (RSSOP) and the RS Payments Lab (RSPL) with the objective to develop domain-based and technology-based payment solutions. These institutions have strengthened the company's global brand, not just as a competent service provider but as a thought leader.

> The above description shows this company also engaged in product and specialised services. However in the profit and loss account the entire revenue is shown under the head 'software services' only. This shows that RS software is engaged in predominantly in software services which have been accepted by the Transfer Pricing Officer. However, the assessee has objected the comparables engaged in similar services or whose revenue is predominantly from software the functional difference. Thus the approach of the assessee is contradictory."

The learned counsel for the assessee submitted that this ground was not raised before the learned Dispute Resolution Panel. **25**

We have heard the rival contentions and perused the material available on record. Taking into consideration the totality of facts and circumstances on the issue, in the interest of justice we consider it deem and proper to restore this issue to the file of the Assessing Officer/Transfer Pricing Officer for fresh consideration as per the principles of natural justice whether this company will be included in the final list of comparables or not. We order accordingly. Thus, this ground raised by the assessee in the appeal is allowed for statistical purposes. **26**

Adjudication of additional ground-Working capital adjustment

The assessee has also preferred additional ground which pertains to "working capital adjustment" of comparable companies. **27**

The learned counsel for the assessee submitted that this adjustment always has to be positive and working capital adjustment cannot be negative. In support of his contentions, the learned counsel for the assessee relied upon the decision of the co-ordinate Bench of the Tribunal, Hyderabad in the case of *Adaptec (India) P. Ltd.* v. *Asst. CIT* I. T. A. No. 206/Hyd/2014 for the assessment year 2009-10 wherein on the issue, the Tribunal has held as follows : **28**

> "10. Ground No. 8 pertains to the issue of negative working capital. As briefly stated above, after arriving at the arithmetic mean of all comparables at 22.03 per cent., the Assessing Officer worked out negative working capital adjustment of 3.22 per cent. thereby, making arm's length price at 25.25 per cent. Even though the Dispute Resolution Panel refused to interfere with the objections of the assessee in its order, we were informed that the Dispute Resolution Panel has directed the Transfer Pricing Officer/Assessing Officer not to make any negative working capital adjustment in some of the cases in the next assessment year, in the cases of Market Tools Research P.

Ltd. and Mega Systems Worldwide India P. Ltd., the assessee placed on record copies of the orders of the Dispute Resolution Panel. In that the Dispute Resolution Panel considered the issue and directed the Transfer Pricing Officer as under :

'14. Ground No. 11 : Negative working capital adjustment - Making a negative working capital adjustment without appreciating the fact that the company does not bear any working capital risks. On this issue, the assessee submitted as under :

"The learned Transfer Pricing Officer determined the arm's length price for the international transactions with the associated enterprises by making a negative working capital adjustment for the differences in working capital between the assessee and the companies considered as comparables. The assessee does not agree with the learned Transfer Pricing Officer as :

- The company does not bear any working capital risk since it has been fully funded by its associated enterprises from its inception and has no working capital contingencies.
- The company has never taken any loans till date from the date of incorporation nor has incurred any expense for meeting the working capital requirement."

We have gone through the submissions and the order of the Transfer Pricing Officer. The assessee pleaded that the Dispute Resolution Panel has acceded such a plea in some other case. On examination, we find that the Dispute Resolution Panel, Hyderabad in the case of *Cordys Software India P. Ltd.* for the assessment year 2008-09 in its directions dated August 3, 2012 has given a finding as under :

"7.7.4 Thus, working capital adjustment is made for the time value of money lost when credit time is provided to the customers. The applicant is not an entrepreneur but a captive service provider. Its entire funding needs are provided by the associated enterprises. This being so, the applicant does not stand to lose anything as it is compensated on a total cost plus basis. The Transfer Pricing Officer probably was carried away by the large amount of receivables appearing in the books of the applicant. But the applicant is running its business without any working capital risk while comparable companies have such a risk for them. If at all any working capital adjustment is to be made to this situation, only a positive adjustment has to be made to the comparables so that they are brought on par with the applicant.

In view of the same, the Panel directs that negative working capital adjustment to the arithmetic mean margin of the comparables shall not be made."

In view of the above, the Panel directs that negative working capital adjustment to the arithmetic mean margin of the comparables shall not be made.'

11. In view of the above, we are of the opinion that the assessee's case being similar, there is no need for making any negative working capital adjustment when the assessee does not carry any working capital risk. In fact, the Transfer Pricing Officer should have done necessary working capital adjustment to the profits of the selected comparables so as to make them comparable to the assessee. In view of this, we direct the Transfer Pricing Officer not to make negative working capital adjustment.

12. The Transfer Pricing Officer is directed to examine the comparability of the two companies directed above and delete rest of the companies as objected to by the assessee and re-workout the arithmetic mean. He should also consider the proviso to section 92C(2) as per law. For this purpose the orders to that extent are set aside for re-doing the same as per the facts and provisions of law."

28.1 This judgment was further relied upon by the co-ordinate Bench of the Tribunal, Bangalore in the case of *Lam Research (India) P. Ltd.* v. *Dy. CIT* I. T. A. Nos. 1437 and 1385/Bang/2014 for the assessment year 2009-10 wherein the Tribunal on the issue has held as follows :

"26. This Tribunal had held that negative working capital adjustment cannot be carried out where the assessee was a captive service provider. Here also it is an admitted position that the assessee was a captive service provider and its services were entirely rendered to its associated enterprises abroad. Its share capital was entirely sourced from its associated enterprises abroad. Therefore, in our opinion, the view taken by this Tribunal in the case of *Adaptec (India) P. Ltd.* will squarely apply here. We, therefore, direct that no negative working capital adjustment shall be carried forward out on the average profit level indicator of the final set of comparables."

28.2 Further, the learned counsel for the assessee has relied on the decision of the co-ordinate Bench of the Tribunal, Hyderabad in the case of *Intoto Software India P. Ltd.* v. *ITO* I. T. A. No. 1810/Hyd/2012 for the assessment year 2008-09 wherein the assessee has raised an additional

ground to the fact that the Transfer Pricing Officer has erred in making a negative working capital adjustment of -3.84 per cent. while computing the adjustment under section 92CA of the Act. The contention of the learned counsel for the assessee was as under :

> "It is the contention of the learned counsel for the assessee that the Tribunal in the case of *Adaptec India P. Ltd.* has held that negative working capital adjustment should not be made in the case of captive service provider, while computing the adjustment under section 92CA of the Act. The learned counsel for the assessee has filed a copy of the decision of this Tribunal in the case of *Adaptec India P. Ltd.* wherein at page No. 20 at para 11 of the order such a direction was given by the Tribunal."

The Tribunal on the issue has held as follows :

> "Having regard to the rival contentions, we deem it fit and proper to remit this issue also to the file of the Transfer Pricing Officer for reconsideration in accordance with the judicial precedents on the issue. The additional ground of the appeal is accordingly allowed for statistical purposes."

29 We have perused the case records and heard the rival contentions. We find though the case law relied upon by the learned counsel for the assessee supports his case, however, there are other decisions of the co-ordinate Bench of the Tribunal which supports the case of the Revenue. That further, in I. T. A. No. 1810/Hyd/2012 (supra), the co-ordinate Bench of the Tribunal, Hyderabad has restored the matter to the file of the Transfer Pricing Officer for reconsideration in accordance with the judicial precedents. That again the judicial precedent has to be tallied with facts in the assessee's case and then a decision has to be taken as per law. In the interest of justice, the matter is restored to the file of the Transfer Pricing Officer/ Assessing Officer to consider the decisions relied on by the assessee vis-a-vis the facts and circumstances of the case and adjudicate the issue in compliance with the principles of natural justice. Thus, this ground of appeal raised by the assessee is allowed for statistical purposes.

30 The assessee has also raised ground relating to disallowances/additions other than transfer pricing adjustment which reads as under :

> "9. The learned Dispute Resolution Panel erred on facts and in law in directing the learned Assessing Officer in adding the amount of INR 25,84,042 appearing in the income-tax system database as interest on income-tax refund granted to the appellant and ignoring the

appellant's submission that the said amount was not taxable in the captioned year since no intimation was received by the appellant qua said refund adjustment and also said amount was not recognised as income in the books of account."

31 With regard to this ground, the learned counsel for the assessee contends the direction of the learned Dispute Resolution Panel wherein it had directed the Assessing Officer in adding the amount of INR 25,84,042 appearing in the income-tax system database as interest on income-tax refund granted to the assessee and ignoring the assessee's submission that the said amount was not taxable in the captioned year since no intimation was received by the assessee qua the said refund adjustment. The learned counsel for the assessee further submitted that this addition should not stand since there was no intimation regarding adjustment of interest on the refund amount and that the said amount was not taxable in the relevant assessment year under consideration.

32 We have perused the case records and heard the rival contentions. We observe that the interest on refund either it can be directly given by the Department to the assessee or as in the present case, suppose if some tax liability is arising with regard to the assessee in respect of the earlier years then the interest on the refund amount if adjusted vis-a-vis those outstanding tax liability, i. e., also deemed payment of interest. It has been held in the case of *Avada Trading Co. (P.) Ltd. v Asst. CIT* [2006] 100 ITD 131 (Mum) [SB] that interest on refund under section 244A(1) would be assessable in the year in which it is granted and not in the year in which proceedings under section 143(1)(a) attain finality. The Special Bench of the Tribunal in this case on the issue has further held as follows :

"9. The main contention of the assessee's counsel is that such right is contingent as the interest so received can be varied or withdrawn after the assessment under section 143(3). We are unable to accept such contention of the assessee for the reasons given hereafter. According to the dictionary meaning, a right or an obligation can be said to be contingent when such right or obligation is dependent on something not yet certain. According to section 244A, the only condition for grant of interest is that there must be a refund due to the assessee under any provision of the Act. There is no other condition in the said provision affecting such right. Therefore, the moment a refund becomes due to the assessee, an enforceable debt is created in favour of the assessee and the assessee acquires a right to receive the

interest. Sub-section (3) of section 244A only affects its quantification under certain circumstances and not the right of interest. The hon'ble Supreme Court in the case of *CIT* v. *Shri Goverdhan Ltd.* [1968] 69 ITR 675 (SC) has observed at page 681 that once a debt is created, then the liability cannot be said to be contingent merely because it is to be quantified at a later date. Under section 244A, even the interest is quantified immediately whenever a refund is issued. In our view, the right to grant interest is absolute since existence of such right is not dependent on any event. For example, the assessee is granted interest of Rs. 1,000 on the date of granting refund. Subsequently, under section 244A(3), it is reduced to Rs. 600 by virtue of assessment under section 143(3). Can it be said that right to interest did not accrue on the date of refund ? In our opinion, the right of interest came into existence on the date of refund by virtue of section 244A(1) though its quantification may or may not vary depending upon the outcome of assessment."

