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gains of an amount equal to such percentage and for such number of assessment years as specified in this section. . . . .

(10) The amount of deduction in the case of an undertaking developing and building housing projects approved before the 31st day of March, 2008, by a local authority shall be hundred per cent. of the profits derived in the previous year relevant to any assessment year from such housing project if,—

(a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October, 1998 and completes such construction,—

(i) in a case where a housing project has been approved by the local authority before the 1st day of April, 2004, on or before the 31st day of March, 2008 ;

(ii) in a case where a housing project has been, or, is approved by the local authority on or after the 1st day of April, 2004 but not later than the 31st day of March, 2005, within four years from the end of the financial year in which the housing project is approved by the local authority ;

(iii) in a case where a housing project has been approved by the local authority on or after the 1st day of April, 2005, within five years from the end of the financial year in which the housing project is approved by the local authority.

Explanation.—For the purposes of this clause,—

(i) in a case where the approval in respect of the housing project is obtained more than once, such housing project shall be deemed to have been approved on the date on which the building plan of such housing project is first approved by the local authority ;

(ii) the date of completion of construction of the housing project shall be taken to be the date on which the completion certificate in respect of such housing project is issued by the local authority ;

(b) the project is on the size of a plot of land which has a minimum area of one acre :

Provided that nothing contained in clause (a) or clause (b) shall apply to a housing project carried out in accordance with a scheme framed by the Central Government or a State Government for reconstruction or redevelopment of existing buildings in areas declared to be slum areas under any law for the time being in force and such scheme is notified by the Board in this behalf ;

(c) the residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the cities of Delhi or Mumbai or within twenty-five kilometres from the municipal limits of these cities and one thousand and five hundred square feet at any other place ;

(d) the built-up area of the shops and other commercial establishments included in the housing project does not exceed three per cent. of the aggregate built-up area of the housing project or five thousand square feet, whichever is higher.

(e) not more than one residential unit in the housing project is allotted to any person not being an individual ; and

(f) in a case where a residential unit in the housing project is allotted to a person being an individual, no other residential unit in such housing project is allotted to any of the following persons, namely :—

(i) the individual or the spouse or the minor children of such individual,

(ii) the Hindu undivided family in which such individual is the karta,

(iii) any person representing such individual, the spouse or the minor children of such individual or the Hindu undivided family in which such individual is the karta ;

Explanation.—For the removal of doubts, it is hereby declared that nothing contained in this sub-section shall apply to any undertaking which executes the housing project as a works contract awarded by any person including the Central or State Government."

As observed by us at length hereinabove, the assessee had obtained the "commencement certificate" for its project, viz., "Adityavardhan" from the Municipal Corporation of Greater Mumbai on July 18, 2006. As the project was approved after April 1, 2005 therefore, as per section 80-IB(10)(a)(iii) of the Act, it was required to be completed on or before March 31, 2012, i. e., within five years from the end of the financial year in which it was so approved. Further, as per *Explanation (ii)* to section 80-IB(10)(a), the date of completion of construction of the housing project statutorily had to be taken to be the date on which the completion certificate in respect of such housing project was issued by the local authority. As is discernible from the records, the Assessing Officer while framing the assessment had observed that as the assessee in the course of the assessment proceedings for the assessment year 2012-13 despite specific

directions had failed to furnish evidence in respect of completion of the project by placing on record the "building completion certificate" as well as the "occupation certificate" issued by the local authority, therefore, the Assessing Officer had called for the requisite information by issuing notice under section 133(6) of the Act to the Municipal Corporation of Greater Mumbai. Information was received by the Assessing Officer from Municipal Corporation of Greater Mumbai, vide its letter No. DyChE/BP/19415/ES, dated March 19, 2015, which revealed that the "building completion certificate" and "occupation certificate" was not issued to the assessee, till date, on account of certain failure on its part as regards complying with the building IOD (intimation of disapproval) conditions. The letter dated March 19, 2015 received by the Assessing Officer from the Municipal Corporation of Greater Mumbai read as under :

"MUNICIPAL CORPORATION OF GREATER MUMBAI

No. DyChE/BP/19415/ES, dated March 19, 2015

Office of the Dy. Chief Engineer (Building Proposal) E.S.,
Near Raj Legacy Paper Mill Compound L. B. S Marg,
Vikhroli (West), Mumbai - 400 083

To,

Shri Durga Nand Raut
Income-tax Officer 23(1)(5), Mumbai-07
R. No. 113, 1st Floor, Matru Mandir,
Tardeo, Mumbai 400 007.

Sub : Furnishing of building completion certificate and occupation certificate in the case of M/s. Harshvardhan Constructions, C.T.S No. 186/B-1 of village Tungwa of Saki Vihar Road, Kurla (West), Mumbai, A. Y. 2012-13, PAN : AADFH6590D

Madam/Sir,

With reference to the above subject matter and as requested by you, the remarks regarding for the file No. CE/4040/BPES/AL are as follows :

(1) *Regarding point No. (i)* : First commencement certificate by this office has been issued on July 18, 2006.

(2) *Regarding point Nos. (ii) and (iii)* : No occupation certificate/building completion certificate has been issued by this office for the building under reference. Occupation certificate/building completion certificate has not been issued by this office since portion of set back of 18.30 metre wide D. P. road passing through the plot under

reference has not been handed over to M. C. G. M. as per intimation of disapproval conditions issued by this office.

Yours faithfully
Sd/-
Executive Engineer
(Building Proposal) E.S.I."

27 In the backdrop of the aforesaid facts, we find that as the assessee as per the approved plan had failed to construct and hand over 18.30 metre wide D. P. Road passing through the south side of the plot to the Municipal Corporation of Greater Mumbai, therefore, the "building completion certificate" and "occupation certificate" was not issued to it by the said local authority. The learned authorised representative had emphasised on two main aspects pertaining to the aforesaid issue under consideration, viz., (i) that the failure on its part to construct the road on the south side of the plot of land was for reasons beyond its control, as where the road was to be constructed there was a hill on which there was a pylon, i. e., a tower for transmission of electricity of Tata Electric Company, which the latter despite level best persuasions of the assessee had not agreed to shift to another location ; and (ii) that de hors issuance of the BCC/OC by the Municipal Corporation of Greater Mumbai, now when the construction of the housing project of the assessee was completed in all respects within the stipulated time period, therefore, its claim of deduction under section 80-IB(10) of the Act was in order. We have deliberated at length on the aforesaid contentions of the learned authorised representative and are unable to persuade ourselves to subscribe to his claim. On a bare perusal of section 80-IB(10)(a)(iii) of the Act, we find that the assessee was obligated to complete the construction of the housing project latest by March 31, 2012. As observed by us hereinabove, the Legislature in all its wisdom, vide the Finance (No. 2) Act, 2004, with effect from April 1, 2005 had carried out an intentional, purposive and conscious insertion of an *Explanation* to clause (a) of section 80-IB(10) of the Act. On a perusal of clause (ii) of the *Explanation*, we find that it has been therein provided that the date of completion of construction of the housing project shall be taken to be the date on which the completion certificate in respect of such housing project is issued by the local authority. As such, an assessee with effect from the assessment year 2005-06 is obligated to substantiate its claim of having completed the housing project within the stipulated time period by placing on record the completion certificate issued by the local authority. Although, we are in agreement with the contention of the learned authorised representative that in cases where but for certain technical reasons the completion

certificate is not issued by the local authority, say for instance the assessee having completed the housing project within the stipulated time period had applied for the completion certificate, but the issuance of the same involved delay on the part of the local authority, in such type of cases there would be no justification in denying the assessee's claim for deduction under section 80-IB(10) of the Act. But then, the facts of the case before us stand on an absolutely different footing. The completion certificate in the case of the assessee before us was not issued by the local authority, i. e., Municipal Corporation of Greater Mumbai, because the assessee had failed to complete the project as per the approved plan, and had failed to construct and handover 18.30 metre wide D. P. Road passing through the south side of the plot to the Municipal Corporation of Greater Mumbai as per the intimation of disapproval conditions. To be brief and explicit, it can safely be concluded that as the assessee had failed to complete the housing project as per the approved plan, therefore, the completion certificate was not issued by the local authority. We are unable to agree with the claim of the learned authorised representative that as it had placed on record material/certificates from the respective Departments of Municipal Corporation of Greater Mumbai and independent professionals, which as per him evidenced the fact that the housing project was completed within the stipulated time period, i. e., up to March 31, 2012, therefore, no adverse inference as regards the completion of the said project within the prescribed time-limit contemplated in section 80-IB(10)(a)(iii) was liable to be drawn. As observed by us hereinabove, the said claim of the learned authorised representative has to fail on two grounds, viz., (i) that as per the mandate of law the housing project is to be taken to have been completed on the date on which a completion certificate is issued by the local authority ; and (ii) that it remains a fact borne from the records that the assessee by not constructing and handing over a 18.30 metre wide D. P. Road passing through the south side of the plot to the Municipal Corporation of Greater Mumbai as per the intimation of disapproval conditions, i. e., as per the approved plan, had thus failed to complete the construction of the project within the prescribed time limit. The learned authorised representative had also advanced a contention that now when the buildings, viz., wings A and B of the housing project had been completed, and out of 108 flats in the housing project the assessee had sold and given possession of 92 flats by March 31, 2012, therefore, it would be incorrect to conclude that the assessee had not completed the "housing project" within the stipulated time period. We are not at all impressed by the said claim of the learned authorised representative. In our considered view, the assessee was obligated to

complete the construction of the housing project as per the approved plan and comply with the intimation of disapproval conditions, and by no means could be permitted to construe the completion of the construction of buildings as completion of the housing project.

28 We shall now advert to the claim of the learned authorised representative that as the failure to construct and hand over 18.30 metre wide D. P. Road passing through the south side of the plot to the Municipal Corporation of Greater Mumbai as per the intimation of disapproval conditions was for reasons beyond its control, therefore, it could not have been justifiably be denied of its claim for deduction under section 80-IB(10) of the Act. We are unable to agree with the said claim of the assessee. As observed by us hereinabove, the obligation to construct and handover 18.30 metre wide D. P. Road passing through the south side of the plot to the Municipal Corporation of Greater Mumbai as per the intimation of disapproval conditions was there at the time of approval of plan. In other words, the obligation to construct the 18.30 metre wide D. P. Road passing through the south side of the plot to the Municipal Corporation of Greater Mumbai formed part of the intimation of disapproval conditions, and was not an obligation that was subsequently cast upon the assessee. In fact, the assessee at the time of approval of its plan was well conversant of the fact that on the south side of the plot of land where the road was to be constructed there was a hill on which there was a pylon, i. e., a tower for transmission of electricity of Tata Electric Company. In our considered view, now when the assessee at the time of getting its plan approved was well aware of the existence of a pylon, i. e., a tower for transmission of electricity of Tata Electric Company on the south side of the plot where it had agreed to construct a 18.30 metre wide D. P. Road, it could not thereafter be allowed to plead impossibility of performance of the said Act. Be that as it may, in the backdrop of our aforesaid observations, we are of a strong conviction that as the assessee had failed to complete the construction of the housing project within the prescribed time-limit envisaged in section 80-IB(10)(a)(iii) of the Act, therefore, the Assessing Officer had rightly declined its claim for deduction under section 80-IB(10) of the Act.

29 We shall now advert to the judicial pronouncements relied upon the learned authorised representative, which we find being distinguishable on facts would not assist the case of the assessee :

(i) *CIT* v. *Hindustan Samuh Awas Ltd.* [2015] 377 ITR 150 (Bom)

(a) In the aforesaid case, the assessee-company was required to complete its project prior to March 31, 2008. The assessee had well in time, i. e., on March 25, 2008 submitted an application along with its architect's

certificate with the municipal authority for issuance of the "completion certificate" of its housing project. However, the municipal authority had on March 27, 2008 directed the assessee to deposit certain amount for issuance of the "completion certificate". Accordingly, the assessee deposited the amount on March 31, 2008, pursuant whereto the "completion certificate" was issued by the municipal authority in the month of October, 2008. It was in the backdrop of the aforesaid facts that the hon'ble High Court had observed that as the delay in issuance of the "completion certificate" could not be attributed to the assessee-company, therefore, the assessee was entitled for exemption under section 80-IB(10) of the Act.

(b) Unlike the facts of the aforesaid case, the facts involved in the case before us are totally distinguishable. As observed by us hereinabove, the "completion certificate" for the project, viz., Adityavardhan, had till date not been issued to the assessee because it had admittedly failed to comply with the building IOD (intimation of disapproval) conditions, and had not completed the "housing project" as per the approved plan. On the basis of our aforesaid observations, we are of the considered view that as the aforesaid case is distinguishable on facts, therefore, the same would not assist the case of the assessee before us.

(ii) *CIT* v. *Tarnetar Corporation* [2014] 362 ITR 174 (Guj)

(a) In the aforesaid case, the fact that the assessee had completed the construction of the "housing project" within the stipulated time period, i.e., well before March 31, 2008, was not in doubt. In fact, the assessee had not only completed the construction two years before the final date and had applied for the "building use" (for short, "BU") permission, which was rejected not on the ground that the construction was not completed but on some other technical ground. However, thereafter upon revised efforts of the assessee the "building use" was granted by the local authority vide its order dated March 19, 2009. Accordingly, it was in the backdrop of the aforesaid facts that the hon'ble High Court while allowing the assessee's claim for deduction, had observed, that where substantial compliance with the statutory requirement was established on the part of the assessee, the court may take the view that minor deviation thereof would not vitiate the very purpose for which the deduction was being made available.

(b) Again, the facts involved in the aforesaid case relied upon by the learned authorised representative are totally distinguishable as against the facts involved in the case before us. In the aforesaid case, the hon'ble High Court had observed that though the assessee before them had completed the construction of the "housing project" much prior to the last date, i. e., March 31,2008, however, the "building use" was declined by the local

authority for a technical reason. It was thus in the backdrop of the said facts that the hon'ble High Court had observed that if substantial compliance thereof is established on record, in a given case, the court may take the view that minor deviation thereof would not vitiate the very purpose for which the deduction was being made available. As such, it was observed by the High Court that delay in obtaining of the "building use" permission by the assessee for a "technical reason" would not justify denial of the assessee's claim for deduction under section 80-IB(10) of the Act. However, in the case before us the "completion certificate" for the project, viz., Adityavardhan, had till date not been issued to the assessee, for the reason, that it had failed to comply with the building IOD (intimation of disapproval) conditions and thus not completed the "housing project" as per the approved plan. In our considered view, as the assessee in the case before us by not completing the construction of the "housing project", viz., Adityavardhan had clearly failed to carry out a substantial compliance with the mandate of section 80-IB, therefore, the aforesaid judicial pronouncement relied upon by the learned authorised representative being distinguishable on facts would not come to the rescue of the assessee.

(iii) *Ashiana Amar Developers* v. *ITO* [2016] 46 ITR (Trib) 17 (Kol) ; [2016] 178 TTJ 474 (Kol)

(a) In the aforesaid case, the assessee had duly applied for the "completion certificate" from JDA, i. e., the local authority, immediately after the completion of the project. However, the local authority directed the assessee-developer to take the completion certificate from a registered architect for official purposes. It was in the backdrop of the aforesaid facts, that the Tribunal had observed that insistence of the Assessing Officer on the certificate from the local authority would only result in impossibility of performance on the part of the assessee. Observing, that the "housing project" was completed within the allotted time frame and the possession certificate was also duly furnished before the Assessing Officer, the Tribunal concluded that the deduction under section 80-IB(10) could not be denied on the ground of non-production of "completion certificate" from the local authority.

(b) As in the aforesaid case, the assessee had admittedly completed the "housing project" within the stipulated time period, therefore, the Tribunal had concluded that the assessee's claim for deduction under section 80-IB(10) could not be declined on the basis of a technical issue. In the case before us, as the assessee had admittedly failed to complete its "housing project", viz., Adityavardhan within the stipulated time period, therefore, the said fact in itself places the facts of the case before us as distinguishable

in comparison to those before the Tribunal in the aforesaid matter. Accordingly, we are afraid that the reliance placed by the learned authorised representative on the aforesaid order of the Income-tax Appellate Tribunal, being distinguishable on facts would not be of any assistance for adjudicating the case of the assessee before us.

(iii) *Puran Ratilal Mehta* v. *Asst. CIT* [2019] 102 taxmann.com 187 (Mum)

(a) In the aforesaid case, the observations of the Tribunal were recorded in the backdrop of the fact that as observed by the Commissioner of Income-tax (Appeals) the project was completed by the assessee before the stipulated time period, i. e., March 31, 2008. It was in the backdrop of the said fact, that it was further observed that the assessee after the completion of the project had filed an application for obtaining the occupation certificate from the Municipal Corporation of Greater Mumbai. Accordingly, the Tribunal taking cognizance of the fact that the project was completed by the assessee in all respects before March 31, 2008, had therein observed that merely for the reason that the "occupation certificate" was not issued by the Municipal Corporation of Greater Mumbai would not justify declining of the assessee's claim for deduction under section 80-IB(10) of the Act.

(b) Again, as is discernible from the facts of the aforesaid case, we find, that the assessee in the said case had admittedly completed the project. As such, it was observed by the Tribunal that in the totality of the facts of the case, the assessee's claim for deduction under section 80-IB(10) could not justifiably be declined for the reason that the "occupation certificate" was not issued by the Municipal Corporation of Greater Mumbai to the assessee. As the facts of the case of the assessee before us, wherein the construction of the "housing project" had not been completed till date as per the approved plan, therefore, the same are distinguishable as against the facts of the aforesaid case law relied upon by the learned authorised representative before us.