32.1 The Special Bench of the Tribunal, Bombay has considered the decision of the hon'ble Supreme Court in the case of *Kedarnath Jute Mfg. Co. Ltd.* v. *CIT* [1971] 82 ITR 363 (SC) ; AIR 1971 SC 2145 ; [1972] 1 SCR 277 approving the judgment of the hon'ble Madras High Court in the case of *Pope The King Match Factory* v. *CIT* [1963] 50 ITR 495 (Mad) and has held as follows :

"12. The ratio of the above judgment is clearly applicable to the present case. According to the above judgment, if an enforceable debt is created under a statute then any subsequent event would not affect the existence of such right/obligation despite the fact that such debt is subject matter of appeal. The right to interest under section 244A is not dependent upon any assessment inasmuch as there is no compulsion or obligation upon the Assessing Officer to make an assessment under section 143(3). The moment the return is processed under section 143(1)(a) and refund is issued on the basis of intimation under section 143(1)(a), an enforceable legal right is created in favour of the assessee under section 244A and simultaneously the Assessing Officer is under legal obligation to grant the interest. Merely because quantum of such interest may vary on assessment made under section 143(3), it cannot be said that legal right was not acquired on the date of refund. The effect of assessment under section 143(3) would be that interest on refund under section 244A would get substituted

in terms of sub-section (3) of section 244A without affecting the right already accrued."

Therefore, interest on refund whenever it is granted, it is assessable in that year itself and if it is adjusted with any prior tax liability of earlier years and such interest is in turn paid to the Government account that also is payment of interest to the assessee, in such case, there is no need for any intimation separately. Hence, this ground of appeal raised by the assessee is dismissed.

The assessee has also raised the ground with regard to initiation of penalty proceedings under section 271(1)(c) of the Act. At this stage, challenging of initiation of penalty proceedings under section 271(1)(c) of the Act is premature and the same is hereby rejected. 33

In the result, the appeal of the assessee is partly allowed for statistical purposes. 34

Order pronounced on 4th day of March, 2020. 35

[2020] 79 ITR (Trib) 695 (Cochin)

[Before the Income-tax Appellate Tribunal — Cochin Bench]

DEPUTY COMMISSIONER OF INCOME-TAX

v.

ASIANET SATELLITE COMMUNICATIONS LTD.

Chandra Poojari ***(Accountant Member)*** and
George George K. ***(Judicial Member)***

March 4, 2020.

SS ▸ ITA 1961, ss 32, 37
AY ▸ 2007-08, 2010-11
HF ▸ Assessee

Business expenditure—Prior period expenses—Interest for delayed payment of pole rental charges—Not prior period expenses but compensatory in nature—Deductible—Income-tax Act, 1961, s. 37.

Depreciation—Modem is an integral part of a computer—Eligible for higher rate of depreciation at 60 per cent.—Income-tax Act, 1961, s. 32.

The Assessing Officer disallowed a portion of the interest expenses amounting to Rs. 2,37,71,066 relating to the demand raised by the Electricity Board on the ground that the amount was in the nature of penal interest for

delayed payment of pole rent since 2002-03. According to him, the amount was a provision made for the liability, the payment of which was not made during the relevant financial year. He noticed that no documentary evidence was also furnished by the assessee. Moreover, the expenses were penal in nature and hence, on this account also the amount claimed was not allowable. Therefore, he added the amount of Rs. 2,37,71,066 to the rental income. The Commissioner (Appeals) observed that there was a dispute between the assessee and the Electricity Board with regard to pole rent chargeable and the issue was settled by the High Court. Subsequent to this order, the Electricity Board finalised the pole rent payable by the assessee with arrears and also charged interest for the delay in payment. From the nature of transaction, he concluded that the interest was only a compensatory payment and the liability had accrued during the assessment year 2007-08. Accordingly, he deleted the addition of interest amount of Rs. 2,37,71,006. On appeal :

Held, *(i) that the amount represented interest for the delayed payment of pole rental charges from the year 2002-03 based on the demand raised by the Electricity Board. In this demand notice the original demand of Rs. 22.99 crores based on the earlier order of the Electricity Board was reduced to Rs. 14.35 crores in pursuance of the order of the High Court. The Electricity Board revised the demand which was accepted by the assessee in the year 2016-17. Thus, the entire dispute was finally settled based on mutual verifications conducted by the parties. This was due the serious anomalies in the apportionment of poles in the urban and in the rural areas. In view of the fact that the demand had arisen and the liability crystallised during the year, the statutory auditors had disclosed the expenditure under the extraordinary items in the financial statements of the company in accordance with the provisions of Accounting Standard 5 on net profit or loss for the year prior period items and changes in the accounting policies issued by the Institute of Chartered Accountants of India considering the largeness of the amount involved. Thus there was no case for the Department that the expenditure was in the nature of prior period expenses. Interest liability was only compensatory payment and the liability was accrued during the assessment year 2007-08. Irrespective of the long delay involved and also the period of default the interest was computed at a stipulated percentage on the amount of pole rent charges remitted with delay. Therefore, the nature of the payment continued to remain was of compensatory nature.*

ITO *v.* LAKSHDWEEP DEVELOPMENT CORPORATION LTD. (I. T. A. No. 312/Cochin/2018 dated October 3, 2018) *followed*.

(ii) That modem is an integral part of a computer eligible for the higher rate of depreciation of 60 per cent.

Dy. CIT *v.* Datacraft India Ltd. [2011] 9 ITR (Trib) 712 (Mumbai) [SB] *followed*.

Cases referred to :

CIT (Dy.) *v.* Datacraft India Ltd. [2011] 9 ITR (Trib) 712 (Mumbai) [SB] (para 17)

CIT (Dy.) *v.* Microsoft Corporation India Pvt. Ltd. [2011] 9 taxmann.com 253 (Delhi Trib.) (para 17)

Dinamalar *v.* ITO [2016] 389 ITR 94 (Mad) (para 17)

ITO *v.* Lakshdweep Development Corporation Ltd. (I. T. A. No. 312/Cochin/2018 dated October 3, 2018) (para 11)

ITO (OSD) *v.* Sicgil India Pvt. Ltd. [2010] 1 ITR (Trib) 749 (Chennai) (para 7)

Lachmandas Mathuradas *v.* CIT [2002] 254 ITR 799 (SC) (para 11)

Mahalakshmi Sugar Mills Co. *v.* CIT [1980] 123 ITR 429 (SC) (para 11)

Prakash Cotton Mills P. Ltd. *v.* CIT [1993] 201 ITR 684 (SC) (para 11)

Ushodaya Enterprises Ltd. *v.* Asst. CIT [2014] 41 taxmann.com 304 (Hyd) (paras 13, 17)

I. T. A. Nos. 661 and 662/Cochin/2019 (assessment years 2007-08 and 2010-11).

Mritunjaya Sharma, Senior Departmental representative, for the Department.

Rajeev R., Chartered Accountant, for the assessee.

ORDER

The order of the Bench was pronounced by

Chandra Poojari ***(Accountant Member)***.—These two appeals filed by the assessee are directed against the different orders of the Commissioner of Income-tax (Appeals) of even date August 23, 2019 for the assessment years 2007-08 and 2010-11. 1

The assessee has raised the following grounds of appeal in I. T. A. No. 661/Cochin/2019 : 2

> "1. The learned Commissioner of Income tax (Appeals), Trivandrum erred in concluding that 'interest amount for the delayed payment of the pole rent payable by the assessee since 2002-03 is an allowable expense'.

2. The Commissioner of Income-tax (Appeals) ought to have noticed that the interest on pole rent was demanded by the KSEB due to non-payment of pole rent which had to be paid by the appellant within the prescribed lime limit.

3. The learned Commissioner of Income-tax (Appeals) ought to have considered the difference between the liability of interest due and penal interest arose out of the demand by a competent authority.

4. The Commissioner of Income-tax (Appeals) ought to have noticed that the amount is penal in nature, as it is for the delayed payment of pole rent since 2002-03, and not compensatory.

5. For these and other grounds that may be advanced at the time of hearing the order of the learned Commissioner of Income-tax (Appeals), Thiruvananthapuram on the above points may be set aside and that of the Assessing Officer restored."

2.1 The assessee has raised the following grounds of appeal in I. T. A. No. 662/Cochin/2019 :

"The learned Commissioner of Income-tax (Appeals), Trivandrum erred in concluding that 'the depreciation on modems is allowable at 60 per cent.' The Commissioner of Income-tax (Appeals) ought to have noticed that as per the rate chart under rule 5 of the Income tax Rules, the rate of depreciation at 60 per cent. is allowable for computers including computer software. 'Computer software' is defined in the rule as 'any computer programme recorded on any disc, tape, perforated media or other information storage device' the learned Commissioner of Income-tax (Appeals) ought to have noticed that 'modem' cannot be considered under this definition but it is only 'a device that modulates an analog carrier signal to encode digital information, and also demodulates such a carrier signal to decode the transmitted information'. The order on which the learned Commissioner of Income-tax (Appeals) relied upon does not discuss the issue of depreciation of modems in detail but passed the 'order simply considering the decision held in I. T. A. No. 1241/Hyd/2010, for other peripherals which are not at all similar to 'modems'.

For these and other grounds that may be advanced at the time of hearing the order of the learned Commissioner of Income-tax (Appeals), Thiruvananthapuram on the above points may be set aside and that of the Assessing Officer restored."

3 The brief facts of the case as narrated in I. T. A. No. 661/Cochin/2019 are that the Assessing Officer disallowed the portion of interest expense amounting to Rs. 2,37,71,066 by way of interest demand raised by the KSEB and accepted by the company was in the nature of penal interest for delayed payment of pole rent since 2002-03. According to the Assessing Officer, the amount debited and claimed is a prior period expense and secondly, the amount claimed is a provision made for the said liability, the payment of which was not made during the relevant financial year prior period expenses can be claimed only on payment basis. The Assessing Officer noticed that no documentary evidence was also furnished by the assessee. Moreover, it was noticed that the said expenses were penal in nature and hence, on this account also the amount claimed was not allowable. Therefore, the amount of Rs. 2,37,71,066 was added back to the rental income.

4 On appeal, the Commissioner of Income-tax (Appeals) observed that the Assessing Officer arrived at this conclusion without any basis or understanding of the issue. It is a fact that there was a dispute between the assessee and the KSEB with regard to pole rent chargeable and the same was settled by the High Court vide order dated June 16, 2005. The Commissioner of Income-tax (Appeals) observed that subsequent to this order, the KSEB finalised the pole rent payable by the assessee with arrears and also charged interest for the delay in payment. From the nature of transaction, the Commissioner of Income-tax (Appeals) concluded that the interest liability was only compensatory payment and the said liability was accrued during the assessment year 2007-08. Accordingly, the Commissioner of Income-tax (Appeals) deleted the addition of interest amount of Rs. 2,37,71,006.

5 Against this, the Revenue is in appeal before us. The learned Departmental representative relied on the grounds raised.

6 The learned authorised representative submitted that the interest paid was only compensation for delayed payment of pole rent and the liability accrued during the financial year 2006-07. The learned authorised representative filed a copy of the letter dated September 28, 2006 received from the KSEB as a proof of crystallisation of liability of interest. The learned authorised representative further submitted that the assessee was following the mercantile system of accounting and therefore, interest liability accrued is deductible expenditure.

7 We have heard the rival submissions and perused the record. The only issue in the appeal is the admissibility of interest paid of Rs. 2,37,71,066 to

the KSEB towards delayed payment of pole rental charges during the financial year 2006-07 corresponding to the assessment year 2007-08 which was written off. The above amount represents interest for the delayed payment of pole rental charges from the year 2002-03 based on the demand raised by the KSEB. In this demand notice the original demand of Rs. 22.99 crores based on the earlier order of the KSEB dated December 5, 2019 was reduced to Rs. 14.35 crores in pursuance of the order of the High Court. The KSEB revised the demand which was accepted by the assessee in the year 2016-17. Thus, the entire dispute was finally settled based on mutual verifications conducted by the parties. This was due to the serious anomalies in the apportionment of poles in the urban and in the rural areas. The assessee has placed a copy of the demand raised by the KSEB on September 28, 2006 and copy of the order of the High Court in O. P. No. 323210 of 2002 dated June 16, 2015 settling the dispute. In view of the fact that the demand had arisen and the liability crystallised during the year, the statutory auditors had disclosed the expenditure under the extraordinary item in the financial statements of the company in accordance with the provisions of Accounting Standard 5 on net profit or loss for the year prior period items and changes in the accounting policies issued by the Institute of Chartered Accountants of India considering the largeness of the amount involved. In view of the above, there is no case for the Department that the expenditure is in the nature of prior period expenses. The Chennai Bench of the Tribunal in the case of *ITO (OSD)* v. *Sicgil India Pvt. Ltd.* [2010] 1 ITR (Trib) 749 (Chennai) ; [2009] 119 ITD 184 (Chennai) dealt with a case wherein the contractual liability which was disputed arose in the year of settlement of dispute. In the instant case, the dispute involved was finally settled during the financial year 2006-07 relevant to the assessment year 2007-08. Hence, we do not find any infirmity in the order of the Commissioner of Income-tax (Appeals) and the same is confirmed. This ground of appeal of the Revenue in I. T. A. No. 661/Cochin/2019 is dismissed.

8 The next ground of the Revenue in I. T. A. No. 661/Cochin/2019 is with regard to the difference between the liability of interest due and penal interest which arose out of the demand by a competent authority.

9 The learned Departmental representative submitted that the Commissioner of Income-tax (Appeals) ought to have noticed that the amount is penal in nature as it is for the delayed payment of pole rent charges since 2002-03 and hence, not compensatory.

The learned authorised representative relied on the order of the Commissioner of Income-tax (Appeals). 10

We have heard the rival submissions and perused the material on record. There is no merit in the above ground raised by the Department in so far as it is clear that irrespective of the long delay involved and also the period of default interest computed at a stipulated percentage on the amount of pole rent charges remitted with delay. Therefore, the nature of the payment continues to remain as interest charges only which is of compensatory nature. Reliance is placed on the judgment of the Supreme Court in the case of *Prakash Cotton Mills P. Ltd.* v. *CIT* reported in [1993] 201 ITR 684 (SC) ; AIR 1993 SCR (2) 983 that the Assessing Officer should examine the provisions of the particular statute to verify whether the levy or charge is in the nature of penalty imposed for contravention of law and only in such cases where penalty is levied and prescribed in the statute, the expenditure would become inadmissible under section 37(1) of the Income-tax Act. Reliance is placed on the judgment of the Supreme Court in the case of *Mahalakshmi Sugar Mills Co.* v. *CIT* [1980] 123 ITR 429 (SC) where it was held that the interest for delayed payment of statutory dues is an allowable deduction under section 37(1) of the Act. The same view was taken by the Supreme Court in the case of *Lachmandas Mathuradas* v. *CIT* [2002] 254 ITR 799 (SC). Similarly, in the recent decision of the Cochin Bench of the Tribunal in the case of *ITO* v. *Lakshdweep Development Corporation Ltd.* (I. T. A. No. 312/Cochin/2018 dated October 3, 2018), the Tribunal has held that interest on delayed payment of VAT and TDS is only compensatory and is not penal in nature. Therefore, the Commissioner of Income-tax (Appeals) has correctly deleted the disallowance made for the interest expenditure claimed on delay payment of VAT and TDS. Thus, this ground of appeal of the Revenue is dismissed. Thus, the appeal of the Revenue in I. T. A. No. 661/Cochin/2019 for the assessment year 2007-08 is dismissed. 11

I. T. A. No. 662/Cochin/2019 : Assessment year 2010-11

The assessee has raised the following grounds of appeal in I. T. A. No. 662/Cochin/2019 : 12

> "The learned Commissioner of Income-tax (Appeals), Trivandrum erred in concluding that 'the depreciation on modems is allowable at 60 per cent'. The Commissioner of Income-tax (Appeals) ought to have noticed that as per the rate chart under rule 5 of the Income tax Rules, the rate of depreciation at 60 per cent. is allowable for computers including computer software. 'Computer software' is defined

in the rule as 'any computer programme recorded on any disc, tape, perforated media or other information storage device' the learned Commissioner of Income-tax (Appeals) ought to have noticed that 'modem' cannot be considered under this definition but it is only 'a device that modulates an analog carrier signal to encode digital information, and also demodulates such a carrier signal to decode the transmitted information'. The order on which the learned Commissioner of Income-tax (Appeals) relied upon does not discuss the issue of depreciation of modems in detail but passed the 'order simply considering the decision held in I. T. A. No. 1241/Hyd/2010, for other peripherals which are not at all similar to 'modems'.

For these and other grounds that may be advanced at the time of hearing the order of the learned Commissioner of Income-tax (Appeals), Thiruvananthapuram on the above points may be set aside and that of the Assessing Officer restored."

13 The facts of the case as narrated in I. T. A. No. 662/Cochin/2019 are that the Assessing Officer restricted the depreciation on modem to 15 per cent. as against the claim of 60 per cent. by the assessee.

14 Before the Commissioner of Income-tax (Appeals), the learned authorised representative submitted that depreciation on modem is allowable at 60 per cent. The Commissioner of Income-tax (Appeals) relied on the decision of the Income-tax Appellate Tribunal, Hyderabad in the case of *Ushodaya Enterprises Ltd.* v. *Asst. CIT* [2014] 41 taxmann.com 304 (Hyd) wherein it was held as follows :

"14. The only issue in the aforesaid appeal is with regard to the disallowance of depreciation amounting to Rs. 2,30,96,110 made by the Assessing Officer and confirmed by the Commissioner of Income-tax (Appeals) on certain equipment and peripherals by treating them as not forming part of computer.

15. Since we have already dealt with the facts quite exhaustively in the assessee's appeal in I. T. A. No. 1241/Hyd/2008, it is not necessary to deal with them over again in this appeal. However, suffice it to say that, in the impugned year also during the scrutiny assessment proceedings the Assessing Officer noticed that the assessee has claimed depreciation at 60 per cent. on various items like printers, scanners, modems, switches, hubs, cables/cards and software, etc., by treating them as computer. Though the assessee argued that all these items being integral part of computer are eligible for depreciation at 60 per

cent. but the Assessing Officer rejected all the contentions of the assessee and allowed depreciation at 25 per cent. by treating it as plant and machinery. While coming to such conclusion, the Assessing Officer as in the case of assessment year 2002-03 held that only CPU, monitor, key board, mouse can be considered to be computer whereas other peripherals like printers, scanners, modems, switches, photo/edit/equipment, UPS, net work cables and software cannot be considered as computer. This view of the Assessing Officer was also upheld by the Commissioner of Income-tax (Appeals).

16. We have heard the submissions of the parties and perused the material on record. We have decided an identical issue in the assessee's appeal in I. T. A. No. 1241 /Hyd/2008 for the assessment year 2002-03. In view of our finding in paras 11 and 12 of the order hereinbefore, we also decide this issue in favour of the assessee by holding that depreciation claimed at 60 per cent. on printers, scanners, modems, switches, hubs, cables/cards and software, etc., should not be disallowed as these devices are used along with the computer and their functions are integrated with the computer. Accordingly, we set aside the order passed by the Commissioner of Income-tax (Appeals) by allowing the grounds of the assessee."

15 Following the above decision of the Tribunal, the Commissioner of Income-tax (Appeals) held that the depreciation on modems is allowable at 60 per cent. and directed the Assessing Officer to allow the same. Thus, the Commissioner of Income-tax (Appeals) allowed the ground with regard to depreciation on modems.

16 Against this, the learned Departmental representative is in appeal before us. The learned Departmental representative relied on the grounds raised.

16.1 The learned authorised representative submitted that the Assessing Officer had himself allowed depreciation at 60 per cent. for modems in the assessments of succeeding four years, i. e., assessment year 2011-12 to the assessment year 2014-15 and in the said years disallowance of depreciation claimed at 60 per cent. was made only in respect of set top boxes and depreciation on modems claimed at 60 per cent. was allowed.