We shall now deal with the claim of the learned authorised representative that a statute is to be construed in a manner that the same makes it effective and workable and a construction which reduces the same to a futility is to be avoided. It was submitted by the learned authorised representative that as the assessee by completing the construction of the "housing project" within the prescribed time frame had substantially complied with the mandate of section 80-IB(10) of the Act, therefore, by taking recourse to a strict literal interpretation its entitlement towards claim of deduction under the said statutory provision could not be declined. In sum

and substance, the learned authorised representative advocated the principle of liberally construing a statutory provision in a case where the assessee is found to have substantially complied with the conditions therein envisaged. The learned authorised representative by pressing into service the *Principles of Statutory Interpretation* by Justice G. P. Singh, submitted, that the general rule that non-compliance with the mandatory requirements results in nullification of the act is, inter alia, subject to an exception, viz., where the performance of the requirement is impossible, then the performance of the same is to be excused. Accordingly, it was submitted by the learned authorised representative that the failure on the part of the assessee to construct the 18.30 metre wide D. P. Road passing through the south side of the plot, being an act which could not possibly be performed, would clearly fall within the exceptions to the mandatory requirements envisaged in section 80-IB(10) of the Act. To sum up, it was averred by the learned authorised representative that as the assessee had substantially complied with the mandate of section 80-IB(10) and had completed the construction of the "housing project", viz., Adityavardhan within the prescribed time-limit, therefore, it could not be divested of its claim for deduction contemplated under the said statutory provision. We have given a thoughtful consideration to the aforesaid claim of the learned authorised representative and in the backdrop of the facts of the case before us are unable to persuade ourselves to subscribe to the same. As observed by the hon'ble Supreme Court in the case of *IPCA Laboratory Ltd.* v. *Dy. CIT* [2004] 266 ITR 521 (SC), that even though a liberal interpretation has to be given, the interpretation has to be as per the wording of the section. If the wordings of the section are clear, then benefits, which are not available under the section cannot be conferred by ignoring or misinterpreting the words in the section. Adopting a similar view, the hon'ble apex court in the case of *Petron Engineering Construction P. Ltd.* v. *CBDT* [1989] 175 ITR 523 (SC), had earlier observed, that liberal interpretation of an incentive provision can be resorted to only when it is possible without impairing the legislative requirement and the spirit of the provision. It was observed by the hon'ble apex court, that where the phraseology of a particular provision takes within its sweep the transactions which are taxable, it is not for the courts to strain and stress the language so as to enable the taxpayer to escape the tax. On a similar footing the hon'ble apex court in the case of *Pandian Chemicals Ltd.* v. *CIT* [2003] 262 ITR 278 (SC), had observed, that rules of interpretation would come into play only if there is any doubt with regard to the express language used in the provision. It was observed by the hon'ble court that where the words are unequivocal, there is no scope

for importing the rule of liberal interpretation of an incentive provision. Also, in the case of *CIT* v. *N. C. Budharaja and Co.* [1993] 204 ITR 412 (SC), the hon'ble Supreme Court had held that interpretation of an incentive section should not do violence to the plain language. It was observed by the hon'ble apex court that the object of an enactment should be gathered from a reasonable interpretation of the language used therein.

Apart from the aforesaid judicial pronouncements of the hon'ble apex **31**
court, we shall now advert to the judgment of the Constitutional Bench of the hon'ble Supreme Court in the case of *Commissioner of Customs* v. *Dilip Kumar and Company* [2018] 6 GSTR-OL 46 (SC) ; [2018] 9 SCC 1 relied upon by the learned Departmental representative. The learned Departmental representative by drawing support from the said judgment had claimed that in case of any ambiguity in understanding an exemption notification or an exemption clause the benefit of such ambiguity must be strictly interpreted in favour of the Revenue. On a perusal of the aforesaid judgment, we find that the hon'ble apex court had deliberated on the aspect as to how a concession/exemption/incentive/rebate/subsidy notifications or provisions are to be construed. In its said judgment the hon'ble apex court had observed that before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section, and if the words of the charging section are ambiguous or open to two interpretations then the benefit of interpretation of such charging provisions has to be given to the assessee. In so far interpretation of an exemption proviso is concerned, the hon'ble apex court had observed that in case of any ambiguity in interpretation of an exemption notification or exemption clause, the benefit of such ambiguity must go in favour of the Revenue/State. Apart from that, it was observed by the hon'ble apex court that the benefit of proving applicability of exemption would be on the assessee who would be obligated to show that his case comes squarely within the parameters of the exemption notification or exemption clause. As regards the stages involved in interpreting an exemption provision, it was observed by the hon'ble apex court that the same comprised of two parts, viz., (i) the question as to whether the assessee falls in the notification or in the exemption clause has to be strictly construed ; and (ii) that once the ambiguity or doubt is resolved by interpreting the applicability of the exemption clause strictly, then the court may construe the notification by giving full play bestowing wider and liberal construction. As regards the tools for interpreting a statutory provision, it was held by the hon'ble apex court that an *Explanation* to a statute is, inter alia, an internal aid for construction of the same. Further, it was observed by the hon'ble court that if

the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the courts are bound to give effect to the said meaning irrespective of consequences. It was observed that if the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. In fact, the hon'ble court observed that the words used declared the intention of the Legislature. Apart from that, it was observed that the fact that applying of the rule of plain meaning had resulted into any hardship or inconvenience cannot be allowed to form a basis to alter the meaning to the language employed by the legislation. It was further observed by the hon'ble apex court that any vagueness in the exemption clauses must go to the benefit of the Revenue, as the same being the creation of the statute itself has to be construed strictly. It was further observed that as exemptions have tendency to increase the burden on the other unexempted class of taxpayers, therefore, a person claiming exemption has to establish that his case squarely falls within the exemption notification, and in case of any ambiguity such notification has to be construed against the assessee. As observed by the hon'ble court, the need to resort to any interpretative process arises only where the meaning is not manifest on the plain words of the statute. If the words are plain and clear and directly convey the meaning, there is no need for any interpretation. Further, it was observed by the hon'ble court that if an exemption is available on complying with certain conditions, then the said conditions have to be complied with. As regards the aspect of "substantial compliance", we find that the hon'ble apex court had observed that the doctrine of substantial compliance seeks to preserve the need to comply strictly with the conditions or requirements that are important to invoke a tax or duty exemption and to forgive non-compliance for either unimportant and tangential requirements or requirements that are so confusingly or incorrectly written that an earnest effort at compliance should be accepted. It was further observed, that an exemption from taxation is to be allowed based wholly by the language of the notification and exemption cannot be gathered by necessary implication or by construction of words. In other words one has to look to the language alone and the object and purpose for granting exemption is irrelevant and immaterial.

32 In the backdrop of the aforesaid observations of the hon'ble Supreme Court in the case of *Commissioner of Customs* v. *Dilip Kumar and Company* [2018] 6 GSTR-OL 46 (SC) ; [2018] 9 SCC 1, we are in agreement with the contention advanced by the learned Departmental representative that if the words used in a statute are clear, plain and unambiguous and only one meaning can be inferred, the courts are bound to give effect to the said

meaning irrespective of consequences. In fact, we find that the hon'ble apex court had observed that if the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. Now, in so far as construing of section 80-IB(10) is concerned, we find that the said statutory provision clearly lays down the set of conditions that are required to be cumulatively satisfied for entitling an assessee to claim deduction therein contemplated. We are unable to persuade ourselves to accept the claim of the learned authorised representative that now when the assessee had substantially complied with the conditions contemplated in section 80-IB(10), it could not on the basis of a strict interpretation of the said statutory provision be divested of its claim for deduction therein raised. In so far as the claim of the learned authorised representative that the assessee had substantially complied with the mandate of section 80-IB(10) of the Act is concerned, we are afraid that the same does not find favour with us. As observed by us hereinabove, as per the innate statutory requirement contemplated in section 80-IB(10), the assessee was obligated to substantiate the date of completion of construction of its housing project, viz., Adityavardhan on the basis of the "completion certificate" of the local authority, i. e., Municipal Corporation of Greater Mumbai, which admittedly in its case was not issued by the Municipal Corporation of Greater Mumbai as the project was not completed by the assessee as per the building IOD (intimation of disapproval) conditions. as such, in the absence of strict compliance with the conditions or requirements contemplated in section 80-IB(10) of the Act, we are afraid that the claim of the learned authorised representative that there was substantial compliance with the said statutory provision by the assessee cannot be accepted. In fact, the hon'ble apex court in its aforesaid judgment had observed that the doctrine of substantial compliance seeks to preserve the need to comply strictly with the conditions or requirements that are important to invoke a tax or duty exemption and to forgive non-compliance for either unimportant and tangential requirements or requirements that are so confusingly or incorrectly written that an earnest effort at compliance should be accepted. Now, in the case of the assessee before us, we are unable to comprehend that as to on what basis the failure of the assessee to complete the construction of its housing project, viz., "Adityavardhan" within the prescribed time-limit could be brought within the meaning of an unimportant or tangential requirement, as had been canvassed by the learned authorised representative before us. In fact, we are of a strong conviction that completion of the construction of a "housing project" by an assessee-developer, as per the approved plan, within the prescribed time

frame forms the very basis for the eligibility of an assessee to claim deduction under section 80-IB(10) of the Act. On the basis of our aforesaid observations, we are of the considered view that the assessee had failed to strictly comply with the conditions or requirements that were important to render it eligible for deduction under section 80-IB(10) of the Act. Also, we do not find favour the claim of the learned authorised representative that applying of the rule of plain meaning of section 80-IB(10) would result into hardship or inconvenience to the assessee, as the said fact in our understanding would not have any bearing on the entitlement or eligibility of the assessee for claim of deduction under the said statutory provision. As observed by the hon'ble apex court in the case of *Dilip Kumar* (supra), the fact that applying of the rule of plain meaning had resulted into any hardship or inconvenience cannot be allowed to form a basis to alter the meaning to the language employed by the legislation. We are also in agreement with the claim of the learned Departmental representative, that though there is no ambiguity in so far as construing of the clearly worded section 80-IB(10) is concerned, but in case even if there was any ambiguity then the benefit of the same must go in favour of the Revenue. Our aforesaid view is fortified by the judgment of the hon'ble apex court in the case of *Dilip Kumar* (supra), wherein it was observed that any vagueness in the exemption clauses must go to the benefit of the Revenue, as the same being the creation of the statute itself has to be construed strictly. In fact, it was observed by the hon'ble apex court that an exemption from taxation is to be allowed based wholly by the language of the notification and cannot be gathered by necessary implication or by construction of words. Further, it was observed by the hon'ble court that one has to look to the language alone and the object and purpose for granting exemption is irrelevant and immaterial. In so far as construing of section 80-IB(10) is concerned, we find that the same clearly lays down the set of conditions that are required to be satisfied for entitling an assessee to claim deduction therein contemplated. We are of a strong conviction that as from the clear, plain and unambiguous words used in section 80-IB(10) only one meaning can be inferred, therefore, effect has to be given to the same, irrespective of the consequences. As observed by us hereinabove, *Explanation (ii)* to section 80-IB(10) contemplates that the date of completion of construction of the housing project has to be taken as the date on which the completion certificate in respect of such housing project is issued by the local authority. At this stage, we may herein observe that the importance of *Explanation (ii)* to section 80-IB(10) cannot be undermined for the purpose of construing the scope and gamut of the said statutory provision. Our said conviction is

fortified by the judgment of the hon'ble apex court in the case of *Dilip Kumar* (supra), wherein it was observed that an *Explanation* to a statutory provision is, inter alia, an internal aid for construing the same. In the back-drop of our aforesaid observations, we are of the considered view that the assessee had failed to show as to how its case comes squarely within the realm of the deduction contemplated under section 80-IB(10) of the Act. Accordingly, in our considered view, the Assessing Officer had rightly concluded that de hors satisfaction of the conditions contemplated in section 80-IB(10) of the Act, the assessee was not entitled for claim of deduction under the said statutory provision. We thus not finding favour with the order of the Commissioner of Income-tax (Appeals), to the extent he had concluded that the assessee had satisfied the conditions contemplated in section 80-IB(10) of the Act, "set aside" his order. The grounds of appeal No. 1 and 4 raised by the Revenue are allowed.

We shall now take up the grievance of the Revenue that the Commis- **33**
sioner of Income-tax (Appeals) has erred in law and the facts of the case in concluding that the assessee had fulfilled the conditions laid down in section 80-IB(10)(c) of the Act, despite the fact that area of some of the flats was more than the prescribed area. On a perusal of clause (c) of section 80-IB(10) of the Act, we find that the same reads as under :

> "80-IB.(10) The amount of deduction in the case of an undertaking developing and building housing projects approved before the 31st day of March, 2008, by a local authority shall be hundred per cent. of the profits derived in the previous year relevant to any assessment year from such housing project if,—. . .
>
> (c) the residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the cities of Delhi or Mumbai or within twenty-five kilometres from the municipal limits of these cities and one thousand and five hundred square feet at any other place ;. . ."

Accordingly, as per the mandate of clause (c) of section 80-IB(10) the maximum built-up area of a residential unit in a "housing project" situated within Mumbai or within twenty five kilometres from its municipal limits is not to exceed one thousand square feet. Admittedly, the Assessing Officer while framing the "original" assessment, vide his order passed under section 143(3), dated March 28, 2013, after raising exhaustive queries as regards the eligibility of the assessee towards the claim of deduction under section 80-IB(10) of the Act, finding the same to be in order had allowed the same. However, after the culmination of the "original" assessment framed vide order passed under section 143(3), dated March 28, 2013 for

the assessment year 2011-12, that the Assessing Officer, inter alia, acting upon the information that the built-up area of all the three BHK flats in the project, viz., "Adityavardhan" was more than 1,000 square feet, which was in clear violation of the norms prescribed in section 80-IB(10)(c) of the Act, inter alia, for the said reason reopened the concluded assessment. On being called upon to explain its eligibility for deduction under section 80-IB(10)(c) in the backdrop of the fact that the built-up area of all the three BHK flats in its project was more than 1,000 square feet, the assessee rebutted the said allegation of the Assessing Officer. It was submitted by the assessee that the area of the three BHK flats as per their calculation was 997 square feet. In order to fortify its aforesaid claim, the assessee had drawn support from the certificate of Shri Bhupendra Patrawala, architect, that was furnished in the course of the assessment proceedings. It was submitted by the assessee that while calculating the "built-up area" of the three BHK flats it had excluded the "dry balcony area" as it was six inches below the floor level. On the basis of its aforesaid submissions, it was the claim of the assessee that it had duly complied with the conditions contemplated in section 80-IB(10)(c) of the Act. However, the Assessing Officer was not inclined to accept the said claim of the assessee. Observing, that unlike the flower bed area which was approximately two feet below the floor level and was not usable, the Assessing Officer held a conviction that the "dry balcony" area was only six inches below the floor level and was usable. Also, on the basis of a report of his inspector who had undertaken an open field enquiry under section 142(2) of the Act, and had carried out physical verification of a flat (held by the assessee as stock-in-trade), it was gathered by the Assessing Officer that the "dry balcony" area was almost at the floor level and was in the nature of a usable area. Apart from that, it was observed by the Assessing Officer that a perusal of the "index-II" of a three BHK flats in the project "Adityavardhan" revealed that the built-up area of the flat, i. e., 98.88 square metre (1,064 square feet) was being charged and sold by the assessee to its customers. Further, referring to the definition of "built-up area" as provided in sub-section (14) of section 80-IB of the Act it was observed by the Assessing Officer that as per the section and its *Explanation* the built-up area was to be taken as the sum total of the inner measurements of the residential unit at the floor level, along with the projections and balconies. As such, the Assessing Officer held a conviction that the area of all projections like drying area, etc., were to be added to the built-up area calculation of the flats. Based on his aforesaid observations, it was concluded by the Assessing Officer that the built-up area of certain residential units of the assessee exceeded 1,000

square feet. In order to support his aforesaid observation the Assessing Officer relied on the order of the Income-tax Appellate Tribunal, Mumbai in the case of *ITO* v. *Siddhivinayak Homes* (I. T. A. No. 8726/Mum/2010, assessment year 2007-08 and I. T. A. No. 5986/Mum/2011, assessment year 2008-09). Accordingly, the Assessing Officer concluded that as the area of certain flats constructed by the assessee exceeded the prescribed area of 1,000 square feet, therefore, the assessee had violated the provisions of section 80-IB(10)(c) of the Act.

34 On appeal, the Commissioner of Income-tax (Appeals) after deliberating on the facts borne from the records, observed, that the assessee had not sold the "dry balcony" area to the purchasers and the same represented service projections. It was further observed by him that the Municipal Corporation of Greater Mumbai had considered the built-up area of the residential flats in the building for the purpose of approving the building plan. Further, it was noticed by the Commissioner of Income-tax (Appeals) that the assessee's architect had also certified that the built-up area of each flat did not exceed 1000 square feet In the backdrop of his aforesaid observations the Commissioner of Income-tax (Appeals) concluded that there was no violation of section 80-IB(10)(c) by the assessee, as was alleged by the Assessing Officer.

35 We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. On a perusal of the records, we find that the controversy involved in the context of the issue under consideration hinges around the construing of the term "built-up area" used in section 80-IB(10)(c) of the Act. We find that the definition of the term "built-up area" has been made available on the statute vide the Finance (No. 2) Act, 2004, with effect from April 1, 2005, and the said term thereafter stands defined in section 80-IB(14)(a) of the Act, as under :

> "80-IB.(14) For the purposes of this section,—
>
> (a) 'built-up area' means the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but does not include the common areas shared with other residential units ;"

As the "housing project" of the assessee, viz., Adityavardhan was approved by the Municipal Corporation of Greater Mumbai after April 1, 2005, therefore, the aforesaid definition of the term "built-up area" would be applicable in its case.