17 We have heard the rival submissions and perused the material on record. The Special Bench of the Income-tax Appellate Tribunal, Mumbai has held in the case of *Dy. CIT* v. *Datacraft India Ltd.* reported in [2011] 9 ITR (Trib) 712 (Mumbai) [SB] ; [2010] 40 SOT 295 that the definition of

computer should not be restricted to the central processing unit of the computer but should also extend to all input and output devices which support computer in the receipt of input on outflow and output to and from the computer. Further, in the following decisions of High Courts and Tribunals, it has been held that modem is an integral part of a computer eligible for higher rate of depreciation of 60 per cent. :

"(i) In the case of *Dinamalar v. ITO* [2016] 389 ITR 94 (Mad) ; [2016] 74 taxmann.com 14 (Mad), the Madras High Court has held that the computer peripherals like CTP machine, scanner, SISCO, router modem, etc., are eligible for 60 per cent. depreciation being a part of computers as computer peripherals.

(ii) In the case of *Ushodaya Enterprises Ltd.* v. *Dy. CIT* [2015] 60 taxmann.com 85 (Hyd-Trib.), it was held that the printers, scanners, modems and routers constitute integral part of computer systems and are eligible for depreciation at higher rate of 60 per cent. applicable to computer.

(iii) In the case of *Dy. CIT* v. *Microsoft Corporation India Pvt. Ltd.* [2011] 9 taxmann.com 253 (Delhi Trib.), the Tribunal held that net working equipment which includes routers, modems, etc., are used as a part of computer in its functions and thus it can be termed as computer only and therefore would be eligible for depreciation at higher rate of 60 per cent."

17.1 In view of the above legal decisions, we do not find any infirmity in the order of the Commissioner of Income-tax (Appeals) and the same is confirmed. Accordingly, this ground of appeal of the Revenue is dismissed. Thus, the appeal of the Revenue in I. T. A. No. 662/Cochin/2019 for the assessment year 2010-11 is dismissed.

18 In the result, both the appeals of the Revenue are dismissed.

Order pronounced in the open court on March 4, 2020.

[2020] 79 ITR (Trib) 705 (Kolkata)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — KOLKATA "SMC" BENCH]

BAJAJ PARIVAHAN P. LTD.

v.

INCOME-TAX OFFICER

J. SUDHAKAR REDDY *(Accountant Member)*

May 29, 2020.

SS ▸ ITA 1961, ss 68, 147, 148
AY ▸ 2011-12
HF ▸ Assessee

REASSESSMENT—NOTICE AFTER FOUR YEARS—CONDITION PRECEDENT—REASONS RECORDED VAGUE AND GENERAL—ASSESSEE DISCLOSING DURING COURSE OF ORIGINAL ASSESSMENT PROCEEDINGS DETAILS OF ALL LOAN CREDITORS—ASSESSEE REPAYING LOAN WITH INTEREST AND DEDUCTING TAX AT SOURCE THEREON—LOAN REPAID WITHIN SAME YEAR—ADDITION ON ACCOUNT OF CASH CREDIT NOT JUSTIFIED—REASSESSMENT NOT VALID—INCOME-TAX ACT, 1961, SS. 68, 147, 148.

The assessee was in the business of transportation of tea leaves. It declared a total income of Rs. 18,43,380 for the assessment year 2011-12 and the assessment was completed. After four years the assessment was reopened under section 147 of the Income-tax Act, 1961 by issue of a notice under section 148. The assessee was given the reasons for the reopening. In response, the assessee requested the Assessing Officer to treat the original return filed by it as the return filed in response to the notice under section 148. The assessee raised various objections to the reopening of the assessment. On the merits, the assessee explained that the amount of Rs. 10 lakhs was taken as loan from R on August 9, 2010 and that the loan was repaid on December 29, 2010. It further submitted that interest of Rs. 39,722 was paid and tax was deducted at source under section 194A of Rs. 39,722. The Assessing Officer completed the reassessment determined the total income of the assessee at Rs. 28,43,380, inter alia, making an addition of Rs. 10 lakhs. On appeal :

Held, *(i) that the reasons recorded were vague and general in nature. In this case the proviso to section 147 came into play. The assessee had disclosed during the course of the original assessment proceedings the details of all the creditors. The assessee had filed a copy of the notice issued under section 142(1) along with the annexure and replies. He had also filed a copy of the unsecured loan account which contained the account of the lender. The asses-*

see had paid interest on this loan and deducted tax at source. The loan had been repaid within the same year. On these facts, it was wrong on the part of the Assessing Officer to state that the assessee had failed to disclose fully and truly all material facts necessary for assessment. Merely alleging that there was failure to disclose, would not serve the purpose. In this case, a factually wrong allegation had been made that the amount of Rs. 10 lakhs had not been fully and truly disclosed. Reopening of the assessment on such wrong reasons could not be upheld.

(ii) That as the assessee had explained the credit and as the amount had also been repaid along with interest, the addition made under section 68 was not justified.

HARYANA ACRYLIC MANUFACTURING CO. *v.* CIT [2009] 308 ITR 38 (Delhi), HINDUSTAN LEVER LTD. *v.* R. B. WADKAR, ASST. CIT (No. 1) [2004] 268 ITR 332 (Bom), DY. CIT *v.* ROHINI BUILDERS [2002] 256 ITR 360 (Guj) *and* ICICI BANK LTD. *v.* K. J. RAO [2004] 268 ITR 203 (Bom) *relied on*.

Cases referred to :

CIT (Dy.) *v.* JSW Ltd. [2020] 79 ITR (Trib) 585 (Mumbai) (para 18)

CIT (Dy.) *v.* Rohini Builders [2002] 256 ITR 360 (Guj) (para 16)

Haryana Acrylic Manufacturing Co. *v.* CIT [2009] 308 ITR 38 (Delhi) (para 12)

Hindustan Lever Ltd. *v.* R. B. Wadkar, Asst. CIT (No. 1) [2004] 268 ITR 332 (Bom) (para 13)

ICICI Bank Ltd. *v.* K. J. Rao [2004] 268 ITR 203 (Bom) (para 13)

Orient Trading Co. Ltd. *v.* CIT [1963] 49 ITR 723 (Bom) (para 16)

I. T. A. No. 2609/Kolkata/2019 (assessment year 2011-12).

*S. K. Kandoi*and *Nikhil Kandoi*, Fellow Chartered Accountant, for the assessee.

Jayanta Khanra, Joint Commissioner of Income-tax-Senior Departmental representative, for the Department.

ORDER

1 J. SUDHAKAR REDDY ***(Accountant Member)***.—This is an appeal filed by the assessee directed against the order of the Commissioner of Income-tax (Appeals)-5, Kolkata ("the CIT(A)" for short) dated October 22, 2019 under section 250 of the Income-tax Act, 1961 ("the Act" for short) for the assessment year 2011-12.

2 The assessee is a company engaged in the business of transportation of tea leaves. It filed its return of income on September 30, 2011 declaring a

total income of Rs. 18,43,380. The assessment was completed under section 143(3) of the Act on March 26, 2014. The assessment was reopened on under section 147 of the Act by issue of a notice dated March 29, 2018 under section 148 of the Act. The assessee was given the reasons of reopening. In response, the assessee filed a letter dated May 31, 2018 requesting the Assessing Officer to treat the original return filed by it as return filed in response to the notice under section 148 of the Act. In this letter dated May 31, 2018 the assessee raised various objections to the reopening of the assessment. On the merits, the assessee explained that the amount of Rs. 10 lakhs was taken as loan from M/s. Rexnox Trexim Pvt. Ltd. on August 9, 2010 and that the same was repaid on December 29, 2010. He further submitted that interest of Rs. 39,722 was paid and tax was deducted at source under section 194A of the Act of Rs. 39,722. The Assessing Officer completed the assessment under section 144 read with section 147 of the Act on December 11, 2018 determining the total income of the assessee at Rs. 28,43,380 inter alia making an addition of Rs. 10 lakhs.

Aggrieved, the assessee carried the matter in appeal without success. **3**
Further aggrieved, the assessee is in appeal before me.

The learned counsel for the assessee disputed both the reopening of **4**
assessment as well as the quantum addition of Rs. 10 lakhs. On the issue of reopening, he submitted that it is factually incorrect to say that there was failure on the part of the assessee to truly and fully disclose material facts necessary for assessment and hence, the reopening beyond a period of 4 years from the end of the assessment year where the original assessment was completed under section 143(3) of the Act is bad in law.

That the information received from the Investigation Wing was vague **5**
and the Assessing Officer simply relying on this information, without application of mind has reopened the assessment. That no fresh tangible material has come into the possession of the Assessing Officer warranting reopening of assessment under section 147 of the Act. The assessee relied on a number of case law in support of his arguments. It would be referring them as and when necessary.

On the merits, it was submitted that the amount taken as loan was **6**
repaid and the cash credit was explained and evidence furnished to prove the identity and creditworthiness of the creditor as well as the genuineness of the transaction.

The learned Departmental representative on the other hand opposed **7**
the contentions and submitted that the assessee is part of the chain of jama-kharchi companies and had no real business. He submitted that the

reopening was based on the information received from the Investigation Wing of the Department. He took this Bench to the reasons and submitted that the Assessing Officer has sufficient material to come to a conclusion that income subject to tax might have escaped assessment. He relied on the order of the Assessing Officer as well as the learned Commissioner of Income-tax (Appeals). On the merits, he submitted that the cash credits of Rs. 10 lakhs was not explained.

8 Rival contentions heard. On a careful consideration of the facts and circumstances of the case, a perusal of the papers on record and case law cited, I hold as follows.