36 In order to deal with the issue in hand, it would be relevant to briefly cull out the reasons which had led the Legislature to make available the definition of the term "built-up area" in the statute. As observed by the hon'ble Supreme Court in the case of *CIT* v. *Sarkar Builders* [2015] 375 ITR 392 (SC), prior to the insertion of section 80-IB(14)(a), in many of the rules and regulations of the local authority approving the housing project "built-up area" did not include projections and balconies. Probably, taking advantage of this fact, builders provided a large balconies and projections making the residential units far bigger than as stipulated in section 80-IB(10), and yet claimed the deduction under the said provision. As observed by the hon'ble apex court, in order to plug this lacuna, clause (a) was inserted in section 80-IB(14) defining the words "built-up area" to mean the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls, but did not include the common areas shared with other residential units. Now, in the case before us, it is the claim of the assessee that the projections like "dry balcony" are not be added to the "built-up area" of the flats for the reason, viz., (i) that as the "dry balcony" area was six inches below the floor area, therefore, the same not being at the floor level was not includible in the "built-up area" as defined in section 80-IB(14)(a) of the Act ; (ii) that as per the certificate of the architect the area of the three BHK flats was 997 square feet ; and (iii) that as per "Index II" of the three BHK flats the "dry balcony" was not sold to the flat purchasers. On the contrary, the Assessing Officer was of the view that the "dry balcony" was liable to be included for computing the "built-up area" as defined in section 80-IB(14)(a) of the Act for the reason, viz., (i) the "dry balcony" which was four to six inches below the floor level implied that it was an extended area which could be very well utilised as carpet area ; (ii) that as per the brochures of the assessee-company and also the "Index II" of the three BHK flats the balconies and projections provided by the assessee had been sold to the flat purchasers ; (iii) that as the "projections" and "balconies" are not in the nature of a common area shared with other residential units, therefore, the same would fall within the realm of the definition of "built-up area" as contemplated in section 80-IB(14)(a) ; (iv) that even otherwise the qualifier "at the floor level" in section 80-IB(14)(a) was applicable to the "inner measurements of the residential unit" and not to the "projections" and "balconies" which followed the term "including the" ; and (v) that even otherwise as per the Development Control Rules (DC Rules) of 2012 (for short, "DCR"), the Government of Maharashtra has announced that under the new Development Control Rules, areas for balcony, flower-beds, terrace, voids, niches would be counted in the floor space index. Hence, even as per

the rules of the local authority, the area for balcony is to be added for computation of the "built-up area".

37 As observed by us hereinabove, the Commissioner of Income-tax (Appeals) accepted the claim of the assessee that the area of neither of the flats exceeded the prescribed limit of 1,000 square feet It was observed by the Commissioner of Income-tax (Appeals) that as claimed by the assessee, as per the definition of "built-up area" in section 80-IB(14)(a) only that area which was at the floor level was to be counted, therefore, the "dry balcony" which was six inches below the floor level was liable to be excluded. Referring to clause 25, page 25 of an "agreement to sell", it was further observed by the Commissioner of Income-tax (Appeals) that the "dry balcony" area did not form part of the residential unit which was the subject matter of sale. It was thus observed by the Commissioner of Income-tax (Appeals), that the service projection neither formed part of the residential unit nor was sold to the flat purchaser. As such, the Commissioner of Income-tax (Appeals) was of the view that the "dry balcony" area was in the nature of a service projection which was relevant from the point of view of servicing the building in case of any emergency or when repairs were required to be carried out. Further, the Commissioner of Income-tax (Appeals) observed that the Municipal Corporation of Greater Mumbai had considered the "built-up area" of the residential flat only for the purpose of approving the building plan. In order to support his view that the "built-up area" of each flat did not exceed 1,000 square feet, the Commissioner of Income-tax (Appeals) relied on the certificate that was issued by the assessee's architect. In the backdrop of his aforesaid observations, the Commissioner of Income-tax (Appeals) concluded that the assessee had not contravened the provisions of section 80-IB(10)(c) of the Act.

38 We have given a thoughtful consideration to the issue before us and are of the considered view that the issue had not been appreciated in the right perspective by the Commissioner of Income-tax (Appeals). As per the mandate of section 80-IB(10)(c) the maximum "built-up area" of the residential unit in the housing project of the assessee, viz., Adityavardhan was not to exceed one thousand square feet. Finance (No. 2) Act, 2004 with effect from April 1, 2005 had provided for a definition of the term "built-up area" in section 80-IB(14)(a) of the Act. As per the definition of "built-up area" in section 80-IB(14)(a), the same would include the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but would not include the common areas shared with other residential units. In sum and substance, the built-up area would include inner measurements of a

residential unit on the floor level added by thickness of a wall as also projections and balconies. This would however, exclude the common areas shared with other residential units. As such, in order to be a part of the built-up area, the same must be part of the inner measurements of a residential unit or projection or balcony. In our considered view, the claim of the assessee that as the "dry balcony" was six inches below the floor level, therefore, the same for the said reason would not fall within the realm of the definition of "built-up area" is absolutely misconceived. As observed by us hereinabove, the inner measurements of a residential unit or projection or balcony would, inter alia, form part of the "built-up area". Our aforesaid view is supported by the judgment of the hon'ble High Court of Gujarat in the case of *CIT* v. *Amaltas Associates* [2016] 389 ITR 175 (Guj). Also, support is drawn from the order of the Income-tax Appellate Tribunal, Mumbai in the case of *ITO* v. *Siddhivinayak Homes* (I. T. A. No. 8726/Mum/2010, the assessment year 2007-08 and I. T. A. No. 5986/Mum/2011, the assessment year 2008-09) and Income-tax Appellate Tribunal, Hyderabad in the case of *Modi Builders and Realtors (P.) Ltd.* v. *Asst. CIT* [2011] 12 taxmann.com 129 (Hyd), as had been relied upon by the Assessing Officer. In so far the observation of the Commissioner of Income-tax (Appeals) that the "dry balcony" has not been sold by the assessee to the flat purchaser, the said fact as per the records remains so. But then, we are unable to comprehend that de hors transfer of ownership of the same, on what basis the said area was being exclusively enjoyed by a specific flat purchaser. Although, in case the "dry balcony" formed part of a common area that was shared by the flat purchaser with other residential units, then the same would clearly fall in the exclusion contemplated in the definition of "built-up area" in section 80-IB(14). We find that though the Commissioner of Income-tax (Appeals) had observed that the "dry balcony" was a service projection, which as per him would be relevant from the point of view of servicing the building in case of any emergency or when repairs are required to be carried out, but then what was the basis for arriving at such a conclusion is not discernible from record. On the contrary, the report of the inspector who in the course of the assessment proceedings for the assessment year 2012-13 had undertaken an open field enquiry under section 142(2) of the Act states otherwise. As per the report of the inspector, the "dry balcony area" being almost at the floor level was clearly a usable area. In fact, the observation of the Assessing Officer that the booking particulars as per the brochures that were made at the time of booking of the flats included the area of the projections, therein fortifies our conviction and strengthens our doubt that the respective flat purchasers were de facto

being provided exclusive right of enjoyment of the "dry balcony" area attached to the flats. As noticed by us hereinabove, the hon'ble Supreme Court in the case of *CIT* v. *Sarkar Builders* [2015] 375 ITR 392 (SC), considering the legislative intent behind defining of the term "built-up area" by way of insertion of section 80-IB(14)(a) vide the Finance (No. 2) Act, 2004 with effect from April 1, 2005, had observed, that prior to defining of the term "built-up area", in many of the rules and regulations of the local authority approving the housing project "built-up area" did not include projections and balconies. Probably, taking advantage of this fact, builders provided a large balconies and projections making the residential units far bigger than as stipulated in section 80-IB(10), and yet claimed the deduction under the said provision. As observed by the hon'ble apex court, in order to plug this lacuna, clause (a) was inserted in section 80-IB(14) defining the words "built-up area" to mean the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls, but did not include the common areas shared with other residential units. In our considered view, if the assessee in the case before us had de facto provided the exclusive possession/enjoyment of the "dry balcony" attached with a flat to the purchaser of the said flat (as advertised by it in its brochures), then the same will have to be included while computing the "built-up area" of such flat, failing which the very purpose of the definition of the said term in section 80-IB(14)(a) would be rendered as otiose. But then, in the absence of the correct factual position the aforesaid issue before us cannot be adjudicated. We thus in all fairness restore the issue to the file of the Assessing Officer for fresh adjudication. In case, the flat purchaser is de facto in exclusive possession/enjoyment of the "dry balcony" attached with the flat, then the area of the same shall be included while computing the "built-up area" of such flat. However, if such projection is either in the nature of a service projection to be used for servicing the building or carrying out repairs of the building, or a common area shared with the other residential units, then the same would not be included in the "built-up area" of the flat. Before parting, we may herein observe that the learned authorised representative in the course of hearing of the appeal had relied on the judgment of the hon'ble High Court of Bombay in the case of *CIT* v. *Raviraj Kothari Punjabi Associates* (I. T. A. No. 1628 of 2013, dated April 24, 2015—(Bom)) and that of the hon'ble High Court of Madras in the case of *CIT* v. *Mahalakshmi Housing* [2014] 222 Taxman 356 (Mad). On a perusal of the said judgments, we find that in both the cases the issue before the hon'ble High Courts was as to whether or not open terrace/exclusive terrace would

form part of the "built-up area". However, as the issue before us is as to whether or not the "balcony" and "projections" of the respective residential units would form part of the "built-up area", and it is nobody's case as to whether or not the area of open terrace/exclusive terrace is to be included in the "built-up area", therefore, both the cases being distinguishable on facts would not assist the case of the assessee before us. The ground of appeal No. 2 filed by the Revenue is allowed for statistical purposes.

39 As regards the grievance of the Revenue that the Commissioner of Income-tax (Appeals) was in error in allowing the assessee's claim for deduction under section 80-IB(10) on the flats which were less than 1,000 square feet in size, when the provisions of the said section allow deduction only upon the completion of the entire project and not on the part project or on the part fulfilment of the requirements stated in the said section, we are afraid does not find favour with us. Although we find that the Commissioner of Income-tax (Appeals) after observing that the area of neither of the flat in the assessee's project had exceeded the prescribed area of 1,000 square feet, had thus not given any finding as regards allowing of deduction under section 80-IB(10) on the flats whose "built-up area" did not exceed one thousand square feet, but then, as the said issue will have a bearing in the course of "set aside" proceedings before the Assessing Officer, therefore, we shall deal with the same. In our considered view, within a composite housing project, where there are eligible and ineligible units, the assessee can claim deduction in respect of eligible units in the project and claim proportionate relief in the units satisfying the extent of the built-up area. Our aforesaid view is fortified by the judgment of the hon'ble High Court of Madras in the case of *Viswas Promoters P. Ltd.* v. *Asst. CIT* [2013] 214 Taxman 524 (Mad) and *CIT* v. *Elegant Estates* [2016] 383 ITR 49 (Mad). Also, a similar view had been taken by various co-ordinate Benches of the Tribunal in, viz., (i) *Dy. CIT* v. *Brigade Enterprises Pvt. Ltd.* [2008] 119 TTJ 269 (Bang) ; (ii) *ITO* v. *AIR Developers* [2009] 319 ITR (A.T.) 167 (Nag) ; [2010] 122 ITD 125 (Nag) ; (iii) *Sheth Developers Pvt. Ltd.* [2009] 33 SOT 277 (Mum) ; (iv) *Runwal Multihousing Pvt. Ltd.* v. *Asst. CIT* (I. T. A. Nos. 1015, 1016 and 1017/PN/2011, dated November 21, 2012) ; (v) *Brahma Associates* v. *Jt. CIT* [2009] 315 ITR (A.T.) 268 (Pune) (SB) : [2009] 119 ITD 255 (Bom) ; (vi) *Kumar Builders Consortium* v. *Asst. CIT* 7 Taxcorp (AT) 32844 (Pune) ; (vii) *Tushar Developers* v. *ITO* [2009] 315 ITR (A.T.) 268 (Pune) (SB) ; (viii) *Raviraj Kothari Punjabi Associates* v. *Dy. CIT* [2013] 57 SOT 71 (Pune) ; (ix) *Jindal Mittal Griha Nirman Pvt. Ltd.* v. *ITO* [2017] 51 CCH 240 (Pune) and (x) *Varun Developers* v. *Dy.*

CIT 7 Taxcorp (AT) 1978 (Pune). Before parting, we may herein observe that our findings recorded in the context of the issue under consideration, are without prejudice to our observations recorded as regards the eligibility of the assessee towards deduction under section 80-IB(10)(a), as dealt with at length hereinabove. The ground of appeal No. 5 raised by the Revenue is dismissed in terms of our aforesaid observations.

We shall now advert to the grievance of the Revenue that the Commissioner of Income-tax (Appeals) has erred in allowing the deduction under section 80-IB(10) of the Act despite the fact that the assessee had claimed high gross profit of 63.08 per cent. As is discernible from the orders of the lower authorities, we find that the Assessing Officer taking note of the fact that the assessee had shown a gross profit rate of 63.08 per cent. which was excessive in its line of business, had stopped short of deciding the matter against the assessee on the said ground alone. We have perused the order of the Commissioner of Income-tax (Appeals) and concur with his view that the Assessing Officer had failed to point out any arrangement of business between the assessee and any other person with whom he had close relations, which had resulted into generation of the excessive profits within the meaning of section 80-IB(10) of the Act. Also, the claim of the assessee that as the land was purchased way back in the year 2004/2005, therefore, the excess profit was attributable to the steep rise in the price of land in the year in which the flats were sold, had also not been taken cognizance of by the Assessing Officer in the course of the assessment proceedings. In our considered view, the Commissioner of Income-tax (Appeals) has rightly concluded that a high gross profit rate cannot be a sole decisive factor for declining an assessee's claim of deduction under section 80-IB(10) of the Act. We thus not finding any infirmity in the view taken by the Commissioner of Income-tax (Appeals) in the context of the issue under consideration uphold his observations to the said extent. The ground of appeal No. 3 raised by the Revenue is dismissed. **40**

Resultantly, the appeal of the Revenue is partly allowed in terms of our aforesaid observations. **41**

Assessment year 2012-13 (I. T. A. No. 4730/Mum/2016 (assessee's appeal))

I. T. A. No. 5523/Mum/2016 (Revenue appeal)

We shall now advert to the cross-appeals for the assessment year 2012-13. The assessee has assailed the impugned order on the following effective grounds of appeal before us : **42**

"1. The Commissioner of Income-tax (Appeals) erred in upholding the disallowance of deduction under section 80-IB(10) of the Act to the extent of Rs. 4,52,95,102.

2. The Commissioner of Income-tax (Appeals) erred in holding that the built-up area of flat Nos. 1, 2 and 7 on each floor of the building exceeded the maximum built-up area of 1,000 square feet in violation of section 80-IB(10)(c) of the Act.

3. The Commissioner of Income-tax (Appeals) failed to appreciate that the area of 30 square feet referred to as dry balcony area actually represented a service projection constructed from the point of view of servicing the building. The said area was 6" to 7" below the floor level. Further, the said area was not a subject matter of sale and was not expected to be occupied by the flat owner and therefore could not be regarded as a part of the built-up area of the residential unit."

On the other hand, the Revenue has challenged the impugned order on the following grounds of appeal before us :

"1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in allowing the deduction under section 80-IB(10) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') to the assessee on a high gross profit of 61.99 per cent. when the assessee had not fulfilled all the conditions laid down in the provisions of the Act.

2. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in allowing the deduction under section 80-IB(10) of the Act to the assessee in spite of the fact that the assessee did not complete its project within the time as stipulated in the provisions of section 80-IB(10)(a)(iii) of the Act.

3. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in allowing the deduction under section 80-IB(10) of the Act to the assessee when the assessee had failed to produce the building completion certificate and the occupation certificate as required under section 80-IB(10)(a)(iii) read with *Explanation (ii)* of the Act.

4. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in relying upon the judgment of the hon'ble Bombay High Court decision in the case of *CIT* v. *Hindustan Samuh Awas Ltd.* [2015] 377 ITR 150 (Bom) ; [2015] 62 Taxmann.com 175 (Bom) without appreciating that the facts

of the present case are totally different from the facts of the case in the above decision. In *Hindustan Samuh Awas Ltd.* (supra), the hon'ble High Court held that since the assessee had complied with all the norms of intimation of disapproval (IOD) and had applied for completion certificate well in time before the municipal authority, therefore, the delay in issuing the project completion certificate cannot be attributable to the assessee, whereas in the present case, the Municipal Corporation of Greater Mumbai (MCGM) had not issued the completion certificate to the assessee as the assessee had not fulfilled in all the norms of intimation of disapproval at the time of applying for the completion certificate. Thus, the assessee is wholly and exclusively responsible for this delay. Hence, the case law relied upon by the learned Commissioner of Income-tax (Appeals) is not applicable to this case.

5. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in relying upon the decision in the case of *Ekta Sankalp Developers* when the facts of the case are different inasmuch as *Ekta Sankalp Developers* had complied with all other eligible conditions of section 80-IB(10) and the only dispute was in respect of section 80-IB(10)(c), whereas in the instant matter the eligibility conditions of section 80-IB(10(a)(iii) are not satisfied and therefore, the decision of *Ekta Sankalp Developers* is not directly applicable. Further, the Revenue is also contesting the decision in the case of *Ekta Sankalp Developers* before the hon'ble Bombay High Court.

6. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in allowing the proportionate deduction under section 80-IB(10) of the Act to the assessee when the provisions of section 80-IB(10) of the Act allow deduction only upon completion of the entire project and not on the part project or on the part fulfilment of the requirements stated in the provisions of the section.

7. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in allowing the proportionate deduction under section 80-IB(10) of the Act to the assessee on those flats which were less than 1,000 square feet in size and disallowed the deduction in respect of the flats which were more than 1,000 square feet in size, when the provisions of section 80-IB(1) of the Act allow the deduction only upon the completion of the entire project and not on the part project or on the part fulfilment of the requirements stated in the provisions of the section.

8. The appellant prays that the order of the learned Commissioner of Income-tax (Appeals) on the above grounds be set aside and that of the Assessing Officer be restored.

9. The appellant craves leave to amend or alter any ground or add a new ground."

43 Briefly stated, the assessee-firm had e-filed its return of income for the assessment year 2012-13 on September 29, 2012, declaring its total income at Rs. nil. Subsequently, the case of the assessee was selected for scrutiny assessment under section 143(2) of the Act. In the course of the assessment proceedings, it was observed by the Assessing Officer that the assessee had in its return of income claimed deduction of Rs. 19,20,04,491 under section 80-IB(10) of the Act in respect of a housing project, viz., "Adityavardhan" that was developed by it at 186-B, Saki Vihar Road, Andheri (East), Mumbai.