9 The reasons recorded for reopening are as follows :

"2. Information and materials were received from the Office of the Deputy Directorate of Income-tax (Investigation Wing), Unit-4(2), Kolkata, vide letter No. DDIT (Inv.)/U-4(2)/Kol/Surendra Agarwal/ 2017-18/ dated March 15, 2018.The gist of the findings and observation of the Investigation Wing is as under :

3. A credible information was received in the case of Sri Surendra Agarwal (PAN : ADCPA8851E) of 10A, 7th floor, Madan Chatterjee Lane, Kolkata-7, West Bengal. The said information is reproduced as under :

"Credits followed by equivalent transfer debits are observed in the account. The value frequency of such transactions is very high hinting that the account is being probably used for rotation of funds. Frequent low value cash withdrawals are also observed. Although the declared business of the company is share trading and investments, the rationale behind routing such transactions is not known. The origin of funds and whether these are actual business transactions cannot be ascertained. More so, account transactions do not reflect any administrative or routine business related expenses. The account seems to have been opened primarily for routing of high value funds To investigate the matter, statements of bank accounts mentioned in the information and respective KYCs were obtained from the bank concerned and the same were examined and analysed. On analysis of bank statements of the concern named in the information also the bank account statements intermediary/beneficiary concerns maintained with various bank, 13 cash/fund deposit bank account was identified. From the analysis of the Ministry of Corporate Affairs data and verification of the Income-tax Department module, it is gathered that these companies are paper/shell companies having no real

existence and business activities and involved in providing accommodation entries in the form of bogus share capital/share premium, pre-arranged bogus long-term capital gain/short-term capital loss and unsecured loans, etc., to various beneficiaries/parties in lieu of commission in cash. It is also observed from the data base of the Department that some of the concerns mentioned in the information are interlinked and existing merely on paper having no real existence and business activities and are controlled and managed by Dinesh Dhandhania, Pankaj Agarwal, Vijay Kumar Gupta, Anand Singhania and Bhagwan Das Agarwal well known entry operators of Kolkata for the purpose of providing accommodation entries in the form of bogus share capital/share premium, pre-arranged bogus long-term capital gain and long-term capital loss and unsecured loans, etc., to various beneficiaries/parities in lieu of commission in cash. On examination of the bank statement of the abovementioned concern and the concern mentioned in the information, it is observed that these account have frequently been used for depositing of unaccounted cash which were layered through the several bank accounts of jamakharachi/shell companies including the concerns named in the information and immediately transferred to the interlinked bank accounts and then ultimately to the bank accounts of the beneficiary. In this way the following beneficiary companies have brought back their unaccounted income into their regular books of account in the guise of bogus share/share premium, prearranged bogus long-term capital gain/ short-term capital loss, unsecured loans, etc. There was no other financial rationale behind such transactions. Movement of unaccounted/fund of Rs. 22.36 crores through the above 13 bank accounts have been made and 52 ultimate beneficiaries have been identified.

4. As per the information received from the Investigation Wing it is seen that the assessee-company M/s. Bajaj Parivahan Pvt. Ltd. had received Rs. 10,00,000 from M/s. Rexnox Trexim Pvt. Ltd. The bank statement of M/s. Rexnox Trexim Pvt. Ltd from Axis Bank bearing account No. 017010200031329 sent by the Investigation Wing revealed that on August 9, 2010 Rs. 10,00,000 was debited from this account to make payment to M/s. Bajaj Parivahan Pvt. Ltd.

5. The case of the assessee for the assessment year 2010-11 was completed on March 26, 2014 determining the income of Rs. 24,61,160 as against the returned income of Rs. 18,43,380. During the course of

assessment the transaction as detected by the Investigation Wing was not looked into.

6. So considering the above financial affairs of the assessee as revealed from the returns of income and the other materials gathered, the credit of Rs. 45,00,000 prima facie represents undisclosed income of the assessee.

7. By the reason of the failure on the part of the assessee to disclose fully and truly all materials facts necessary for assessment and from this material on record, there is enough reason to believe that income has escaped assessment in the hands of M/s. Bajaj Parivahan Pvt. Ltd. amounting to Rs. 10,00,000 for the assessment year 2011-12 as per the provisions of section 147 of the Income-tax Act, 1961.

8. It is also pertinent to mention that four years have already elapsed from the end of the relevant assessment year 2011-12 and income chargeable to tax which has escaped assessment amounts to more that Rs. 1,00,000. Therefore necessary approval under section 151 of the Income-tax Act, 1961 may kindly be accorded by the Principal Commissioner of Income-tax-5, Kolkata for issue of notice under section 148 for the assessment year 2011-12."

10 The perusal of the same demonstrates that they are vague and general in nature. The original assessment in this case was completed under section 143(3) of the Act order dated March 26, 2014. The assessment was reopened on March 21, 2018, i. e., beyond a period of 4 years. Under these circumstances, the proviso to section 147 of the Act comes into play.

11 In this case, the assessee has disclosed during the course of original assessment proceedings details of all the loan creditors. The assessee has filed before us a copy of the notice issued under section 142(1) of the Act dated November 12, 2013 along with the annexure and replies. He has also filed a copy of the unsecured loan account which contains the account of M/s. Rexnox Trexim Pvt. Ltd. The assessee has paid interest on this loan and deducted tax at source. The loan has been repaid within the same year. On these facts, it is wrong on the part of the Assessing Officer to record at para 7 of his reasons that the assessee has failed to disclose fully and truly all material facts necessary for assessment. Merely alleging that there is failure to disclose, would not serve the purpose. In this case, a factually wrong allegation has been made that the amount of Rs. 10 lakhs has not

been fully and truly disclosed. Reopening of assessment on such wrong reasons cannot be upheld.

The hon'ble Delhi High Court in the case of *Haryana Acrylic Manufacturing Co.* v. *CIT* [2009] 308 ITR 38 (Delhi) held as follows (at page 57) : 12

> "Merely having a reason to believe that income had escaped assessment, is not sufficient to reopen assessments beyond the four year period indicated above. The escapement of income from assessment must also be occasioned by the failure on the part of the assessee to disclose material facts, fully and truly. This is a necessary condition for overcoming the bar set up by the proviso to section 147. If this condition is not satisfied, the bar would operate and no action under section 147 could be taken."

Similar view has been taken by the hon'ble Bombay High Court in the case of *Hindustan Lever Ltd.* v. *R. B. Wadkar, Asst. CIT (No. 1)* [2004] 268 ITR 332 (Bom), *ICICI Bank Ltd.* v. *K. J. Rao* [2004] 268 ITR 203 (Bom). 13

I also find that no fresh tangible material has come into the possession of the Assessing Officer, which could trigger reopening in this case. The transaction with M/s. Rexnox Trexim Pvt. Ltd. was fully disclosed and it is not fresh material. All the other sentences in the reasons recorded are general and vague and it is not known how these observations are relevant to the assessee-company. 14

Thus, the reopening of assessment is bad in law on this ground also. 15

Coming to the merits of the case, the assessee had received Rs. 10 lakhs in cash through banking channels and he has repaid the same along with interest after deducting tax at source. The details of the company from which the amount was received were filed. Under these circumstances, the question is whether the addition can be made under section 68 of the Act. 16

The hon'ble Gujarat High Court in the case of *Dy. CIT* v. *Rohini Builders* [2002] 256 ITR 360 (Guj) held as under (page 360) :

> "It has also proved the capacity of the creditors by showing that the amounts were received by the assessee by account payee cheques drawn from bank accounts of the creditors and the assessee is not expected to prove the source of the credits in its books of account but not the source of the source as held by the Bombay High Court in the case of *Orient Trading Co. Ltd.* v. *CIT* [1963] 49 ITR 723 (Bom). The genuineness of the transaction is proved by the fact that the payment to the assessee as well as repayment of the loan by the assessee to the

depositors is made by account payee cheques and the interest is also paid by the assessee to the creditors by account payee cheques."

17 Applying the propositions of law laid down in the case law to the facts of the case and as the assessee has explained the credit in question and as the amount has also been repaid along with interest, the addition in question made under section 68 of the Act is bad in law. Hence we delete the same.

18 Before parting, it is noted that the order is being pronounced after ninety (90) days of hearing. However, taking note of the extraordinary situation in the light of the COVID-19 pandemic and lockdown, the period of lockdown days need to be excluded. For coming to such a conclusion, I rely upon the decision of the co-ordinate Bench of the Mumbai Tribunal in the case of *Dy. CIT* v. *JSW Ltd.* [2020] 79 ITR (Trib) 585 (Mumbai) ; (I. T. A. Nos. 6264/Mum/2018 and 6103/Mum/2018, assessment year 2013-14, order dated May 14, 2020).

19 In the result, the appeal of the assessee is allowed.

End of Volume 79

finding that agricultural credit provided by the assessee was only a minuscule and the assessee could not be termed a primary agricultural credit society. Accordingly he upheld the disallowance of claim of deduction under section 80P made by the Assessing Officer. On appeal :

Held, *that the narration in the loan extracts in the audit reports by itself may not be conclusive to prove whether a loan is an agricultural loan or a non-agricultural loan. The gold loans may or may not be disbursed for the purpose of agricultural purposes. Necessarily, the Assessing Officer had to examine the details of each loan disbursement and determine the purpose for which the loans were disbursed, i. e., whether for agricultural purpose or non-agricultural purpose. In this case, such a detailed examination had not been conducted by the Assessing Officer. At the time of assessment, the judgment of the High Court was operative and the certificate issued by the Registrar of Co-operative Societies terming the assessee a primary agricultural credit society was sufficient for grant of deduction under section 80P. There should be fresh examination by the Assessing Officer as regards the nature of each loan disbursement and the purpose for which it had been disbursed, i. e., whether for agricultural purpose or not. The Assessing Officer shall list out the instances where loans had disbursed for non-agricultural purposes, etc., and accordingly conclude that the assessee's activities were not in compliance with the activities of a primary agricultural credit society functioning under the Kerala Co-operative Societies Act, 1969, before denying the deduction under section 80P(2). For the purpose, the issue was restored to the Assessing Officer. The Assessing Officer shall examine the activities of the assessee by following the dictum laid down by the Full Bench of the High Court and shall take a decision in accordance with law.*

I. T. A. No. 176/Cochin/2020 (assessment year 2014-15).

Sivadas Chettoor, Chartered Accountant, for the assessee.

B. Sajjive, Senior Departmental representative, for the Department.

For the order please go to : http://www.taxlawsonline.com/sn

[2020] 79 ITR (Trib) (S. N.) 34 (Bangalore)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — BANGALORE "C" BENCH]

FRONTIER BUSINESS SYSTEMS P. LTD.

v.

INCOME-TAX OFFICER

N. V. VASUDEVAN *(Vice-President)* and
B. R. BASKARAN *(Accountant Member)*

June 12, 2020.

SS ▸ ITA 1961, ss 37, 40(a)(i), (iii), 271(1)(c)
AY ▸ 2015-16
HF ▸ Assessee

PENALTY—FURNISHING INACCURATE PARTICULARS OF INCOME—EXPENSES DISALLOWED DUE TO FAILURE TO DEDUCT TAX AT SOURCE ON PAYMENTS—ASSESSEE DISCLOSING DETAILS RELATING TO RELEVANT EXPENSES—STATUTORY DISALLOWANCE NOT FURNISHING OF INACCURATE PARTICULARS OF INCOME—CORPORATE SOCIAL RESPONSIBILITY EXPENSES—NOT A CASE THAT ASSESSEE DISCLOSED EXPENSES AS SOME OTHER ALLOWABLE EXPENSE AND ASSESSING OFFICER FOUND TO BE CORPORATE SOCIAL RESPONSIBILITY EXPENSES—PENALTY NOT LEVIABLE—INCOME-TAX ACT, 1961, ss. 37, 40(a)(i), (iii), 271(1)(c).

The Assessing Officer levied penalty of Rs. 2 lakhs under section 271(1)(c) of the Income-tax Act, 1961, on the disallowance under section 40(a)(i) of corporate social responsibility expenses of Rs. 1,38,000, of purchase of software Rs. 1,71,980, and under section 40(a)(iii) of payment of salary to a non-resident Rs. 2,90,140, holding that the assessee had furnished "inaccurate particulars of income". The Commissioner (Appeals) confirmed the penalty. On appeal :

Held, *that the disallowances made under section 40(a)(i) and 40(a)(iii) are statutory disallowances which are required to be made for failure to deduct tax at source under the provisions of the Act. It was not the case of the Department that the expenses, which were disallowed due to statutory provisions, were either bogus or non-genuine, i. e., but for the statutory provisions, the expenses were allowable under the Act. The assessee had disclosed the details relating to the relevant expenses. Hence, the question of furnishing of inaccurate particulars of income with regard to these disallowances did not arise. Merely making a claim which is not sustainable in law by itself will not amount to furnishing of inaccurate particulars of income. The assessee had*

claimed expenditure which was otherwise allowable, but for the statutory provisions of section 40(a)(i) and (iii). Hence, such statutory disallowance would not fall under the category of furnishing of inaccurate particulars of income and therefore, penalty levied under section 271(1)(c) was not sustainable on such kind of disallowances.

CIT *v.* RELIANCE PETROPRODUCTS P. LTD. [2010] 322 ITR 158 (SC) *applied*.

TANUSHREE BASU *v.* ASST. CIT (I. T. A. No. 2922/Mum/2012, dated May 25, 2013) *followed*.

(ii) That the assessee had disclosed the corporate social responsibility expenses in his return and had submitted before the Assessing Officer that the disallowance was not made voluntarily as per the requirement of section 37 by oversight. Hence, it was a case of inadvertent omission by the assessee. It was not the case that the assessee had disclosed the expenses as some other allowable expense and the Assessing Officer had found them to be corporate social responsibility expenses. Hence the explanation of the assessee was a bona fide one. Penalty was not leviable on a bona fide and inadvertent error committed by the assessee. Accordingly, the penalty levied on this disallowance was not justified.

PIRCE WATERHOUSE COOPERS P. LTD. *v.* CIT [2012] 348 ITR 306 (SC) *applied*.

I. T. A. No. 1568/Bang/2019 (assessment year 2015-16).

None appeared for the assessee.

Smt. R. Premi, Joint Commissioner of Income-tax, for the Department.

For the order please go to : *http://www.taxlawsonline.com/sn*

[2020] 79 ITR (Trib) (S. N.) 36 (Cochin)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — COCHIN BENCH]

SANGEETH NURSING HOME

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

GEORGE GEORGE K. ***(Judicial Member)***

June 11, 2020.

AY ▶ 2007-08
HF ▶ Assessee

FIRM—INTEREST PAID TO PARTNERS—ASSESSEE CONSISTENTLY CALCULATING INTEREST AT 12 PER CENT. ON OPENING BALANCE OF EACH ASSESSMENT YEARS—PARTNERS DECLARING INTEREST IN THEIR RETURNS AND ASSESSMENTS COMPLETED IN THEIR HANDS—DOUBLE TAXATION OF SAME INCOME BOTH IN HANDS OF PARTNERS AS WELL AS IN HANDS OF ASSESSEE—ENTIRE EXERCISE OF ASSESSING OFFICER REVENUE NEUTRAL WHEN HE CALCULATED INTEREST AT 12 PER CENT. FOR RELEVANT YEAR—DIRECTION TO ASSESSING OFFICER TO RECTIFY ASSESSMENTS IN HANDS OF PARTNERS—NOT PRACTICABLE—INTEREST PAYMENTS DEDUCTIBLE—INCOME-TAX ACT, 1961.

The assessee-firm derived income from house property and other sources. For the assessment year 2007-08, it declared an income of Rs. 21,00,590. The assessment was completed at Rs. 25,44,668. The Assessing Officer disallowed Rs. 2,89,957 out of the interest paid to the partners of the assessee. The Commissioner (Appeals) directed the Assessing Officer to allow the corresponding relief to the partners in the returns filed by them as per law. On appeal :

Held, *that the assessee had been consistently calculating interest at the rate of 12 per cent. on the opening balance of each of the assessment years. Therefore, the entire exercise of the Assessing Officer would be revenue neutral when the Assessing Officer calculated the interest at the rate of 12 per cent. only for the assessment year 2007-08 for the balance outstanding as on March 31, 2007. Moreover, the partners of the assessee-firm had declared interest received from the assessee-firm in their returns of incomes and accordingly, the assessments were completed in the hands of the partners. This amounted to double taxation of the same income both in the hands of the partners as well as in the hands of the assessee-firm. Though the Commissioner (Appeals) had directed the Assessing Officer to rectify the assessments in the hands of the partners, this exercise may not be practical since the assessment order pertained to the assessment year 2007-08. Since the entire*

exercise done by the Assessing Officer in the facts and circumstances of the case was revenue neutral, interest paid to the partners based on the opening balance was to be granted deduction.

I. T. A. No. 155/Cochin/2020 (assessment year 2007-08).

Vedanga R. Prabhu, Chartered Accountant, for the assessee.

B. Sajjive, Senior Departmental representative, for the Department.

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[2020] 79 ITR (Trib) (S. N.) 37 (Cochin)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — COCHIN "SMC" BENCH]

TRAVEL TRAILS INDIA P. LTD.

v.

ASSISTANT COMMISSIONER OF INCOME-TAX, TDS

GEORGE GEORGE K. ***(Judicial Member)***

June 10, 2020.

SS ▸ ITA 1961, s 234E
AY ▸ 2013-14
HF ▸ Assessee

DEDUCTION OF TAX AT SOURCE—FEES FOR DELAY IN FURNISHING RETURNS REGARDING DEDUCTION OF TAX AT SOURCE—NO POWER IN AUTHORITY EITHER TO COMPUTE AND COLLECT ANY FEE—DEMAND PRIOR TO 1-6-2015—NOT SUSTAINABLE—INCOME-TAX ACT, 1961, S. 234E.

For the fourth quarter in the financial year 2012-13 an intimation under section 200A of the Income-tax Act, 1961 was sent to the assessee. In the intimation, late filing fee under section 234E amounting to Rs. 2,07,965 was levied. The Commissioner (Appeals) confirmed levy of fees under section 234E. On appeal :

Held, *that when the statute confers no express power under section 200A before June 1, 2015 on the authority either to compute or collect any fee under section 234E, the demand for the period before June 1, 2015 could not be sustained. Further, Circular No. 19 of 2015*[1] *clearly emphasised that the amendments would take effect only from June 1, 2015. In the instant case, the assessment year being 2013-14, there could not be any levy of fees under section 234E.*

1. See [2015] 379 ITR (St.) 19.

SARALA MEMORIAL HOSPITAL *v.* ITO (TDS) (W. P. (C) No. 37775 of 2018 dated December 18, 2018 (Ker)) *relied on*.

I. T. A. No. 168/Cochin/2020 (assessment year 2013-14).

Vinod Haridas, Fellow Chartered Accountant, for the assessee.

B. Sajjive, Senior Departmental representative, for the Department.

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[2020] 79 ITR (Trib) (S. N.) 38 (Visakhapatnam)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — VISAKHAPATNAM BENCH]

DEPUTY COMMISSIONER OF INCOME-TAX (EXEMPTIONS)

v.

CARGO HANDLING PRIVATE WORKERS POOL TRUST

V. DURGA RAO *(Judicial Member)* and
D. S. SUNDER SINGH *(Accountant Member)*

June 9, 2020.

SS ▶ ITA 1961, ss 11, 13(1)(c)
AY ▶ 2008-09, 2011-12, 2012-13
HF ▶ Assessee

CHARITABLE PURPOSE—EXEMPTION—DISQUALIFICATION—EXCESS AMOUNT CHARGED REFUNDED IN NORMAL COURSE OF BUSINESS—NO VIOLATION OF PROVISIONS—NOT A CASE OF DIVERSION OF FUNDS AT INSTANCE OF TRUSTEES—ENTITLED TO EXEMPTION—INCOME-TAX ACT, 1961, s. 13(1)(c).

CHARITABLE PURPOSE—APPLICATION OF INCOME—DETERMINATION OF INCOME—COMPUTATION UNDER NORMAL COMMERCIAL PRINCIPLES—INCOME-TAX PAYMENT—ALLOWABLE DEDUCTION TOWARDS INCOME AVAILABLE FOR APPLICATION TO CHARITABLE PURPOSES—INCOME-TAX ACT, 1961, s. 11.

CHARITABLE PURPOSE—APPLICATION OF INCOME—BUILDING SECURITY DEPOSIT, CANTEEN EQUIPMENT, COMPUTER SYSTEM AND PRINTER, ADVANCING LOANS TO STAFF, VEHICLE LOAN AND TAX DEDUCTION AT SOURCE PAYABLE—ASSESSEE NOT HAVING REGISTRATION WHEN ASSESSING OFFICER PASSED ASSESSMENT ORDER BUT TRIBUNAL LATER RESTORING REGISTRATION—EXPENDITURE INCURRED IN THE NATURE OF APPLICATION OF INCOME—INCOME-TAX ACT, 1961, s. 11.

Charitable purpose—Assessee following cash system of accounting for determination of income for purpose of application of income—Rejection of books of account without finding any defects in accounts not justified—Income-tax Act, 1961, s. 11.