44 In the course of the assessment proceedings, it was observed by the Assessing Officer that the assessee had failed to comply with the requisite conditions envisaged in section 80-IB(10) of the Act. As per the details gathered by the Assessing Officer in the course of the assessment proceedings, it stood revealed, viz., (a) that the assessee had not completed its housing project, viz., "Adityavardhan" within the stipulated period contemplated in section 80-IB(10)(a)(iii) of the Act ; and (b) that the built up area of all the three BHK flats in the said project was more than 1,000 square feet which was in violation of the conditions specified in section 80-IB(10)(c) of the Act. In the backdrop of the aforesaid facts, the Assessing Officer holding a conviction that the assessee had failed to comply with the provisions of section 80-IB(10)(a) and section 80-IB(10)(c) of the Act disallowed its claim for deduction of Rs. 19,20,04,491 raised under section 80-IB(10) of the Act.

45 Aggrieved, the assessee assailed the assessment order before the Commissioner of Income-tax (Appeals). As regards the declining of the assessee's claim for deduction under section 80-IB(10) by the Assessing Officer, for the reason, that as the "building completion certificate" and "occupation certificate" was not obtained by the assessee from the Municipal Corporation of Greater Mumbai, therefore, the project, viz., "Adityavardhan" could not be held to have been completed within the stipulated time period as envisaged in section 80-IB(10)(a)(iii), i. e., latest by March 31, 2012, the same did not find favour with the Commissioner of Income-tax (Appeals). It was observed by the Commissioner of Income-tax (Appeals) that the withholding of the aforesaid certificates by the local authority was because the assessee which as per the approved plan was mandated to construct

and handover a 18.3 metre wide D. P. road on the south side of the plot had failed to comply with the said requirement. On a perusal of the facts borne from the records, it was observed by the Commissioner of Income-tax (Appeals) that the construction of the aforesaid road was being obstructed by a power pylon transmission line belonging to Tata Electric Company, which had to be relocated before the road could be constructed. It was further observed by the Commissioner of Income-tax (Appeals) that despite persuasion by the assessee the aforesaid power company had refused to relocate or shift the power pylon. After deliberating at length on the facts attending to the issue under consideration, it was observed by the Commissioner of Income-tax (Appeals) that as it was impossible on the part of the assessee to remove the hill for constructing the road, therefore, for the said reason it had failed to comply with the said condition in the intimation of disapproval/CC. In the backdrop of the aforesaid facts, the Commissioner of Income-tax (Appeals) was of the view that the assessee should not have been denied deduction under section 80-IB(10) for not performing of an act which was impossible of performance, and that the building completion certificate/occupation certificate could not be obtained for the reasons beyond its control. The Commissioner of Income-tax (Appeals) further drawing support from the judgment of the hon'ble High Court of Bombay in the case of *CIT* v. *Hindustan Samuh Awas Ltd.* [2015] 377 ITR 150 (Bom) ; [2015] 62 taxmann.com 175 (Bom), therein observed that the facts borne from the records, viz., purchasers of the flats had taken possession and were residing in the said flats ; approvals were obtained by the assessee from the Fire Brigade Authority, Lift Inspector, Assistant Engineer Municipal Corporation of Greater Mumbai for drainage works, etc., evidenced that the assessee had completed the physical construction of the project. Accordingly, the Commissioner of Income-tax (Appeals) holding a conviction that the assessee had completed its project, viz., "Adityavardhan" within the time allowed under section 80-IB(10)(a)(iii), therein vacated the adverse inferences that were drawn by the Assessing Officer.

As regards the view of the Assessing Officer that the area of certain flats **46** in the project of the assessee exceeded the prescribed limit of 1,000 square feet, it was observed by the Commissioner of Income-tax (Appeals) that the judicial pronouncements relied upon by the assessee being distinguishable on facts would not assist the case of the assessee. Observing, that the issue involved in the present appeal was squarely covered by the order of the Income-tax Appellate Tribunal, Mumbai in the case of *ITO* v. *Siddhivinayak Homes* (I. T. A. No. 8726/Mum/2010, the assessment year 2007-08 and I. T. A. No. 5986/Mum/2011, the assessment year 2008-09), the

Commissioner of Income-tax (Appeals) concluded that the "dry balcony" area of the flats would form part of the "built-up area" of the respective flats.

47 As regards the claim of the assessee that the exceeding of the "built-up area" of the three BHK flats could not be extrapolated to the whole of the project and the same could not lead to disallowance of the entire claim of deduction raised by the assessee under section 80-IB of the Act the same did find favour with the Commissioner of Income-tax (Appeals). Observing, that the issue was covered by the order of the Income-tax Appellate Tribunal, Mumbai in the case of *Asst. CIT* v. *Ekta Sankalp Developers* [2015] 152 ITD 805 (Mum), the Commissioner of Income-tax (Appeals) was of the view that the deduction under section 80-IB(10) was qua the residential units and not qua the project. Accordingly, it was observed by the Commissioner of Income-tax (Appeals) that only the residential units which exceeded the prescribed "built-up area" would not be eligible for deduction under section 80-IB(10) of the Act. Observing, that the "dry balcony" area of 30 square feet was to be included in the "built-up area" of the residential units, the Commissioner of Income-tax (Appeals) on the basis of the details gathered noticed that only flats Nos. 1, 2 and 7 on each of the 10 floors of the project exceeded the limit of 1,000 square feet (if the "dry balcony" area of 30 square feet was added). Accordingly, it was observed by the Commissioner of Income-tax (Appeals) that a total of 30 flats out of the total 108 flats exceeded the prescribed area limit. As regards the quantification of the assessee's claim of deduction under section 80-IB(10), in so far the same pertained to the residential units whose "built-up area" exceeded the prescribed area of 1,000 square feet, the Commissioner of Income-tax (Appeals) called for the details such as the total area sold and the assessment years in which the profits from the sale were recognised, which were furnished by the assessee as under :

Assessment year	*B/U area sold during the year (sq/ft.)*	*B/U area in respect of flat Nos. 1, 2 and 7 (sq. ft.)*	*(A) – (B) sq/ft.*
2011-12	49347.88	13956.28	35391.60
2012-13	33782.71	7969.56	25,813.15
2013-14	10277.36	4985.13	5292.23
2014-15	5642.06	2995.73	2646.33
Total	99050.01	29906.70	69143.31

On the basis of the aforesaid facts and figures provided by the assessee, the Commissioner of Income-tax (Appeals) observed that the "built-up area" of 7969.56 of flats Nos. 1, 2 and 7 was ineligible for deduction

under section 80-IB of the Act. Accordingly, the Commissioner of Income-tax (Appeals) disallowed the assessee's pro rata claim for deduction of Rs. 4,52,95,102 under section 80-IB on the said residential units.

Both the assessee and the Revenue being aggrieved with the order of the **48** Commissioner of Income-tax (Appeals) has carried the matter in appeal before us. We shall first deal with the grievance of the assessee. The assessee has assailed the order of the Commissioner of Income-tax (Appeals), for the reason, that he had erred in disallowing the assessee's claim for deduction of Rs. 4,52,95,102 under section 80-IB(10) in respect of flat Nos. 1, 2 and 7 on each floor of the building. The genesis of the controversy involved pertains to the construing of the term "built-up area" by the Commissioner of Income-tax (Appeals), who as per the assessee had erred in concurring with the Assessing Officer that the area of the "dry balcony" is to be included for the purpose of calculating the "built-up area" of the flats within the meaning of section 80-IB(14)(a) of the Act. As observed by us hereinabove, it is only pursuant to the inclusion of the area of "dry balcony" (30 square feet), that the "built-up area" of flat Nos. 1, 2 and 7 on each floor of the building is found to have exceeded the prescribed limit of 1,000 square feet. As such, the disallowance of the assessee's claim for deduction of Rs. 4,52,95,102 pertains to the flat Nos. 1,2 and 7 on each floor of the building in the assessee's project. We find that the construing of the term "built-up area" as envisaged in section 80-IB(14)(a) by the Assessing Officer had been assailed by the Revenue in its appeal in the assessee's own case for the immediately preceding year, i. e., the assessment year 2011-12 in I. T. A. No. 5912/Mum/2017. In the preceding year, the Commissioner of Income-tax (Appeals) finding favour with the claim of the assessee that the "dry balcony" was not to be included while calculating the "built-up area" of the flats in the assessee's project, had concluded, that the area of all the flats was well within the prescribed limit of 1,000 square feet. As we have after exhaustive deliberations not found favour with the manner as per which the Commissioner of Income-tax (Appeals) had construed the term "built-up area" which stands defined in section 80-IB(14)(a), therefore, with specific directions we have restored the matter to the file of the Assessing Officer for fresh adjudication. Accordingly, we are of the considered view that on the same terms the matter in the present appeal also requires to be restored to the file of the Assessing Officer, who is directed to adjudicate the issue afresh considering our observations/directions recorded while disposing of the grounds of Appeal Nos. 2 and 5 in I. T. A. No. 5912/Mum/2017 raised in the Revenue's appeal in the assessee's own case for the immediately preceding year, i. e.,

the assessment year 2011-12. On the same terms, we may herein observe that in case the flat purchasers are de facto in exclusive possession/enjoyment of the "dry balcony" attached with the flat, then the area of the same shall be included while computing the "built-up area" of such flat. However, if such projection is either in the nature of a service projection to be used for servicing the building or carrying out repairs of the building, or a common area shared with the other residential units, then the same would not be included in the "built-up area" of the flat. The grounds of appeal No. 1 to 3 are allowed for statistical purposes.

49 Resultantly, the appeal of the assessee is allowed for statistical purposes in terms of our aforesaid observations.

I. T. A. No. 5523/Mum/2016

Assessment year 2011-12 (Revenue's appeal)

50 We shall now take up the appeal of the Revenue. On a perusal of the grounds of appeal, we find that the Revenue has assailed the order of the Commissioner of Income-tax (Appeals) on three grounds, viz., (i) that the Commissioner of Income-tax (Appeals) had erred in allowing the assessee's claim of deduction under section 80-IB(10), despite the fact that it had failed to complete the project within the prescribed time contemplated in section 80-IB(10)(a)(ii) of the Act ; (ii) that the Commissioner of Income-tax (Appeals) had erred in allowing pro rata deduction under section 80-IB(10), failing to appreciate that the provisions of section 80-IB(10) allowed the deduction only upon the completion of the entire project and not on the part project or on the part fulfilment of the requirements stated in the provisions of the section ; and (iii) that the Commissioner of Income-tax (Appeals) had erred in relying on the order of the Tribunal in the case of *Ekta Sankalp Developers* as the same was distinguishable on facts.

51 We shall first advert to the claim of the Revenue that the Commissioner of Income-tax (Appeals) had erred in concluding that the assessee had duly complied with the provisions of section 80-IB(10)(a)(iii) of the Act and completed the construction of its housing project within the prescribed limit. As the facts and the issue involved in the present appeal of the assessee in the context of the issue under consideration remains the same as were there before us in the appeal of the Revenue in the assessee's own case for the immediately preceding year, i. e., the assessment year 2011-12, in I. T. A. No. 5912/Mum/2017, therefore, our order therein passed while disposing of the grounds of appeal Nos. 1 and 4 in the said appeal, shall apply mutatis mutandis for the purpose of disposal of the grounds of appeal Nos. 2, 3 and 4 of the present appeal of the Revenue for the assessment year 2012-13, I. T. A. No. 5523/Mum/2016. Accordingly, the grounds

of Appeal Nos. 2, 3 and 4 raised by the Revenue are allowed in terms of our aforesaid observations.

52 We shall now take up the claim of the Revenue that the Commissioner of Income-tax (Appeals) had erred in allowing the pro rata deduction under section 80-IB(10) to the assessee as regards the residential units whose "built-up area" did not exceed the prescribed limit of 1,000 square feet. As the said issue had been adjudicated by us in the appeal filed by the Revenue in the case of the assessee for the immediately preceding year, i. e., the assessment year 2011-12 in I. T. A. No. 5912/Mum/2017, therefore, our order passed while disposing of the ground of Appeal No. 5 in the Revenue's appeal in the assessee's own case for the assessment year 2011-12, I. T. A. No. 5912/Mum/2017, shall apply mutatis mutandis for the purpose of disposing of the grounds of appeal Nos. 6 and 7 of the present appeal of the Revenue for the assessment year 2012-13. Accordingly, the grounds of Appeal Nos. 6 and 7 raised by the Revenue are on the same terms dismissed.

53 We shall now advert to the claim of the Revenue that the Commissioner of Income-tax (Appeals) had erred in relying on the order of the Income-tax Appellate Tribunal, Mumbai in the case of *Asst. CIT* v. *Ekta Sankalp Developers* [2015] 152 ITD 805 (Mum), while deciding the issue as regards pro rata allowing of deduction under section 80-IB(10) to the assessee as regards its eligible residential units. It is the claim of the Revenue that unlike the case of the present assessee who had failed to comply with the provisions of section 80-IB(10)(a)(iii) and also section 80-IB(10)(c), in the case of *Ekta Sankalp Developers* (supra) the only non-compliance was as regards the provisions of section 80-IB(10)(c) of the Act. In so far as the Commissioner of Income-tax (Appeals) is concerned, as observed by us hereinabove, he had while disposing of the appeal held that the assessee had completed the construction of the housing project within the time-limit contemplated in section 80-IB(10)(a)(iii) of the Act. Accordingly, the said distinguishing factor brought to our notice cannot be accepted. At the same time, we may herein clarify that though we have principally upheld the entitlement of the assessee towards pro rata claim of deduction under section 80-IB(10), i. e., as regards the residential units whose "built-up area" is found to be within the prescribed limit of 1,000 square feet but then as we have held that the assessee had failed to complete the construction of the housing project within the meaning of section 80-IB(10)(a)(iii), therefore, its claim for deduction under section 80-IB would fail on the said count itself. The ground of Appeal No. 5 is disposed of in terms of our aforesaid observations.

54 We shall now advert to the grievance of the Revenue that the Commissioner of Income-tax (Appeals) has erred in allowing the deduction under section 80-IB(10) of the Act despite the fact that the assessee had claimed high gross profit of 61.99 per cent. As the said issue had been adjudicated by us in the appeal filed by the Revenue in the case of the assessee for the immediately preceding year, i. e., the assessment year 2011-12 in I. T. A. No. 5912/Mum/2017, therefore, our order passed while disposing of the ground of Appeal No. 3 in the Revenue's appeal in the assessee's own case for the assessment year 2011-12, I. T. A. No. 5912/Mum/2017 shall apply mutatis mutandis for the purpose of disposing of the ground of Appeal No. 1 of the present appeal of the Revenue for the assessment year 2012-13. Accordingly, the ground of Appeal No. 1 raised by the Revenue are on the same terms dismissed.

55 Resultantly, the appeal of the Revenue is partly allowed in terms of our aforesaid observations.

Assessment year 2013-14

I. T. A. 5913/Mum/2017 (Revenue's appeal)

56 We shall now advert to the appeal filed by the Revenue for the assessment year 2013-14 wherein the impugned order has been assailed on the following effective grounds of appeal before us :

> "1. Whether on the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in allowing the deduction under section 80-IB(10) of the Income-tax Act, 1961 to the assessee when the assessee failed to produce the building completing certificate and the occupation certificate as required under section 80-IB(10)(a)(iii) read with *Explanation (ii)* of the Income-tax Act, 1961 ?
>
> 2. Whether on the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in allowing the deduction under section 80-IB(10) of the Income-tax Act, 1961 to the assessee in spite of the fact that the assessee did not fulfil the conditions laid down under section 80-IB(10)(c) of the Income-tax Act as some of the flats were more than the prescribed area ?
>
> 3. Whether on the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in allowing deduction under section 80-IB(1) of the Income-tax Act, 1961 to the assessee in spite of the fact that the assessee has claimed

high gross profit of 63.08 per cent. when the assessee had not fulfilled all the conditions laid down in the provisions of the Act ?

4. Whether on the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in relying upon the judgment of the hon'ble Bombay High Court decision in the case of *CIT* v. *Hindustan Samuh Awas Ltd.* [2015] 377 ITR 150 (Bom) ; [2015] 62 taxmann.com 175 (Bom) without appreciating that the facts of the present case are totally different from the facts of the case in the above decision. In *Hindustan Samuh Awas Ltd.* (supra), the hon'ble High Court held that since the assessee had complied with all the norms of intimation of disapproval (IOD) and had applied for completion certificate well in time before the municipal authority, therefore, the delay in issuing the project completion certificate cannot be attributable to the assessee, whereas in the present case, the Municipal Corporation of Greater Mumbai (MCGM) had not issued the completion certificate to the assessee as the assessee had not fulfilled in all the norms of intimation of disapproval at the time of applying for completion certificate. Thus, the assessee is wholly and exclusively responsible for this delay. Hence, the case law relied upon by the learned Commissioner of Income-tax (Appeals) is not applicable in this case ?

5. Whether on the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in allowing deduction under section 80-IB(10) of the Income-tax Act, 1961 to the assessee on those flats which were less than 1,000 square feet in size, when the provisions of section 80-IB(10) of the Act allow deduction only upon the completion of the entire project and not on the part project or on the part fulfilment of the requirements stated in the provisions of the section ?"

57 Briefly stated, the assessee-firm had e-filed its return of income for the assessment year 2013-14 on September 28, 2013, declaring its total income at Rs. nil. Subsequently, the case of the assessee was selected for scrutiny assessment under section 143(2) of the Act. In the course of the assessment proceedings, it was observed by the Assessing Officer that the assessee had in its return of income claimed deduction of Rs. 7,85,16,411 under section 80-IB(10) of the Act in respect of a housing project "Adityavardhan" that was developed by it at 186-B, Saki Vihar Road, Andheri (East), Mumbai.