The assessee charged excess amount from SICL and in the normal course of business refunded an amount of Rs. 3,51,90,879 to SICL out of which an amount of Rs. 1,57,47,623 was refunded in the previous year relevant to the assessment year 2008-09 and the balance was refunded in the previous years relevant to the assessment years 2009-10 and 2010-11. The Assessing Officer took the view that the amount of Rs. 1,57,47,623 refunded to SICL was out of income for that year. The payment was reflected as an outgoing in the receipt and payment of the assessee and refund was made by it on the basis of the resolution passed by the trust at the instance of the authors or founders and therefore the payment was hit by the provisions of section 13(1)(c) and 13(2)(g) read with section 13(3) of the Income-tax Act, 1961. Accordingly, he added amount to the total income of the assessee. The Commissioner (Appeals) deleted the addition. On appeal :

Held, *that the excess amount refunded to SICL did not amount to diversion of funds as defined under section 13(2)(g). The assessee had refunded the excess amount collected from the party by way of anonymous decision of the board of directors of the trust further supported by proof of payment. Therefore, the assessee had not violated the provisions of section 13(1)(c) and 13(2)(g) read with section 13(3). Thus the assessee was entitled to exemption.*

According to the Assessing Officer, the income-tax payment made by the assessee for the assessment years 2004-05 and 2005-06 amounting to Rs. 9,11,880 and Rs. 91,16,768 which came to Rs. 1,00,28,648 was not an allowable deduction, and added the amount to the total income of the assessee. The Commissioner (Appeals) allowed the payments as an application of income. On appeal :

Held, *that income of any trust or society claiming exemption under section 11 had to be computed under the normal commercial principles. Income tax payable is necessarily an outgo from the income of the trust. Therefore, once there is outgo towards income-tax payment, it has to be allowed as a deduction towards income available for application of income for charitable purpose. Therefore the payments were allowable as an application of income.*

CIT *v.* Trustee of H. E. H. the Nizam's Supplemental Religious Endowment Trust [1981] 127 ITR 378 (AP) *relied on.*

The Assessing Officer disallowed the expenses on building security deposit amounting to Rs. 7,11,708, canteen equipment of Rs. 3,150, computer system

and printer of Rs. 36,500, advancing loans to the staff of Rs. 2,85,000, vehicle loan of Rs. 57,844 and tax deduction at source payable of Rs. 2,85,813 on the ground of absence of registration under section 12A. The Commissioner (Appeals) held that these were the allowable expenses. On appeal :

Held, *that when the Assessing Officer passed the assessment order the assessee did not have registration. Subsequently, the Tribunal had restored the registration to the assessee. Therefore, these expenses incurred by the assessee were in the nature of application of income and to be allowed.*

The assessee accounted various current assets and liabilities in the nature of receivables and payables, whereas refund dues which were in the nature of ascertained liability were not accounted in the books of account. The assessee pleaded that it followed the cash system of accounting and hence the ascertained liabilities had neither been accounted in the books of account nor in the balance-sheet filed with the return. The Assessing Officer rejected the books of account under section 145 and estimated the income under section 144 treating the assessee as an association of persons at 12 per cent. of the receipts. The Commissioner (Appeals) deleted the addition made by the Assessing Officer on the ground that the assessee consistently followed the cash system of account and this was accepted by the Assessing Officer. Therefore, the action of the Assessing Officer in rejecting the books of account without finding any defects in the accounts could not be upheld. Accordingly, he directed the Assessing Officer to delete the addition. On appeal :

Held, *that the assessee followed the cash system of accounting for determination of income for the purpose of application of income for charitable purpose. Therefore, the Assessing Officer was directed to compute the income as per the method of accounting followed by the assessee.*

I. T. A. Nos. 312 to 314/Vizag/2018 (assessment years 2008-09, 2011-12 and 2012-13).

S. R. S. Narayan, Commissioner of Income-tax-Departmental representative, for the Department.

Dr. C.P. Rama Swami, Advocate, for the assessee.

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[2020] 79 ITR (Trib) (S. N.) 41 (Cochin)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — COCHIN "C" BENCH]

SMT. HONEY RAHULAN

v.

INCOME-TAX OFFICER

GEORGE GEORGE K. ***(Judicial Member)***

June 9, 2020.

SS ▸ ITA 1961, s 44AD
AY ▸ 2011-12
HF ▸ Assessee

PRESUMPTIVE TAXATION—ASSESSING OFFICER NOT CONSIDERING OPENING CASH BALANCE AND ONLY PROFITS DECLARED CONSIDERED AS INFLOW IN CASH FLOW PREPARED—MOST OF APPLICATIONS OF INCOME DIRECTLY LINKED TO BUSINESS OF ASSESSEE DECLARED—ADDITION NOT WARRANTED—INCOME-TAX ACT, 1961, S. 44AD.

The assessee was an individual, who ran a houseboat for tourists. The assessee disclosed income of Rs. 4,46,224 under section 44AD of the Income-tax Act, 1961. The Assessing Officer accepted the income declared by the assessee at Rs. 4,46,224. However, he made addition under section 69. He did not reject the books of account of the assessee. The Commissioner (Appeals) confirmed the addition. On appeal :

Held, *that the Assessing Officer had prepared a cash flow statement by including on the application side many business outgoings and transfers and calculated the cash deficiency of Rs. 11,52,273. Except for investments in the Multi Commodity Exchange, Cochin Stock Exchange and household expenses of Rs. 2,53,000, Rs. 25,000 and Rs. 1,50,000 respectively all other amounts considered as application, were directly or indirectly linked to the business of running houseboats. Therefore, the inclusion of the business transaction as unexplained investments or expenditure would go against the provisions of section 44AD. The Assessing Officer had also not considered the opening cash and bank balances as on April 1, 2010 and only the profits declared were considered as inflow in the cash flow prepared by him. The cash flow statement prepared by the Assessing Officer was based on assumption and was to be rejected. Moreover, in the cash flow statement, the Assessing Officer had added household expenses to the tune of Rs. 1,50,000. The estimation made by the Assessing Officer for household expenses was totally arbitrary and without any supporting evidence especially when in the hands of the assessee's husband a sum of Rs. 2,50,000 was estimated as household expenses.*

NAND LAL POPIL *v.* DY. CIT (I. T. A. Nos. 1161 and 1162/Chd/2013 dated June 14, 2016) *and* THOMAS EAPEN *v.* ITO (I. T. A. No. 451/Cochin/2019 dated November 19, 2019) *followed*.

I. T. A. No. 150/Cochin/2020 (assessment year 2011-12).

Smt. Swathy H. Prasad for the assessee.

B. Sajjive, Senior Departmental representative, for the Department.

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[2020] 79 ITR (Trib) (S. N.) 42 (Pune)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — PUNE "SMC" VIRTUAL COURT BENCH]

MOHANRAO VISHWANATH GAIKWAD

v.

INCOME-TAX OFFICER

R. S. SYAL *(Vice-President)*

June 8, 2020.

SS ▶ ITA 1961, s 2(47)
AY ▶ 2012-13
HF ▶ Assessee

CAPITAL GAINS—SHORT-TERM CAPITAL GAINS—TRANSFER OF PROPERTY WITH CO-OWNERS—ASSESSEE CLAIMING HE HAD NOT RECEIVED PART OF CONSIDERATION—IN THE ABSENCE OF RECEIPT OF SALE CONSIDERATION—NO CAPITAL GAINS COULD BE TAXED—ASSESSING OFFICER TO VERIFY NON-RECEIPT OF CONSIDERATION—INCOME-TAX ACT, 1961, s. 2(47).

The Assessing Officer received information that the assessee sold certain immovable property along with co-owners for a consideration of Rs. 50 lakhs, which was not disclosed in his return. A notice under section 148 of the Income-tax Act, 1961 was issued. The assessee filed a return pursuant to the notice, still not disclosing the profit from the transfer of land. This property was purchased in the financial year 2011-12 jointly with four other persons for Rs. 4,15,000 and the assessee entered into a development agreement in respect of the same plot with a builder for a sum of Rs. 50 lakhs. The assessee submitted that he did not receive his share of Rs. 9,91,250 which was referred to in the development deed. The Assessing Officer observed that the land was already handed over to the purchaser. Invoking the provisions of section 2(47) he treated the plot as short-term capital asset and computed the assessee's

share at one-fifth as short-term capital gains amounting to Rs. 9,02,440. The Commissioner (Appeals) did not allow any relief. On appeal :

Held, *that no part of the consideration was received till date and the assessee would be offering the amount of capital gains to tax as and when the sale consideration was actually received. The issue was remitted to the Assessing Officer for verifying the assessee's contention about non-receipt of sale consideration. In case such contention was found to be correct, nothing should be charged to tax in the hands of the assessee for the year 2012-13 and the resultant computation of capital gains should be made and included in the total income for the year in which the assessee actually received the consideration.*

I. T. A. No. 590/Pune/2017 (assessment year 2012-13).

Hari Krishan for the assessee.

Ms. Nishtha Tiwari and *Prathamesh J. Lawand* for the Department.

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[2020] 79 ITR (Trib) (S. N.) 43 (Kolkata)

[Before the Income-tax Appellate Tribunal — Kolkata "SMC" Bench]

SHREE SHREE MOHANANANDA SAMAJ SEVA SAMITY

v.

INCOME-TAX OFFICER (EXEMPTION)

P. M. Jagtap *(Vice-President)*

June 5, 2020.

SS ▸ ITA 1961, s 11(2)
AY ▸ 2010-11
HF ▸ Assessee

Charitable purpose—Exemption—Assessee earmarking funds for public charitable purposes like hospital, and educational institutions and thirthasharm—Predominant object is to carry out charitable purpose and not to earn profit—Merely because some profit arising from activity—Purpose not losing its charitable character—Assessee entitled to exemption—Income-tax Act, 1961, s. 11(2).

The assessee-trust was registered under section 12A of the Income-tax Act, 1961. For the assessment year 2010-11 the assessee declared its total income at nil. Although the return was initially processed by the Assessing Officer, the assessment was subsequently reopened and a notice under section 148

was issued to the assessee. In reply, the assessee requested that the return filed originally be treated as the return filed in response to the notice under section 148. The assessee had set apart a fund of Rs. 13,48,365 during the year 2010-11 by virtue of section 11(2). In support thereof, form 10 was filed by the assessee showing the purpose of setting apart a fund for thirthashram and other charitable objects of the trust. According to the Assessing Officer the purpose of setting apart a fund as per section 11(2) should have been specific in nature and since the purpose as shown in form 10 was general in nature, he disallowed the claim of the assessee for exemption under section 11(2) and made an addition of Rs. 13,48,365 to the total income of the assessee in the assessment completed. The Commissioner (Appeals) upheld the validity of the reassessment. On appeal :

Held, *that out of the other objects, the fund was clearly earmarked first for public charitable purposes like hospital, second for educational institutions and thirthasharm in form 10. The test was what was the predominant object of the activity – whether it was to carry out a charitable purpose or to earn profit. If the predominant object was to carry out a charitable purpose and not to earn profit, the purpose would not lose its charitable character merely because some profit arises from the activity. The Assessing Officer was directed to allow the claim of the assessee for exemption under section 11(2).*

I. T. A. No. 2650/Kolkata/2019 (assessment year 2010-11).

V. N. Datta, Advocate, for the assessee.

Smt. Ranu Biswas, Additional Commissioner of Income-tax-Departmental representative, for the Department.

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[2020] 79 ITR (Trib) (S. N.) 44 (Cuttack)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — CUTTACK BENCH]

VODAFONE IDEA LTD.

(formerly known as Vodafone Mobile Services Ltd.)

v.

ASSISTANT COMMISSIONER OF INCOME-TAX (TDS)

CHANDRA MOHAN GARG *(Judicial Member)* and
LAXMI PRASAD SAHU *(Accountant Member)*

June 5, 2020.

SS ▸ ITA 1961, ss 194H, 194J
AY ▸ 2009-10 to 2012-13
HF ▸ Assessee

DEDUCTION OF TAX AT SOURCE—ASSESSEE PROVIDING TELECOMMUNICATION SERVICES IN VARIOUS PARTS OF INDIA UNDER PREPAID ARRANGEMENT—EXTENDING DISCOUNT TO PREPAID CARDS TO DISTRIBUTORS—ARRANGEMENT WITH PREPAID DISTRIBUTORS ON PRINCIPAL-TO-PRINCIPAL BASIS—DISCOUNT EXTENDED TO PREPAID DISTRIBUTORS NOT COMMISSION REQUIRING TAX DEDUCTION AT SOURCE—ROAMING ARRANGEMENTS WITH OTHER TELECOMMUNICATIONS OPERATORS—SERVICES REQUIRING NO HUMAN INTERACTION OR SKILL—ROAMING CHARGES NOT PAID FOR RENDERING ANY MANAGERIAL, TECHNICAL OR CONSULTANCY SERVICES AND NOT FEES FOR TECHNICAL SERVICES—ASSESSEE NOT REQUIRED TO DEDUCT TAX AT SOURCE—INCOME-TAX ACT, 1961, SS. 194H, 194J.

The assessee was engaged in the business of providing telecommunications services in various parts of India. The assessee, under the prepaid arrangement, extended a discount to distributors on prepaid cards. The arrangement between the assessee and the prepaid distributors for distributor of right to prepaid service was on a principal-to-principal basis. Under this arrangement, at each level of the distribution chain, the party distributing the right to prepaid service retained a margin for its efforts and risks assumed, while the telecommunications operator, being the service provider assumed the responsibility for provision of services to the subscribers. The distributors were free to distribute the right to prepaid service to the retailers and eligible subscribers once they had acquired the service from the assessee on payment of consideration. Similarly, in order to enable its subscribers to make or receive calls when they moved out of the licensed territory, under roaming arrangements with other telecommunications operators they could enjoy the service facility outside the territory. Services in respect of roaming charges were standard automated services and required no human interaction or skill. The Assessing Officer held that the assessee was in default in terms of section 201(1) for failure to deduct tax at source under section 194H in respect of the discount offered to the distributor and consequently making the assessee liable for interest under section 201(1A). This was upheld by the Commissioner (Appeals). On appeal :

Held, *that the discount extended to the prepaid distributors was in the nature of margin for such distribution of the right to prepaid services and such discount did not qualify as commission within the meaning of section 194H. Thus, the assessee was not required to deduct tax under section 194H on the prepaid SIM cards and hence, the assessee was not in default in terms of the provisions of section 201(1). With regard to the provisions of section 194J in respect of roaming charges, the assessee was not required to deduct tax under*

section 194J and consequently the assessee was not to be treated as an assessee in default under section 201(1). The roaming charges were not paid for rendering any managerial, technical or consultancy services and hence, did not fall under the category of fee for technical services. Therefore, the assessee was not required to deduct tax on such roaming charges under section 194J. Once the assessee was treated as not in default under section 201(1), interest under section 201(1A) was not required to be charged.

BHARTI AIRTEL LTD. *v.* DY. CIT [2015] 372 ITR 33 (Karn), VODAFONE CELLULAR LTD. *v.* DY. CIT [2017] 53 ITR (Trib) (S.N.) 113 (Mumbai) *and* TATA TELESERVICES LTD. *v.* ITO [2015] 42 ITR (Trib) 121 (Jaipur) *followed*.

I. T. A. Nos. 306 to 309/Cuttack/2019 (assessment year 2009-10 to 2012-13).

Salil Kapoor, *Ms. Soumya Singh* and *Nirod Patade* for the assessee.

M. K. Gautam, Commissioner of Income-tax-Departmental representative, for the Department.

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[2020] 79 ITR (Trib) (S. N.) 46 (Cuttack)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — CUTTACK BENCH]

SMT. SANGHAMITRA PATTNAIK

v.

INCOME-TAX OFFICER

C. M. GARG *(Judicial Member)* and **L. P. SAHU *(Accountant Member)***

June 11, 2020.

SS ▶ ITA 1961, ss 44AA, 271A, 273B
AY ▶ 2013-14
HF ▶ Department

PENALTY—FAILURE TO MAINTAIN ACCOUNTS—REASONABLE CAUSE—ASSESSING OFFICER GIVING SEVERAL OPPORTUNITIES TO ASSESSEE FOR PRODUCTION OF BOOKS OF ACCOUNT BUT ASSESSEE NOT PRODUCING BOOKS OF ACCOUNT—EXPLANATION THAT BOOKS OF ACCOUNT GOT DAMAGED BY WHITE ANTS AND HARD DISKS CORRUPTED—NOT TENABLE AND NOT REASONABLE CAUSE—PENALTY LEVIED JUSTIFIED—INCOME-TAX ACT, 1961, SS. 44AA, 271A, 273B.

The assessee was an individual who derived income from the sale of Indian made foreign liquor. During the course of assessment proceedings for the

assessment year 2013-14, the assessee was asked to produce the books of account by the Assessing Officer for completing the scrutiny assessment. The assessee submitted the audit report along with the balance-sheet and profit and loss account, bank statement, copies of money receipts towards licence fees paid and the copy of value added tax returns only. The Assessing Officer provided many opportunities to the assessee to produce the books of account as mentioned in the audit report issued by the chartered accountant but the assessee did not produce any books of account and furnished written submissions stating that its books of account were audited by the qualified chartered accountant and submitted the audit report done under section 44AB of the Income-tax Act, 1961 with proper verification of computerised cash book, bank book, general ledger and general register with relevant vouchers but subsequently the hard disc was corrupted and it could not take the backup. Unfortunately the hard copies of the documents were damaged by white ants and were not visible. The Assessing Officer noticed that the assessee failed to produce the books of account and supporting bills and vouchers for the verification of expenditure claimed by it and arriving at the correct taxable profit of the assessee but the assessee was unable to produce the books of account. Thereafter, he issued a show-cause notice for the rejection of books of account and the net profit disclosed by the assessee invoking the provisions of section 145(3) and computed the profit at 4 per cent. of the total turnover transferred by the assessee in the audit report and imposed penalty under section 271A for not complying with the provisions of section 44AA. The Commissioner (Appeals) confirmed the levy of penalty. On appeal :

Held, *that the Assessing Officer had observed that the assessee derived her income from sale of Indian made foreign liquor and was covered under section 44AA(2)(i). Although the assessee was not bound to maintain specified books of account as mentioned in rule 6F of the Income-tax Rules, 1962 section 44AA(2) mandates every person to keep and maintain such books of account and other documents as may enable the Assessing Officer to compute his total income in accordance with the provisions of the Act. Therefore, there existed cogent reason for imposition of penalty under section 271A. A conjoint reading of section 44AA and 271A made it clear that the assessee failed to maintain books of account. Therefore, in terms of section 44AA the assessee was liable for penalty under section 271A of Rs. 25,000. The Assessing Officer gave opportunity to the assessee for production of books of account many times but the assessee did not produce the books of account. Further, the assessee submitted that its books of account had been damaged by white ants and the hard disk of the computer in which books of account were prepared*

also got damaged. The Assessing Officer did not accept the book results shown by the assessee for computing the taxable income and he rejected the profits shown by the assessee in the return and applied section 145(3) and computed the profit applying 4 per cent. of the turnover shown by the assessee. Therefore, there was a cogent reason before the Assessing Officer for imposing the penalty. It is the duty of the assessee to maintain books of account in terms of section 44AA. If the income of the taxpayer fell above the prescribed limit, then he had to maintain books of account under section 44AA and produce the books of account as and when required by the Assessing Officer enabling him to calculate the correct taxable income of the assessee, which is lack in this case. The assessee could not show any reasonable cause under which he may get relief under section 273B. Therefore, the Assessing Officer was justified in imposing the penalty under section 271A for non-maintenance of the books of account. There was no reason to interfere in the order of the Commissioner (Appeals) in upholding the penalty levied by the Assessing Officer under section 271A.

According to section 271A, if any person fails to keep and maintain any such books of account and other documents as required by section 44AA or the rules made thereunder, in respect of any previous year or to retain such books of account and other documents for the period specified in the Rules, the Assessing Officer or the Commissioner (Appeals) may direct that such person shall pay, by way of penalty a sum of twenty-five thousand rupees.

I. T. A. No. 390/Cuttack/2018 (assessment year 2013-14).

S. N. Sahoo and *Somnath Sahoo*, Advocates, for the assessee.

D. K. Pradhan, Joint Commissioner of Income-tax-Departmental representative, for the Department.

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End of Volume 79