58 In the course of the assessment proceedings it was observed by the Assessing Officer that the assessee had failed to comply with the requisite conditions envisaged in section 80-IB(10) of the Act. It was observed by the

Assessing Officer that the details gathered in the course of the assessment proceedings for the immediately preceding year, i. e., assessment year 2012-13, therein revealed, viz., (a) that the assessee had not completed its housing project, viz., "Adityavardhan" within the stipulated period contemplated in section 80-IB(10)(a)(iii) of the Act ; and (b) that the built-up area of all three BHK flats in the said project was more than 1,000 square feet which was in violation of the conditions specified in section 80-IB(10)(c) of the Act. In the backdrop of the aforesaid facts, the Assessing Officer holding a conviction that the assessee had failed to comply with the provisions of section 80-IB(10)(a) and section 80-IB(10)(c) of the Act disallowed its claim for deduction of Rs. 7,85,16,411 raised under section 80-IB(10) of the Act.

59 Aggrieved, the assessee assailed the assessment order before the Commissioner of Income-tax (Appeals). As regards the declining of the assessee's claim for deduction under section 80-IB(10) by the Assessing Officer, for the reason, that as the "building completion certificate" and "occupation certificate" was not obtained by the assessee from the Municipal Corporation of Greater Mumbai, therefore, the project, viz., "Adityavardhan" could not be held to have been completed within the stipulated time period as envisaged in section 80-IB(10)(a)(iii), i. e., latest by March 31, 2012, the same did not find favour with the Commissioner of Income-tax (Appeals). It was observed by the Commissioner of Income-tax (Appeals) that the withholding of the aforesaid certificates by the local authority was because the assessee which as per the approved plan was mandated to construct and hand over a 18.3 metre wide D. P. road on the south side of the plot had failed to comply with the said requirement. On a perusal of the facts borne from the records, it was observed by the Commissioner of Income-tax (Appeals) that the construction of the aforesaid road was being obstructed by a power pylon transmission line belonging to Tata Electric Company, which had to be relocated before the road could be constructed. It was further observed by the Commissioner of Income-tax (Appeals) that despite persuasion by the assessee the aforesaid power company had refused to relocate or shift the power pylon. After deliberating at length on the facts attending to the issue under consideration, it was observed by the Commissioner of Income-tax (Appeals) that as it was impossible on the part of the assessee to remove the hill for constructing the road, therefore, for the said reason it had failed to comply with the said condition in the intimation of disapproval/CC. In the backdrop of the aforesaid facts, the Commissioner of Income-tax (Appeals) was of the view that the assessee should not have been denied deduction under section 80-IB(10) for not

performing of an act which was impossible of performance, and that the building completion certificate/occupation certificate could not be obtained for reasons beyond its control. The Commissioner of Income-tax (Appeals) further drawing support from the judgment of the hon'ble High Court of Bombay in the case of *CIT* v. *Hindustan Samuh Awas Ltd.* [2015] 377 ITR 150 (Bom) ; [2015] 62 taxmann.com 175 (Bom), therein observed that the facts borne from the records, viz., purchasers of the flats had taken possession and were residing in the said flats ; approvals were obtained by the assessee from the Fire Brigade Authority, Lift Inspector, Assistant Engineer Municipal Corporation of Greater Mumbai for drainage works, etc., evidenced that the assessee had completed the physical construction of the project. Accordingly, the Commissioner of Income-tax (Appeals) holding a conviction that the assessee had completed its project, viz., "Adityavardhan" within the time allowed under section 80-IB(10)(a)(iii), therein vacated the adverse inferences that were drawn by the Assessing Officer.

60 As regards the view of the Assessing Officer that the area of certain flats in the project of the assessee exceeded the prescribed limit of 1,000 square feet, it was observed by the Commissioner of Income-tax (Appeals) that the assessee had not sold the "dry balcony area" to the purchasers and the same represented service projections. It was further observed by him that the Municipal Corporation of Greater Mumbai had considered the built-up area of the residential flats in the building for the purpose of approving the building plan. Further, it was noticed by the Commissioner of Income-tax (Appeals) that the assessee's architect had also certified that the built-up area of each flat did not exceed 1,000 square feet. In the backdrop of his aforesaid observations the Commissioner of Income-tax (Appeals) concluded that there was no violation of section 80-IB(10)(c) as was alleged by the Assessing Officer.

61 Accordingly, on the basis of his aforesaid deliberations the Commissioner of Income-tax (Appeals) allowed the appeal of the assessee.

62 The Revenue being aggrieved with the order of the Commissioner of Income-tax (Appeals) has carried the matter in appeal before us. We shall first advert to the claim of the Revenue that the Commissioner of Income-tax (Appeals) had erred in concluding that the assessee had duly complied with the provisions of section 80-IB(10)(a)(iii) of the Act and completed the construction of its housing project within the prescribed limit. As the facts and the issue involved in the present appeal of the assessee in the context of the issue under consideration remains the same as were there before us in the appeal of the Revenue in the assessee's own case for the preceding year, i. e., the assessment year 2011-12, in I. T. A. No. 5912/Mum/2017,

therefore, our order therein passed while disposing of the grounds of Appeal Nos. 1 and 4 in the said appeal, shall apply mutatis mutandis for the purpose of disposal of the grounds of appeal Nos. 1 and 4 of the present appeal of the Revenue for the assessment year 2012-13, I. T. A. No. 5523/Mum/2016. Accordingly, the grounds of Appeal Nos. 1 and 4 raised by the Revenue are allowed in terms of our aforesaid observations.

63 We shall now take up the claim of the Revenue that the Commissioner of Income-tax (Appeals) had erred in allowing the deduction under section 80-IB(10) to the assessee despite the fact that the assessee did not fulfil the conditions laid down under section 80-IB(10)(c) of the Act as some of the area of some of the residential units was more than the prescribed limit. The genesis of the controversy involved pertains to the construing of the term "built-up area" by the Commissioner of Income-tax (Appeals), who as per the learned Departmental representative had erred in accepting the claim of the assessee that the area of the "dry balcony" is not to be included for the purpose of calculating the "built-up area" of the flats within the meaning of section 80-IB(14)(a) of the Act. We find that the construing of the term "built-up area" as envisaged in section 80-IB(14)(a) by the Commissioner of Income-tax (Appeals), had been assailed by the Revenue in its appeal in the assessee's own case for the preceding year, i.e., the assessment year 2011-12 in I. T. A. No. 5912/Mum/2017. As in the year under consideration, in the assessment year 2011-12 also the Commissioner of Income-tax (Appeals) had found favour with the claim of the assessee that the area of "dry balcony" was not to be included while calculating the "built-up area" of the flats in the assessee's project. As such, on the basis of his said observations, the Commissioner of Income-tax (Appeals) while disposing of the appeal for the assessment year 2011-12, had concluded, that the area of all the residential units was well within the prescribed limit of 1,000 square feet. As we have after exhaustive deliberations not found favour with the manner as per which the Commissioner of Income-tax (Appeals) had construed the term "built-up area" which stands defined in section 80-IB(14)(a), therefore, with the specific directions we have restored the matter to the file of the Assessing Officer for fresh adjudication. Accordingly, we are of the considered view that on the same terms the matter in the present appeal also requires to be restored to the file of the Assessing Officer, who is directed to adjudicate the issue afresh considering our observations/directions recorded while disposing of the grounds of Appeal Nos. 2 and 5 in I. T. A. No. 5912/Mum/2017 raised in the Revenue's appeal in the assessee's own case for the preceding year, i. e., assessment year 2011-12. In case, the flat purchaser is de facto in

exclusive possession/enjoyment of the "dry balcony" attached with the flat, then the area of the same shall be included while computing the "built-up area" of such flat. However, if such projection is either in the nature of a service projection to be used for servicing the building or carrying out repairs of the building, or a common area shared with the other residential units, then the same would not be included in the "built-up area" of the flat. The grounds of Appeal Nos. 2 and 5 are allowed for statistical purposes.

64 We shall now advert to the grievance of the Revenue that the Commissioner of Income-tax (Appeals) has erred in allowing the deduction under section 80-IB(10) of the Act despite the fact that the assessee had claimed high gross profit of 63.08 per cent. As the said issue had been adjudicated by us in the appeal filed by the Revenue in the case of the assessee for the preceding year, i. e., assessment year 2011-12 in I. T. A. No. 5912/Mum/2017, therefore, our order passed while disposing of the ground of Appeal No. 3 in the Revenue's appeal in the assessee's own case for the assessment year 2011-12, I. T. A. No. 5912/Mum/2017, shall apply mutatis mutandis for the purpose of disposing of the ground of Appeal No. 3 of the present appeal of the Revenue for the assessment year 2012-13. Accordingly, the ground of Appeal No. 3 raised by the Revenue are on the same terms dismissed.

65 Before parting, we may herein deal with a procedural issue that though the hearing of the captioned appeal was concluded on February 19, 2020, however, this order is being pronounced much after the expiry of 90 days from the date of conclusion of hearing. We find that rule 34(5) of the Income-tax (Appellate Tribunal) Rules, 1963, which envisages the procedure for pronouncement of orders, provides as follows : (5) The pronouncement may be in any of the following manners : (a) The Bench may pronounce the order immediately upon the conclusion of the hearing. (b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement. In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board. As such, "ordinarily" the order on an appeal should be pronounced by the Bench within not more than 90 days from the date of

concluding the hearing. It is, however, important to note that the expression "ordinarily" has been used in the said rule itself. This rule was inserted as a result of directions of hon'ble High Court in the case of *Shivsagar Veg. Restaurant* v. *Asst. CIT* [2009] 317 ITR 433 (Bom) wherein it was, inter alia, observed as under (page 437 of ITR) :

> "We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the apex court in the case of *Anil Rai* v. *State of Bihar* [2002] 3 BCR 360 (SC) ; [2001] 7 SCC 318 and to issue appropriate administrative directions to all the Benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile (emphasis, by underlining, supplied by us now), all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment."

In the rule so framed, as a result of these directions, the expression "ordinarily" has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether or not the passing of this order, beyond a period of ninety days in the case before us was necessitated by any "extraordinary" circumstances.

66 We find that the aforesaid issue after exhaustive deliberations had been answered by a co-ordinate Bench of the Tribunal, viz., Income-tax Appellate Tribunal, Mumbai "F" Bench in *Dy. CIT* v. *JSW Ltd.* [2020] 79 ITR (Trib) 585 (Mumbai) (I. T. A. No. 6264/Mum/2018, dated May 14, 2020), wherein it was observed as under (page 592) :

> "Let us in this light revert to the prevailing situation in the country. On March 24, 2020, the hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time . . . The epidemic situation being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial work all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated May 6, 2020 read with order dated March 23, 2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the

lockdown by observing that 'In case the limitation expired after March 15, 2020 then the period from March 15, 2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown'. The hon'ble Bombay High Court, in an order dated April 15, 2020, has, besides extending the validity of all interim orders, has also observed that, 'It is also clarified that while calculating time for disposal of matters made time-bound by this court, the period for which the order dated March 26, 2020 continues to operate shall be added and time shall stand extended accordingly', and also observed that 'arrangement continued by an order dated March 26, 2020 till April 30, 2020 shall continue further till June 15, 2020'. It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated February 19, 2020, taken the stand that, the corona virus 'should be considered a case of natural calamity and FMC, (i. e., force majeure clause) may be invoked, wherever considered appropriate, following the due procedure . . . .' The term 'force majeure' has been defined in *Black's Law Dictionary*, as 'an event or effect that can be neither anticipated nor controlled' When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an 'ordinary' period.

In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time-limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act, 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of *Otters Club* v. *DIT(E)*

[2017] 392 ITR 244 (Bom), the hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation the hon'ble Bombay High Court itself has, vide judgment dated April 15, 2020, held that directed 'while calculating the time for disposal of matters made time bound by this court, the period for which the order dated March 26, 2020 continues to operate shall be added and time shall stand extended accordingly'. The extraordinary steps taken suo motu by the hon'ble High Court and hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time-limits are to remain in force. In our considered view, even without the words 'ordinarily', in the light of the above analysis of the legal position, the period during which lockout was in force is to excluded for the purpose of time-limits set out in rule 34(5) of the Income-tax (Appellate Tribunal) Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case."

We have given a thoughtful consideration to the aforesaid observations of the Tribunal and finding ourselves to be in agreement with the same, therein respectfully follow the same. As such, we are of the considered view that the period during which the lockdown was in force shall stand excluded for the purpose of working out the time-limit for pronouncement orders, as envisaged in rule 34(5) of the Income-tax (Appellate Tribunal) Rules, 1963.

67 Resultantly, the appeals of the assessee for the assessment year 2011-12 in I. T. A. No. 5225/Mum/2017 is dismissed and the appeal of the assessee for the assessment year 2012-13 is allowed for statistical purposes. On the other hand, the appeals of the Revenue for the assessment year 2011-12 in I. T. A. No. 5912/Mum/2017, assessment year 2012-13 in I. T. A. No. 5523/Mum/2016 and the assessment year 2013-14 in I. T. A. No. 5913/Mum/2014 are partly allowed in terms of our aforesaid observations.

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

[2020] 81 ITR (Trib) 377 (Chandigarh)

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

SANJAY SINGHAL (HUF)

v.

DEPUTY COMMISSIONER OF INCOME-TAX

N. K. SAINI *(Vice-President)* and
SANJAY GARG *(Judicial Member)*

June 19, 2020.

SS ▸ ITA 1961, ss 147, 148
AY ▸ 2011-12 to 2013-14
HF ▸ Assessee

REASSESSMENT—SEARCH AND SEIZURE—ASSESSMENT PURSUANT TO SEARCH IN CASE OF ANOTHER PARTY TAKEN UP BUT AFTER RETURN AND DETAILS FILED BY ASSESSEE PROCEEDINGS DROPPED—NOTICE FOR REASSESSMENT ISSUED THEREAFTER ON BASIS OF INFORMATION RECEIVED FROM INVESTIGATION WING—INFORMATION NOT INDEPENDENTLY VERIFIED FROM RECORD—SUSPICION OF INCOME HAVING ESCAPED ASSESSMENT NOT SUFFICIENT FOR REASSESSMENT—CORRECT COURSE OF ACTION WOULD HAVE BEEN TO PROCEED AGAINST ASSESSEE UNDER SECTION 153C AND NOT UNDER SECTION 147—INCOME-TAX ACT, 1961, SS. 147, 148.

A search and seizure operation under section 132 of the Income-tax Act, 1961 took place in the case of B group to which the assessee belonged. The basis for the search was a third party statement. However, no incriminating material for the purpose of section 153A was found. The Assessing Officer issued notice under section 153A to the assessee and notice under section 142(1) seeking details of long-term capital gains claim made in the return, ledger of purchasers and sellers in the books of the assessee and cash flow statement, the Assessing Officer also issued show-cause notice. Thereafter, the Assessing Officer sought approval from the Additional Commissioner for dropping the proceedings under section 153A in the case of the assessee and the approval was granted. Accordingly, the proceedings under section 153A in the case of the assessee were dropped. The Assessing Officer issued notice under section 147 read with section 148 for reopening the assessment by issuing the notice and recording the reasons. This was confirmed by the Commissioner (Appeals). On appeal :

Held, *that the Assessing Officer had acted on the basis of the information received from the Investigation Wing of the Department and had not*

independently verified from the record available to him in the form of the return filed by the assessee. So there was only suspicion of some income having escaped assessment which could not by itself be sufficient to sustain the action under section 147 read with section 148. The reopening in the assessee's case by the Assessing Officer was merely based on the borrowed satisfaction drawn from other cases which was not sufficient for the purposes of sustaining any addition made under section 147 read with section 148. If any action was required to be done on the basis of certain documents found from other persons during the course of search the assessment could have been framed under section 153C but no such action was taken in the assessee's case. Rather the action was taken indirectly under section 147 read with section 148. If any material was found relating to the assessee during the course of search on third parties the correct course of action would have been to proceed against the assessee under section 153C and there was no justification for the Assessing Officer to initiate the proceedings under section 147 read with section 148. The order of the Assessing Officer was set aside and quashed.

ADARSH AGRAWAL *v.* ITO [2020] 77 ITR (Trib) (S.N.) 52 (Delhi) *followed*.

Cases referred to :

Adarsh Agrawal *v.* ITO [2020] 77 ITR (Trib) (S.N.) 52 (Delhi) (para 17)

Anil Rai *v.* State of Bihar [2001] 7 SCC 318 (para 21)

Babulal Lath *v.* Asst. CIT [2002] 83 ITD 691 (Mum) (para 10)

Brij Bhushan Singal *v.* Asst. CIT [2019] 14 ITR (Trib)-OL 209 (Delhi) (para 10)

Calcutta Discount Co. Ltd. *v.* ITO [1961] 41 ITR 191 (SC) (para 10)

Cargo Cleaning Agency (Gujarat) *v.* Jt. CIT [2008] 307 ITR 1 (Guj) (para 17)

CIT *v.* Anil Kumar Bhatia [2013] 352 ITR 493 (Delhi) (para 7)

CIT *v.* Chetan Das Lachman Das [2012] 254 CTR 392 (Delhi) (para 7)

CIT *v.* Fair Finvest Ltd. [2013] 357 ITR 146 (Delhi) (para 10)

CIT (Pr.) *v.* G and G Pharma India Ltd. [2016] 384 ITR 147 (Delhi) (para 10)

CIT *v.* Gangeshwari Metal P. Ltd. [2014] 361 ITR 10 (Delhi) (para 10)

CIT *v.* Goel Sons Golden Estate Pvt. Ltd. (I. T. A. No. 212 of 2012 dated April 11, 2012) (para 10)

CIT (Dy.) *v.* Himanshu B. Kanakia [2016] 46 ITR (Trib) 756 (Mum) (para 7)

CIT (Dy.) *v.* JSW Ltd. [2020] 79 ITR (Trib) 585 (Mumbai) (para 21)

CIT *v.* Kabul Chawla [2016] 380 ITR 573 (Delhi) (para 7)

CIT *v.* Kelvinator of India Ltd. [2002] 256 ITR 1 (Delhi) [FB] (para 10)

CIT (Pr.) *v.* Meenakshi Overseas (P.) Ltd. [2017] 395 ITR 677 (Delhi) (para 10)

CIT *v.* Multiplex Trading and Industrial Co. Ltd. [2015] 378 ITR 351 (Delhi) (para 10)

CIT *v.* Oasis Hospitalities (P.) Ltd. [2011] 333 ITR 119 (Delhi) (para 10)

CIT *v.* Paramjit Kaur (Smt.) [2009] 311 ITR 38 (P&H) (para 10)

CIT (Pr.) *v.* RMG Polyvinyl (I.) Ltd. [2017] 396 ITR 5 (Delhi) (para 10)

CIT *v.* SFIL Stock Broking Ltd. [2010] 325 ITR 285 (Delhi) (para 10)

CIT *v.* Vrindavan Farms (P.) Ltd. [2016] 6 ITR-OL 502 (Delhi) (para 10)

Deepraj Hospital (P.) Ltd. *v.* ITO [2018] 65 ITR (Trib) 663 (Agra) (para 10)

Devansh Exports *v.* Asst. CIT (I. T. A. No. 2178/Kol/2017, dated October 15, 2018) (para 10)

Durgabati (Smt.) *v.* CIT [1956] 30 ITR 101 (Patna) (para 10)

Dwarka Gems Ltd. *v.* Dy. CIT (I. T. A. No. 71/Jaipur/2017, dated March 27, 2018) (para 10)

Gee Cee Cycle Balls Pvt. Ltd. *v.* ITO (I. T. A. No. 867/Delhi/2013 dated October 30, 2015) (para 10)

GKN Driveshafts (India) Ltd. *v.* ITO [2003] 259 ITR 19 (SC) (para 6)

ITO *v.* Arun Kumar Kapoor [2011] 140 TTJ 249 (Asr) (para 17)

ITO *v.* Lakhmani Mewal Das [1976] 103 ITR 437 (SC) (para 10)

ITO *v.* Softline Creations (P.) Ltd. [2016] 51 ITR (Trib) 460 (Delhi) (para 10)

Khatri Projects P. Ltd. *v.* ITO (I. T. A. No. 4353/Delhi/2016, dated December 16, 2016) (para 10)

Koteswara Rao (G.) *v.* Dy. CIT [2015] 64 taxmann.com 159 (Vizag) (para 17)

Mala Builders (P.) Ltd *v.* Asst. CIT [2016] 51 ITR (Trib) 272 (Chand) (para 7)

Manish Maheshwari *v.* Asst. CIT [2007] 289 ITR 341 (SC) (para 17)

Moti Adhesive P. Ltd. *v.* ITO (I. T. A. No. 3133/Delhi/2018, dated June 25, 2018) (para 10)

Narayanappa (S.) *v.* CIT [1967] 63 ITR 219 (SC) (para 10)

Narmadabala Gupta (Smt.) *v.* CIT [1956] 30 ITR 101 (Patna) (para 10)

Nirmala Agarwal *v.* Asst. CIT [2018] 64 ITR (Trib) 658 (Jaipur) (para 10)

Otters Club *v.* DIT(E) [2017] 392 ITR 244 (Bom) (para 21)

Raja Yadvendra Datt Dube *v.* State of U. P. [1964] 54 ITR 506 (All) (para 10)

Rashmi Wadhwa (Smt.) *v.* Dy. CIT (I. T. A. No. 5184/Delhi/2014 dated January 18, 2016) (para 7)

Reliance Corporation *v.* ITO [2017] 55 ITR (Trib) (S.N.) 69 (Mum) (para 10)

Sanjay Aggarwal *v.* Dy. CIT [2014] 150 ITD 692 (Delhi) (para 7)

Sarthak Securities Co. (P.) Ltd. *v.* ITO [2010] 329 ITR 110 (Delhi) (para 10)

Shailesh S. Patel *v.* ITO [2018] 97 taxmann.com 570 (Ahd.-Trib) (para 13)

Sheo Nath Singh *v.* AAC of I.T. [1971] 82 ITR 147 (SC) (para 10)

Shivsagar Veg. Restaurant *v.* Asst. CIT [2009] 317 ITR 433 (Bom) (para 21)

Signature Hotels (P.) Ltd. *v.* ITO [2011] 338 ITR 51 (Delhi) (para 10)

Siraigo Pharma (P.) Ltd. *v.* Dy. CIT (I. T. A. No. 1010/Jaipur/2013 dated January 13, 2016) (para 7)

Windson Electronics (P.) Ltd. *v.* Union of India [2004] 269 ITR 481 (Cal) (para 10)

I. T. A. Nos. 702 to 704/Chd/2018 (assessment years 2011-12 to 2013-14).

S. K. Tulsiyan, Advocate, and *Ashwani Kumar*, *Ms. Abha Aggarwal*, *Ms. Bhoomija Verma* and *Aditya Kumar*, Chartered Accountants, for the assessee.

G. C. Srivastava, Special Counsel, and *Smt. C. Chandrakanta*, Commissioner of Income-tax-Departmental representative, for the Department.

ORDER

1 These three appeals by the assessee are directed against the consolidated order of the learned Commissioner of Income-tax (Appeals)-3, Gurgaon dated March 31, 2018.

2 Since the issues involved are common and the appeals were heard together so these are being disposed of by this consolidated order for the sake of convenience and brevity.

At the first instance we will deal with the appeal in I. T. A. No. 702/Chd/2018 for the assessment year 2011-12. 3

Following grounds have been raised in this appeal. 4

1. That order passed under section 250(6) of the Income-tax Act, 1961 by the learned Commissioner of Income-tax (Appeals)-3, Gurgaon is against law and facts on the file inasmuch as he was not justified to uphold the action of the learned Assessing Officer in initiating proceedings under section 148 of the Income-tax Act, 1961.

2. That the learned Commissioner of Income-tax (Appeals)-3, Gurgaon gravely erred in upholding the action of the learned Assessing Officer in making an addition of Rs. 22,37,80,889 representing the sale proceeds of listed equity shares held by the appellant for more than 12 months by invoking the provisions of section 68 of the Act by ignoring the relevant specific facts and circumstances of the case any by relying on extraneous arguments and evidence, including in particular, circumstantial evidence, which has no bearing and applicability to the case.

3. That the learned Commissioner of Income-tax (Appeals)-3, Gurgaon was not justified to uphold the action of the learned Assessing Officer in treating the transactions relating to purchase and sale of equity shares as ingenuine transactions.

4. That the learned Commissioner of Income-tax (Appeals)-3, Gurgaon further gravely erred in upholding the action of the learned Assessing Officer in making an addition of Rs. 1,40,77,758 on account of alleged commission expenses paid by the appellant for arranging the alleged entries in respect of long-term capital gains by invoking the provisions of section 69C of the Act on sheer presumptive basis.

5. That the learned Commissioner of Income-tax (Appeals)-3, Gurgaon while adjudicating the appeal, has dismissed various grounds of appeal raised by the appellant by relying on the statements of various persons and data without affording any opportunity to cross-examine such persons thereby ignoring the basic principles of natural justice despite the fact that a specific ground was raised to this effect.

Vide ground No. 1 the assessee challenged the validity of initiation of proceedings under section 148 of the Income-tax Act, 1961 (hereinafter referred to as, "the Act"). 5

The facts related to this issue as emerging from the assessment order dated December 29, 2016 in brief are that a search and seizure operation under section 132(1) of the Act was initiated by the Department on 6

February 21, 2014 at the business and residential premises of "Bhushan Power and Steel Group" (BPSL) along with its directors and other related entities and persons. During the course of pre-search/post-search enquiries, various incriminating documents, papers, books of account, etc., were found and seized which indicated that bogus long-term capital gain (LTCG), accommodation entries in the case of individuals of Bhushan Power and Steel Group and one-time accommodation entries (OT) towards share capital/share premium in the case of group concern were obtained. During the course of search and seizure action on February 22, 2014 Shri Sanjay Singal was confronted with the various incriminating evidence along with the statement of various connected persons, and his statement under section 132(4) was recorded, he disclosed additional income of Rs. 250 crores again his statement was recorded under section 132(4) of the Act on March 6, 2014 wherein in response to question No. 2 he stated as under :

"*Question 2*. On your statement recorded under section 132(4) of the Income-tax Act on February 22, 2014, you submitted a letter declaring additional income of Rs. 250 crores for the entire group. Please give the particulars and heads under which this additional income is disclosed. Please also give the manner in which this additional undisclosed income has been derived and also substantiate it, how it was derived ?

Answer. Yes, I have disclosed total of Rs. 250 crores as additional income for the whole group out of 250 crores declared as additional income, I am disclosing and giving particulars by submitting a letter dated March 6, 2014. In this letter, I am disclosing in the following for the assessment years 2011-12 and 2012-13 :

1.	Mrs. Aarti Singal	82.38 crores
2.	Mr. Sanjay Singal	55.57 crores
3.	Sanjay Singal (HUF)	21.66 crores
	Total	159.61 crores

Details of the balance amount will be submitted in few time after examining seized material."

6.1 The Assessing Officer pointed out that in the disclosure letter dated March 6, 2014 Shri Sanjay Singal categorically stated that the amount of surrender of Rs. 159.61 crores was related to exempt long-term capital gains shown by him and his family members from sale of shares of M/s. Parnneta Industries Ltd. (PIL).

6.2 The Assessing Officer issued the notice under section 153A of the Act dated January 29, 2015 for the assessment years 2008-09 to 2013-14, in response the assessee furnished the submission on February 23, 2015 in which surrender income had not been reflected in the return of income of the assessee group. Thereafter, the Assessing Officer issued a notice under section 143(2) of the Act. The Assessing Officer mentioned that the search folder revealed that the assessee's name was not appearing on warrant of authorisation, therefore, he had written a letter dated October 13, 2015 to the Deputy Director of Income-tax, Faridabad for clarification. As nothing was heard from the Deputy Director of Income-tax-I, Faridabad. The Assessing Officer again wrote a letter dated December 31, 2015 to the Additional Commissioner of Income-tax and after normal discussion it was stated that the notice under section 153A in the case of the assessee to be dropped. On January 8, 2016 a letter for seeking approval/permission for dropping the proceedings under section 153A was written to the Additional Commissioner of Income-tax, Range Central, Chandigarh for dropping the proceedings under section 153A of the Act and the approval for dropping the proceedings under section 153A of the Act was received from the Additional Commissioner of Income-tax vide letter dated January 13, 2016. Thereafter, the Assessing Officer from the income-tax returns of the assessee noticed that income was claimed exempt from sale of shares of various listed companies from the assessment years 2011-12 to 2014-15 and in the statement recorded on March 6, 2014 and March 19, 2014 under section 132(4) of the Act Shri Sanjay Singal was not able to satisfactorily reply the question asked by the authorised officer and finally he voluntarily surrendered unaccounted income of Rs. 250 crores which included an amount of Rs. 159.61 crores of long-term capital gains earned through M/s. Parnneta Industries Ltd. for the assessment years 2011-12 and 2012-13 in the hands of Shri Sanjay Singal (Rs. 55.57 crores), Sanjay Singhal HUF (Rs. 21.66 crores) and Smt. Aarti Singhal (Rs. 82.38 crores) respectively but no further bifurcation for the remaining amount had been submitted by him. Thereafter, the Assessing Officer recorded the following reasons for reopening the assessment under section 147 read with section 148 of the Act :

> "A search and seizure operation under section 132 of the Income-tax Act, 1961 was conducted in the 'Bhushan Power and Steel Group' of Chandigarh (BPSL) by the Faridabad Unit of Directorate of Investigation, Chandigarh, on February 22, 2014.
>
> 1.1. Prior/subsequent to the above search and seizure operation various search, seizure and survey operations were conducted on numerous entry operators and their beneficiaries situated across the

country. One of such search and seizure operation under section 132 of the Income-tax Act, 1961 was conducted by the Directorate of Investigation of Ahmedabad in the case of Shrish Chander Shah (SCS) on April 9, 2013. Further, another search and seizure operation under section 132 of the Income-tax Act, 1961 was conducted by the Directorate of Investigation of New Delhi in the case of R. K. Kedia Group along with 'Bhushan Group' of New Delhi on June 13, 2014. Various incriminating documents and huge amount of incriminating soft data was found and seized impounded form the different places connected to the persons covered and the sworn statements of these persons were recorded.

1.2. The correlation of the seized/impounded data with the transactions of long-term capital gains mentioned in the return of income of the assessee and the sworn statements of various entry operators prima facie reveals that the assessee has received a huge amount of accommodation entries in the garb of exempt long-term capital gains (LTCG) from the cartel of companies managed and controlled by Sh. Shrish Chander Shah (SCS), Sh. R. K. Kedia and their various allies located across the country.

2. From the perusal of income-tax returns of Sh. Sanjay Singal HUF it is noticed that the assessee has claimed exempt income from sale of shares of various listed companies from the assessment years 2011-12 to 2014-15. Those listed companies are (1) Prraneta Industries Ltd., (2) Blue Circle Service Ltd., (3) DB International Stock Broker Ltd. (3) Unisis Software and Holding Industries Ltd., (4) Global Infratech Ltd. formerly known as Asian Lak Capital and Finance Ltd., (5) Rutron International Ltd., and 6) Grandama Trading Agencies Ltd. As per the information gathered from the analysis of various documents a total of approximately Rs. 144.02 crores exempt long-term capital gains has been earned by the assessee through Sh. R. K. Kedia and Sirish Chandrakant Shah (SCS). The details of exempt long-term capital gains of Rs. 144.02 crores related to the assessee are given in the table below :

Figures in Rs.

Exempt LTCG earned by M/s. Sanjay Singal HUF, names of penny stock companies	*AY 2011-12*	*AY 2012-13*	*AY 2013-14*	*AY 2014-15*	*Grand total*
Prraneta Industries Ltd.	21,65,80,899				

DB International		15,55,41,448			
Blue Circle		40,48.37,931			
Unisis Software and Holding Ltd.			9,51,31,140		
Global Infratech Ltd. formerly known as Asian Lak Capital and Finance Ltd.				42,07,70,813	
Rutron International Ltd.				9,57,38,651	
Grandama Trading Agencies Ltd.				5,16,94,004	
Total	21,65,80,899	56,03,79,380	9,51,31,140	56,82,03,468	144,02,94,887

2.1. The exempt long-term capital gains accommodation entries from the above listed papers companies were taken through Sh. R. K. Kedia, an entry operator from Delhi. He was specifically asked to explain his business relation, stakes and his involvement with the above listed paper companies vide question No. 11 of his statement on oath under section 132(4) of the Income-tax Act on June 13, 2014. In reply to this question Shri R. K. Kedia gave complete details of these companies like status of company, name of controlling persons (operators), their contact numbers, etc., and confirmed that all the above companies are managed and controlled by various entry operators and these are involved in the business of providing bogus accommodation entries. The accountant of Shri R. K. Kedia, Shri Manish Arora was the person who maintained the complete hard and soft records of the transactions made through Sh. R. K. Kedia. Detailed statements were recorded for each and every seized documents. The statements of Sh. Manish Arora continued for 25 days and he gave full and complete details of the bogus accommodation entries provided by Sh. R. K. Kedia to various beneficiaries including the Singals of Bhushan Power and Steel Group. Thus, Sh. R. K. Kedia, an entry operator, has stated on oath that the various listed companies, whose shares were sold to provide exempt long-term capital gains accommodation entries to the assessee are controlled and managed by different entry operators. The names of the listed paper companies along with the name of the entry operator, controlling and managing the affairs of such companies are given in table below :

Sr. No.	*Name of the company*	*Name of entry operator controlling and managing the affairs of the company*
1.	Pranneta Industries Ltd.	Shirish Chandrakant Shah (SCS)

2.	DB International Stock Broker Ltd.	S. N. Daga
3.	Blue Circle Services Ltd.	Jagdish Prashad Purohit
4.	Unisys Software and Holding Ltd.	Jagdish Prashad Purohit
5.	Global Infratech Ltd.	Jagdish Prashad Purohit
6.	Rutron International Ltd.	Anil Aggarwal
7.	Grandama Trading Agencies Ltd.	Sawan Jaju

2.2. Thus, from the above discussion it is inferred that, Sh. R. K. Kedia has played a key role in arranging the exempt long-term capital gains accommodation entries for the assessee from the above named companies. During the post-search investigation, various information related to the above named listed paper companies was collected which shows that all these companies were paper companies, doing no actual business and were being used for giving exempt long-term capital gains accommodation entries by various entry operators.

S. No.	*Particulars of the evidence*	*File description*	*Path in case of digital evidence*	*Hereinafter referred to as*	*Seized /impounded from*
1.	Cheque sheets for the period 1-4-2009 to 31-3-2012.	Final all ot up 310312.xls	F: \Shetty\c \ Documents and Set-tings\user2\Desto P	"OT ENTRIES	SCS
2.	Account of R. K. Kedia in the books of Shirish Shah maintained in MS Excel for-mat (till 14-2-2012)	-Kedia 2" sheet in MS Excel file acl.xls	F:\pen drive back up\Removable Disk\ Bips backup 14.02.12	"Kedia 2" sheet	SCS
3.	Cheque received from the Singal Group by SCS	"Cheque received from singals "		Cheque received From Singals Group by SCS	SCS
4.	Hard and soft data				R. K. Kedia, Delhi
5.	Excel sheets				Praveen Kumar Agarwal, Kolkata
6.	Excel and note-pad sheets				Praveen Kumar Jain

3.1 Oral evidence in possession of the Department

During the course of search and survey operations conducted by the Directorate of Income-tax (Investigation), Ahmedabad on April 9,

2013 statements of Sh. Shirish Chander Shah, his associates and the key employees were recorded. During the course of their statements they were asked to explain about the business activities of Shirish Chander Shah. The following key employees and associates were examined during the course of search and survey operations :

Sr. No.	*Name of the persons*	*Association with SCS*	*Date of statement and section under which recorded*
1.	Shirish Chander Shah (SCS)		132(4) dated 13-4-2013, 3-6-2013, 11-6-2013 and u/s. 131(1A) dated 25-11-2013 and 13-1-2014 (relevant parts)
2.	Rajan Kachalia	Main person handling the accounting and documentation part.	9-4-2013 u/s. 132(4) ; 11-4-2013 u/s. 131(1A)
3.	Chandan Kumar Singh	Main person handling cash and bank transactions and preparation of primary receipt payment documents.	9-4-2013 u/s. 132(4) and 11-4-2013 u/s. 131(1A)
5.	Damodar Attal	Main person handling share trading and synchronised trading work.	9-4-2013 u/s. 131(1A)
6.	Devang D. Master	Key associate handling the compliance work and involved in legal planning	9-4-2013 u/s. 132(4) and 11-4-2013 u/s. 131(1A)
7.	Devang Jhaveri	Key associate handling day-to-day compliances and verification of documents.	u/s. 132(4) dated 9-4-2013
8.	Prakash Dave	Employee of Shirish Shah	u/s. 132(4) dated 9-4-2013
9.	Naresh Parmar	Employee of Shirish Shah, prepares cash and cheques sheets.	u/s. 132(4) dated 10-4-2013
10.	Kumar Raichand Madan	Person supplying directors and addresses for the companies of Shirish Shah. He has also been found to be director in many of the companies of Shirish Shah	u/s. 131(1A) dated 9-4-2013
11.	Praveen Kumar Jain (*alias* Pintu *alias* Chintan)	Accommodation entry provider, facilitated conversion of cash into RTGS/cheques in the accounts of Shirish Shah's entities.	u/s. 131(1A) dated 11-10-2013

12.	Satish Saraf	Accommodation entry provider, facilitated conversion of cash into RTGS/cheques in the accounts of Shirish Shah's entities.	u/s. 131(1A) dated 5-10-2013
13.	Om Prakash Anandilal Khandelwal	Promoter and director of M/s. Prraneta Industires Limited, a listed company found and accepted to be controlled by Shirish Shah.	u/s. 132(4) dated 30-5-2013
14.	Yogendra Kumar Gupta	Promoter and director of M/s. Mahan Industries Limited, a listed company found and accepted to be controlled by Shirish Shah.	u/s. 131(1A) dated 26-12-2013
15.	Jayesh Raichand Thakkar	Promoter and director of M/s. Prabhav Industries Limited, a listed company found and accepted to be controlled by Shirish Shah.	u/s. 131(1A) dated 10-2-2014
16.	Shri Satyaprakash Goel	Director of Avance Technologies Limited, listed company controlled and managed by Shirish Shah.	u/s. 131(1A) dated 26-10-2012
17.	Sh. R. K. Kedia		
18.	Sh. Mahish Arora		
19.	Sh. Praveen Kumar Agarwal		

4. The details of the payments made by the assessee, for the purchase of the shares of M/s. Prraneta Industries Limited (PIL) are as follows :

Date	*Name of the person*	*No. of shares*	*Amount*
4-8-2009	Sanjay Singal HUF	32,00,000	72,00,000

4.1. It is to state that during the course of search and survey at the office premises of Shri Shirish Chander Shah (SCS), backup of the books of account was taken and in that an excel sheet named 'Kedia 2' was also impounded in the MS excel File 'acLxls' in the bips folder located at the path F:\pen drive back up\removable disk\Bips backup February 14, 2012. In the 'Kedia 2' sheet details of the shares of M/s. Parnneta Industries Ltd. sold by the Bhushan Power and Steel Group family have been recorded under the heading 'new account'. The

above sheet contains the details of cash received by Shrish Chander Shah from Kedia, (i. e., Shri R. K. Kedia of Delhi) on behalf of the Bhushan Group against the payout made on the purchase of shares.

4.2. From the analysis of the trade details of M/s. Parnneta Industries Ltd. received from the Bombay Stock Exchange and enquiries conducted by the Department, it is observed that majority of the shares of M/s. Parnneta Industries Ltd. held by 'Bhushan Power and the Steel Group Family' were sold to (counter parties) entities controlled and managed by Shrish Chander Shah. Some of these entities are given below :

Sr. No.	*Name of the company*
1.	Ailish Traders Pvt. Ltd.
2	Avance Technologies Ltd
3.	Jeshna Muiltltrade Pvt. Ltd.
4.	Kinita Real Estate Pvt. Ltd.
5.	Midway Tradelink Pvt. Ltd.
6.	Addo Constructions Pvt. Ltd.
7.	Adamina Traders Private Limited
8.	Roho Real Estate Private Limited
9.	Midpoint Tradelink Pvt. Ltd.
10.	Aristo Media and Entertainment Private Limited
11.	Gatewayinfracon Private Limited
12.	Adila Traders Private Ltd.
13.	Mahan Industries Ltd.
14.	Ethan Constructions P. Ltd.
15.	V and R Yarns Private Limited
16.	Abu Ah Real Estate Pvt. Ltd.
17.	Shriganesh Spinners Ltd.
18.	Indivar Traders Private Limited
19.	Acacio Tradelink Pvt. Ltd.
20.	Radford Real Estate Private Limited
21.	Gajpal Buildinfra Private Limited
22.	C and K Realtors Private Ltd.
23.	Magan Mercantile Pvt. Ltd.

4.3. These companies are included in the list of 212 companies which have been accepted by Shrish Chander Shah in statements on oath to have been managed and controlled by him. Further,

corroborative sworn affidavits have been given by so called dummy directors of these companies.

5. Further, the analysis of the time difference between the order placed by the assessee and the trade execution has also been carried out on the data received from the Bombay Stock Exchange. It has been found that out of the total 3138 share sale transactions entered into by 'Bhushan Power and the Steel Group Family', mentioned above, 48 per cent. of the total trades were executed within one minute of the order placed in the exchange and more than 71 per cent. orders were executed within five minutes of placing the orders on the exchange (The trading data received from the Bombay Stock Exchange was analysed for time difference of placing of the order and execution of trade).

6. The evidence and statements of the employees of Sirish Chander Shah (SCS) were confronted to him during the course of search and in the post-search proceedings, in his statements referred to above. In these statements he has admitted to have provided various types of accommodation entries against receipt of cash from the clients either directly or through intermediaries. He has also admitted to be engaged in synchronised trading in the shares of various listed companies managed and controlled by him so as to facilitate long-term capital gains to the clients against receipt of cash from them. In these statements Shirish Chander Shah (SCS) recorded under section 132(4) of the Act has himself admitted and accepted that he is engaged in providing accommodation entries against receipt of cash. The modus operandi accommodation entries including exempt long-term capital gains of his statement. The modus operandi followed entries of long-term capital gains, as explained by him in his statement is summarised hereunder :

- The preferential shares are allotted by way of private placement by the listed companies controlled and managed by him to various clients/beneficiaries who approach him for getting accommodation entry of long-term capital gains,
- In certain cases the clients purchase shares from the companies under his control on BOLT at low prices.
- Thereafter, the price of share of the listed companies is artificially raised by way of purchase and sale of shares through the web of companies.
- When the share prices are raised to high levels, the shares of these clients are purchased by the companies and individuals

under his control on BOLT using the cash received from the clients that has been layered in the buyer company/individual's bank account after layering the funds through the group companies.

6.1. A search and seizure action was also carried out on M/s. PIL by the Directorate of Income-tax (Investigation), Ahmedabad on April 9, 2013 at the registered office and the residential premises of the managing director of M/s. PIL Shri Omprakash Anandilal Khandelwal. This search action established that M/s. PIL was only a paper company without any activities and was being used by Shrish Chander Shah for providing various types of accommodation entries including long-term capital gains. The statement of the managing director, Shri Omprakash Anandialal Khnadelwal was recorded under section 132(4) of the Act on May 30, 2013 and May 31, 2013. He in his statement has specifically mentioned that M/s. Parnneta Industries Ltd. has been engaged in providing accommodation entries. He has also stated that the shares of Parnneta Industries Ltd. under his control were transferred to various companies and persons off-market or through stock exchange, as directed by Shrish Chander Shah. He has also stated that the same was done so as to provide and facilitate exempt long-term capital gains using the shares of M/s. Parnneta Industries Ltd. On examination and analysis of the statements of Shri Omprakash Anandilal Khandelwal (OPK), Shrish Chander Shah, referred to above, it is established that Shrish Chander Shah has used the shares of M/s. Parnneta Industries Ltd. for providing long-term capital gains entries against receipt of cash from the clients. The modus operandi as stated by Shrish Chander Shah, Omprakash Anandilal Khandelwal in their statements is summarised hereunder :

* Shrish Chander Shah approaches promoters of defunct listed companies and enters into an arrangement with them to use their companies for giving accommodation entries. He then appoints dummy directors in such companies and opens a bank account of such companies in Mumbai which is operated by him. With regard to Parnneta Industries Ltd. it is clear from the statement of Shrish Chander Shah and Omprakash Anandilal Khandelwal, discussed above.
* To have effective control over the shares of the penny stock companies, the share capital of these penny stock companies is structured by Shrish Chander Shah by allotting a large number

of fresh shares through private placement. The structuring of share capital involves two types of allotment :

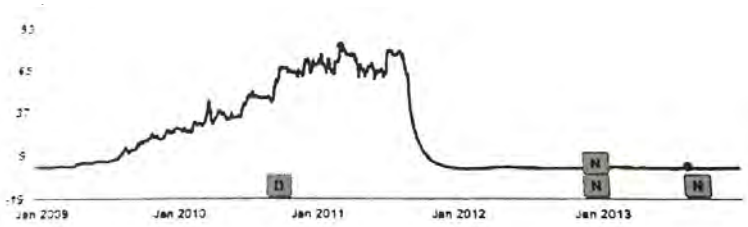
(b) Majority of the shares are allotted a number of private companies which too are under control of Shrish Chander Shah. The investment is made by the private limited companies in the shares of listed companies following the two modus operandi :

* Firstly, the unaccounted cash received from clients is layered into the investing private company which invests in the shares of the listed company and the listed company in turn provides accommodation entry of share capital/premium to the client from whom cash was received.

* Secondly, an artificial structure of share capital of the listed company is created, wherein, private limited company managed by Shrish Chander Shah subscribes to the shares of the listed company. The listed company in turn advances these funds to another private limited company managed by Shrish Chander Shah. This money so received by the second private limited company is layered in the web of companies managed by Shrish Chander Shah and another private limited company invests in the share capital of the listed company. In this manner the cycle of layering and increasing the share capital of the listed company is repeated several times. In this way the share capital of the listed company is artificially structured without actual flow of funds into the entities under the control of Shrish Chander Shah.

Thereafter, the prices of these shares were artificially raised through synchronised trading on the stock exchange amongst the private companies and other entities/persons under control of Shrish Chander Shah or associated with him. After a lapse of around one year to eighteen months from the issue of preference shares, the persons intending to get long-term capital gains are allowed to offload their holding at the artificially inflated prices and the private companies under control of Shrish Chander Shah become counter parties to such trades on the stock exchange. In the case of Parnneta Industries Ltd. the share price was jacked up from Rs. 2.25 per share to Rs. 87.10 per share during a period April 2009 to March 2011. A graphical rep-

resentation of the share price movement of M/s. Parnneta Industries Ltd. is as under :



7. There are a plethora of other evidences in possession of the Department which indicate that M/s. Prraneta Industries Limited is a paper company without any activities and is being used so as to provide various types of accommodation entries including long-term capital gains by Shrish Chander Shah.

7.1. Various other evidence were also gathered from the possession Sh. Praveen Kumar Jain (Pintu *alias* Chintan, a Mumbai based entry operator and a close allay of Shrish Chander Shah and R. K. Kedia) during a search and seizure operation under section 132 of the Income-tax Act, 1961 carried out by the Directorate of Income-tax (Investigation), Mumbai. From the analysis and cross verification of the data seized from R. K. Kedia, Shrish Chander Shah and Praveen Kumar Jain it was gathered that the entries mentioned in their accounts were exactly cross matching. Thus, the entries recorded in the accounts maintained by Pintu and seized in an independent search operation conducted by the Mumbai Directorate are independently correlated with the entries recorded in the evidence seized/ impounded during the course of search in case of Shrish Chander Shah.

7.2 The correlation between the books of account and other documents seized in the case of Shri Shiritish Chander Shah (SCS) independently correlate with evidence seized in the case of Shri Praveen Kumar Jain (*alias* Pintu/Chintan) which is sufficient to establish that the entries recorded in the evidence seized are true, correct and independently verifiable.

7.3 Analysis of books of account of Sirish Chandrakant Shah (SCS), Praveen Kumar Jain (Pintu *alias* Chintan), R. K. Kedia and bank accounts of Bhushan Power and Steel Group was also made and the entries recorded in 'Kedia2 sheet' vis-a-vis payments made from Account No. 0131008700000327 in Punjab National Bank in the name

of M/s. Bhushan Power and Steel Ltd. were cross verified. From this verification/analysis, it is observed that the transactions recorded in the 'Kedia2 sheet' are exactly the same as recorded in the bank statement of Account No. 0131008700000327, Punjab National Bank of M/s. Bhushan Power and Steel Group. Thus, this further establishes that the transactions recorded in the 'Kedia-2 sheet' are authentic and the assessee group was involved in receiving accommodation entries.

7.4. Further the documents found and seized during the search action on Shri R. K. Kedia and related entities on June 13, 2014 by the Directorate of Income-tax (Investigation), New Delhi also corroborate the same facts.

7.5. Further, on the date of search on Bhushan Power and Steel Group, i. e., on February 22, 2014, all the above facts, and findings including complete modus operandi followed by Shrish Chander Shah for giving accommodation entries were confronted to Shri Sanjay Singal while recording his statement on oath under section 132(4) dated March 6, 2014 and March 19, 2014 respectively. During the course of these statements dated March 6/19, 2015 he was not able to satisfactorily reply the questions asked by the authorised officers and finally he voluntarily surrendered unaccounted income of Rs. 250 under section 132(4) in the whole group. This voluntarily surrender of unaccounted income of Rs. 250 crores included the amount of Rs. 159.61 crores of long-term capital gains earned through M/s. Prraneeta Industries Ltd. (PIL) for the assessment years 2011-12 and 2012-13 in the hands of Shri Sanjay Singhal (Rs. 55.57 crores), Sanjay Singhal HUF (Rs. 21.66 crores) and Smt. Aarti Singhal (Rs. 82.38 crores) respectively but no further bifurcation for the remaining amount has been submitted by him thereafter.

8. Considering the facts and circumstances it is prima facie noticed that the income claimed as exempt under the head "long-term capital gain" (LTCG) from the sale of shares of M/s. Prraneeta Industries Ltd. (PIL) is not genuine. Therefore, the long-term capital gain of Rs. 21.65 crores claimed to have been earned through sale of shares of M/s. Prraneeta Industries Ltd. (PIL) has escaped assessment. More so, commission paid by the assessee at 6.5 per cent. of the total sales consideration of Rs. 22.37 crores, which is Rs. 1.4 crores has also escaped assessment, being the amount of commission paid in cash for getting the accommodation entries, as admitted by Sh. R. K. Kedia on

the basis of evidence found during the course of search and seizure operation.

Sr. No.	*Name of the scrip*	*A.Y. 2011-12*			
		Total receipts against sale of shares (Rs. in crores)	*LTCG shown as per return of income (Rs. in crores)*	*Commission @ 6.5% of capital gain (Col. No. 4) (paid in cash) (Rs. in crores)*	*Total (capital gain + commission) (total of columns 3 and 5)*
(1)	*(2)*	*(3)*	*(4)*	*(5)*	*(6)*
1.	Prraneta Industries Ltd.	22,37,80,899.24	21,65,80,899.24	1,40,77,758.43	23,78,58,657.67

9. I have gone through the complete record and perused the details available with the Department and I am satisfied that this is a fit case to issue notice under section 148 as the amount of Rs. 23,78,58,657.67 has not been offered for tax. Therefore, in view of the above, I have reason to believe that the amount of Rs. 23.78 crores has escaped assessment within the meaning of section 147 of the Income-tax Act, 1961."

6.3 In response to the above notice the assessee filed its return of income on April 5, 2016 declaring a total income of Rs. 2,31,150 and requested for supply of reasons recorded under section 147 of the Act which were provided to the authorised representative of the assessee on September 15, 2016. The Assessing Officer mentioned that as the assessee had not filed any objection with respect to the reasons recorded for reopening of the case, therefore, the procedures laid down by the hon'ble Supreme Court in the case of *GKN Driveshafts (India) Ltd.* v. *ITO* [2003] 259 ITR 19 (SC) (Appeal Civil No. 7731 of 2002) were not applicable in the case of the assessee. Accordingly, the Assessing Officer framed the assessment by observing that the transaction of long-term capital gains claimed by the assessee as exempt was to be treated as sham transaction and deserves to be added as income of the assessee under section 68 of the Act along with the unaccounted commission expenses at 6.5 per cent. of the total long-term capital gains of the year for arranging those entries. Accordingly, the addition of Rs. 23.78 crores was made for the year under consideration as per the following details:

Total sale proceeds u/s. 68	Rs. 22,37,80,889
6.5% of NET gain (LTCG) u/s. 69C towards commission expenses	Rs. 1,40,77,758
Total addition to the returned income	Rs. 23,78,58,647

7 Being aggrieved the assessee carried the matter to the learned Commissioner of Income-tax (Appeals) and submitted as under :

"(1) It is humbly submitted that as on the date of search, i. e., February 21, 2014, assessment proceedings for the assessment year 2012-13 had already been completed vide order No. CPC/1213/P4/1306877063 dated January 19, 2014 passed under section 143(1) of the Act (copy enclosed) and no incriminating material had been found during the course of search with respect to the year under appeal.

(2) In this connection, your honour's attention is invited to the provisions of section 153A of the Act the relevant parts of which read as follows :

'153A. (1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139 ;

(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made :

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment year :

Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this sub-section pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate.'

(3) It is implicit in the above provisions that where an assessment order has already been passed for a year within the relevant six assessment years, then the Assessing Officer is duty bound to reopen

those proceedings and reassess the total income but by taking note of the undisclosed income if any, unearthed during the search. The legislative intent behind incorporating the said provisions into the statute book was to establish a live link/undeniable nexus between some incriminating material/document, etc., found/unearthed/discovered in the course of search under section 132 and undisclosed income arising therefrom.

(4) In this regard, it is humbly and respectfully submitted that the provisions of law, as enshrined in section 153A of the Act and as interpreted by various courts, including the Delhi High Court, and jurisdictional Income-tax Appellate Tribunal, Chandigarh from time to time, in a number of cases clearly lay down that only those assessment proceedings which are pending before an Assessing Officer on the date of initiation of the search shall abate and merge into assessment proceedings initiated under section 153A of the Act. Undoubtedly, in such cases the scope of assessment is wide open and would cover matters reflected in the original return of income and also matters reflected from the material seized in the course of search under section 132 of the Act.

(5) However, importantly and pertinently it should be noted that completed proceedings will not merge with the proceedings initiated under section 153A but will survive and their sanctity will, inviolably, have to be respected unless indelibly violated by any incriminating material found during the course of search under section 132 of the Act to put it differently completed proceedings, whether under section 143(3) or even under section 143(1)(a) of the Act can be interfered with by proceedings under section 153A only on the basis of some positively incriminating search material found during the course of action under section 132 of the Act.

(6) In view of the same since no incriminating document pertaining to the year under appeal, i. e., the assessment year 2012-13 has been found during the course of search, it is submitted that no cause lies for the issue of the said notices by resort to the provisions of section 153A of the Act and accordingly the said notices are void ab initio rendering them infructuous.

(7) In this connection reference may also be made to the judgment passed by the hon'ble Delhi High Court in the case of *CIT v. Kabul Chawla* [2016] 380 ITR 573 (Delhi) wherein it has been clearly held that completed assessments can be interfered with by the learned Assessing Officer while making assessment under section 153A only

on basis of some incriminating material unearthed during course of search which was not produced or not already disclosed or made known in course of original assessment. While delivering the aforesaid judgment, their Lordships have analysed the provisions of section 153A as following :

(i) Once a search takes place under section 132 of the Act, notice under section 153A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six assessment years immediately preceding the previous year relevant to the assessment year in which the search takes place.

(ii) Assessments and reassessments pending on the date of the search shall abate. The total income for such assessment years will have to be computed by the Assessing Officers as a fresh exercise.

(iii) The Assessing Officers will exercise normal assessment powers in respect of the six years previous to the relevant assessment year in which the search takes place. The Assessing Officer has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words, there will be only one assessment order in respect of each of the six assessment years in which both the disclosed and the undisclosed income would be brought to tax.

(iv) Although section 153A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the Assessing Officer which can be related to the evidence found, it does not mean that the assessment 'can be arbitrary or made without any relevance or nexus with the seized material. Obviously, an assessment has to be made under this section only on the basis of the seized material'.

(v) In the absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in section 153A is relatable to abated proceedings (i. e., those pending on the date of search and the word 'reassess' to completed assessment proceedings.

(vi) In so far as the pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under section 153A merges into one. Only one assessment shall be made separately for each assessment year on the basis of the findings of the search and any other material existing or brought on the record of the Assessing Officer.

(vii) Completed assessments can be interfered with by the Assessing Officer while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.

(8) Since in the instant case since no incriminating documents/ material or information of any sort has been unearthed/discovered in the search operation under section 132A of the Act the completed assessments cannot be interfered with and accordingly the assessment order is bad in law void and infructuous. In this connection, Your honour's attention is also invited to the following decided case law :

- *CIT* v. *Anil Kumar Bhatia* [2013] 352 ITR 493 (Delhi) ;
- *CIT* v. *Chetan Das Lachman Das* [2012] 254 CTR 392 (Delhi) ;
- *Sanjay Aggarwal* v. *Dy. CIT* [2014] 150 ITD 692 (Delhi) ;
- *Smt. Rashmi Wadhwa* v. *Dy. CIT* (order dated January 18, 2016 in I. T. A. No. 5184/Delhi/2014) passed by the hon'ble Income-tax Appellate Tribunal Delhi Bench, New Delhi ;
- *Siraigo Pharma (P.) Ltd.* v. *Dy. CIT* (order dated January 13, 2016 in I. T. A. No. 1010/Jaipur/2013) passed by the hon'ble Income-tax Appellate Tribunal Jaipur Bench, Jaipur ;
- *Dy. CIT* v. *Himanshu B. Kanakia* [2016] 46 ITR (Trib) 756 (Mum) (order dated January 18, 2016 in I. T. A. No. 3187/ Mum/2014) passed by the hon'ble Income-tax Appellate Tribunal, "H" Bench, Mumbai.

(9) In particular, it may be noted that the jurisdictional Chandigarh Bench of the hon'ble Income-tax Appellate Tribunal in the case of *Mala Builders (P.) Ltd.* v. *Asst. CIT* vide order dated August 23, 2016 in I. T. A. Nos. 433 to 437/Chandi/2014 [2016] 51 ITR (Trib) 272 (Chand) has also unequivocally affirmed the above interpretation of law.

It is respectfully prayed that the above ground may kindly be adjudicated in the light of the submissions made above."

The assessee also submitted the written submission on the merits of the case which is incorporated at page Nos. 124-155 of the impugned order, for the cost of repetition the same is not reproduced herein. However the learned Commissioner of Income-tax (Appeals) did not find merit in the 8

submissions of the assessee who sustained the addition made by the Assessing Officer by passing the combined impugned order.

9 Now, the assessee is in appeal and has challenged the validity of the issuance of initiation of the proceedings under section 147 of the Act by issuing the notice under section 148 of the Act.

10 The learned counsel for the assessee submitted that no incriminating material for the purpose of section 153A of the Act was found at the time of search on the group to which the assessee belongs, which took place on February 21, 2014, therefore the proceedings under section 153A of the Act were dropped in the case of the assessee. However, the Assessing Officer issued the notice dated March 26, 2016 for reopening the assessment under section 147 of the Act read with section 148 of the Act merely on the borrowed satisfaction by entirely relying on unverified third party information /material/statements which had already lost the evidentiary value on want of being material under section 142(3) of the Act and having no presumptive evidentiary value under section 292C of the Act for the lack of having been discovered during the course of search under section 132 of the Act and such pre-existing Departmental data thus having no evidentiary value could not have been utilised as legally admissible tangible material for recording satisfaction inasmuch as the Assessing Officer also knew that the notices under section 131 of the Act to the persons from whom such pre-existing material had been found, had not responded to his summons, therefore, the said material could not have been relied upon for fastening any such tax liability either in the hands of the individual assessees in which case the search was undertaken or in the case of the present assessee, as such the aforesaid material was not information or evidence based on which the Assessing Officer could have arrived at a belief of escapement of income since the same had no live link or nexus with the reasons recorded and escapement of income.

10.1 It was submitted that the basis and fundamental requirement to invoke the provisions of section 147 of the Act for the purpose of validity of the reopening assessment proceedings against the assessee is the existence of a "reason to believe" that the income chargeable to tax has escaped assessment. It was contended that the scope and ambit of the phrase "reason to believe" is well-settled and trite law wherein various decisions including those of the hon'ble apex court have time and again held that the reasons for the formation of belief must have a rationale connection with the information received and there must be some direct nexus or live link between the material coming to the notice of the Assessing Officer for the formation of the belief that there has been escapement of income of the

assessee from assessment in the particular year because of his failure to disclose fully and truly material facts. Reliance was placed on the following case law :

(a) *Calcutta Discount Co. Ltd.* v. *ITO* [1961] 41 ITR 191 (SC).

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

(c) *Sheo Nath Singh* v. *AAC of I. T.* [1971] 82 ITR 147 (SC) ; [1972] 1 SCR 175.

(d) *S. Narayanappa* v. *CIT* [1967] 63 ITR 219 (SC) ; AIR 1967 SC 523.

10.2. It was submitted that the reasons recorded for the resort to the reassessment proceedings and consequent issue of the notice under section 148 of the Act in the instant case was based solely on the information received from the Investigation Wing which had not been independently verified by any degree of application of mind or conducting any such enquiries by the Assessing Officer who merely by relying upon the information provided by the Director of Income-tax during the course of the assessment proceedings without supplementing the same to any degree by application of mind or any independent enquiries of his own has only relied upon a "suspicion" as to the escapement of income and that the relevant legal provisions in this regard specially call for a definite conclusion as to the "reason to believe" as opposed to "reason to suspect". It was reiterated that in the assessee's case there was only a suspicion as to some income having escaped assessment which suspicion cannot by itself sustain any action under section 147/148 of the Act. Reliance was placed on the following case law :

- *Signature Hotels (P.) Ltd.* v. *ITO* [2011] 338 ITR 51 (Delhi) ; [2012] 20 taxmann.com 797 (Delhi).
- *CIT* v. *Smt. Paramjit Kaur* [2009] 311 ITR 38 (P&H).
- *Sarthak Securities Co. (P.) Ltd.* v. *ITO* [2010] 329 ITR 110 (Delhi).
- *CIT* v. *SFIL Stock Broking Ltd.* [2010] 325 ITR 285 (Delhi) ;
- *Pr. CIT* v. *G and G Pharma India Ltd.* [2016] 384 ITR 147 (Delhi).

10.3 It was stated that the reassessment proceedings initiated merely on the basis of the information provided by external source without any independent application of mind by the Assessing Officer were void ab initio. The reliance was placed on the following case law :

- *ITO* v. *Softline Creations (P.) Ltd.* [2016] 51 ITR (Trib) 460 (Delhi) ; (I. T. A. No. 744/Delhi/2012)
- *CIT* v. *Gangeshwari Metal P. Ltd.* [2014] 361 ITR 10 (Delhi) ; [2014] 264 CTR 277 (Delhi)

- *Khatri Projects P. Ltd.* v. *ITO* (I. T. A. No. 4353/Delhi/2016)
- *Devansh Exports* v. *Asst. CIT* (I. T. A. No. 2178/Kol/2017)
- *Moti Adhesive P. Ltd.* v. *ITO* (I. T. A. No. 3133/Delhi/2018)
- *CIT* v. *Oasis Hospitalities (P.) Ltd.* [2011] 333 ITR 119 (Delhi)
- *CIT* v. *Fair Finvest Ltd.* [2013] 357 ITR 146 (Delhi)
- *Sarthak Securities Co. (P.) Ltd.* v. *ITO* [2010] 329 ITR 110 (Delhi)
- *Deepraj Hospital (P.) Ltd.* v. *ITO* [2018] 65 ITR (Trib) 663 (Agra) ; (I. T. A. No. 41/Agra/2017 dated June 1, 2018)
- *Reliance Corporation* v. *ITO* [2017] 55 ITR (Trib) (S.N.) 69 (Mum) ;
- *Pr. CIT* v. *RMG Polyvinyl (I.) Ltd.* [2017] 396 ITR 5 (Delhi) ; [2017] 83 taxmann.com 348 (Delhi)
- *Pr. CIT* v. *Meenakshi Overseas (P.) Ltd.* [2017] 395 ITR 677 (Delhi) ; [2017] 82 taxmann.com 300 (Delhi)
- *Gee Cee Cycle Balls Pvt. Ltd.* v. *ITO* (I. T. A. No. 867/Delhi/2013 dated October 30, 2015)
- *CIT* v. *Goel Sons Golden Estate Pvt. Ltd.* (I. T. A. No. 212 of 2012 dated April 11, 2012)
- *CIT* v. *Vrindavan Farms (P.) Ltd.* [2016] 6 ITR-OL 502 (Delhi) ; I. T. A. Nos. 71, 72 and 84 of 2015 dated August 12, 2015)
- *Dwarka Gems Ltd.* v. *Dy. CIT* (I. T. A. No. 71/Jp/2017)
- *Nirmala Agarwal* v. *Asst. CIT* [2018] 64 ITR (Trib) 658 (Jaipur) ; (I. T. A. Nos. 995 and 996/Jaipur/2016)

10.4 It was further stated that the Income-tax Appellate Tribunal Delhi Bench in the case of *Brij Bhushan Singal* v. *Asst. CIT* [2019] 14 ITR (Trib)-OL 209 (Delhi) (I. T. A. Nos. 1415-1417, 1479-1481, 1483 and 1484/Deli/2018) has held that the documents seized from the premises of third parties cannot be used for making addition in the hands of the assessee without the assessee being granted an opportunity of cross-examination of those parties and that the presumption under section 132(4A)/292C is available only in the case of the person in whose possession and control the documents were found and not in the case of third parties. Accordingly it was submitted that the material which was unreliable piece of evidence and bereft of evidentiary value and thus could not have been entrusted in the hands of the learned Assessing Officer to provide him jurisdiction for reopening the concluded assessments by invoking the provisions of section 147 of the Act.

10.5 It was also stated that the disclosure was made under section 132(4) of the Act amounting to Rs. 250 crores by Sanjay Singal under

duress and the same shall be evident from the fact that bereft of any such incriminating material such an admission was unwarranted. It was further submitted that Shri Sanjay Singal was examined for long hours and the said disclosure was made merely to buy peace which was totally against the Central Board of Direct Taxes Circular No. F. No. 286/2/2003-IT (Investigation) dated March 10, 2003 and F. No. 286/98/2013-IT dated December 18, 2014 wherein the proposition that assessment pursuant to search operation are required to be based on incriminating material discovered as a result of search operation in the case of the assessee and that no reliance should be placed on confessions/admissions of undisclosed income obtained in the course of search has been spelt out in unerring terms by the Central Board of Direct Taxes. It was stated that the Central Board of Direct Taxes has categorically noted such confession, if not based upon credible evidence are later retracted by the concerned assessee while filing returns of income and in these circumstances such confessions during the course of search and seizure and survey operations do serve any useful purpose or have any evidentiary value, therefore, the offer of additional income of Rs. 250 crores and subsequent bifurcation thereof to the extent of Rs. 159.61 crores made by Shri Sanjay Singal in the course of his statement recorded under section 132(4) (and subsequently withdrawn while filing returns in response to the notice under section 153A of the Act do not as per the clear mandate of the Central Board of Direct Taxes, constitute credible evidence for the purpose of reopening/reagitating completed proceedings. It was submitted that the said statement of Shri Sanjay Singal was also withdrawn before the recoding of reasons under section 147 of the Act in the assessee's case and that the Department had not pointed out any incriminating material to prove that such withdrawal/ retraction was not valid. Therefore such a statement being withdrawn and thus non-existent on the date of recoding of satisfaction under section 147 of the Act could not have been used to say that there had been any escapement of income warranting the notice under section 148 of the Act for the years under consideration.

10.6 It was further submitted that the learned Commissioner of Income-tax (Appeals) had made the categorical findings that nothing incriminating material belonging to the assessee was found from the premises of third parties therefore the said third party material/evidence as relied upon by the Department for reopening the assessment, could not have been the basis for formation of belief that the assessee's income had escaped assessment and the same could not have been utilised by the Assessing Officer for the purpose of reopening the assessment under

section 148 of the Act after the proceedings under section 153A of the Act were dropped. It was vehemently argued that the reasons recorded by the Assessing Officer for the purpose of reopening the assessment under section 148 of the Act was based solely on borrowed satisfaction without application of mind by the Assessing Officer and moreover the reasons recorded by the Assessing Officer were nothing but the exact replica of the assessment order passed under section 153A of the Act in the case of Shri Sanjay Singhal, Aarti Singhal, and Aniket Singhal, therefore, the reopening of the assessment merely on the basis of borrowed satisfaction was insufficient for the purpose of sustaining any such addition under section 148 of the Act. The learned counsel for the assessee stated that the reasons recorded for reopening the assessment under section 147 of the Act was a reproduction of the orders under section 153A in the cases of the aforesaid assessee. In support of the above, a chart was furnished which read as under :

Reasons for reopening as reproduced in Shri Sanjay Singal (HUF) order for A.Y. 2011-12 - Para No. and Page No.	*Corresponding para in assessment order u/s. 153A in the case of Sanjay Singhal for AY 2011 -12*
Para 1.1, page 3	Para 8, page 34
Para 2.1, page 4	Para 1.1, page 65, para 1.2, page 69
Para 2.2, page 5	Para 1.4, page 69
Para 3.1, page 5	Para 2. page 70
Para 3.2, page 6	Para 2.1, page 71
Para 3.3. page 6	page 72
Para 3.3.1, page 6	Para 2.3, page 74
Para 3.3.2. page 6	Para 2.3.1, page 74
Para 3.4, page 7	Para 2.4, page 75 and paras 4.1 to 4.22, pages 84-89
Para 3.6, page 8	Para 2.5, page 75
Para 3.7, page 8	Para 2.6, page 76
Para 3.8, page 9	Para 2.7, page 77
Para 3.9, page 9	Para 2.8, page 77
Para 3.10, page 9	Para 2.9, page 77
Para 3.1!, page 9	Para 2.10, page 78
Para 3.12, page 10	Para 2.1 l.page 78
Para 3.13, page 10	Para 2.11 (12th line onwards), page 79
Para 3.14, page 10	Para 2.12, page 79
Para 3.15, page 11	Para 2.13, page 80
Para 3.16, page 11	Para 2.14, page 81

Para 3.17, page 12	Para 2.15 and 2.16, page 81
Para 3.19, page 13	Para 2.17, page 82
Para 4.1 to 4.9, pages 14-1 7	Para 3 page 86 - annexure to the 153A order (SCN)
Para 5, page 17	Paras 4,4.1 to 4.22 pages 83-89
Para 6.1, page 18	Para 5, page 89
Para 6.2, page 18	Para 5.1, page 90
Para 6.3, page 19	Para 5.2, page 90
Para 6.4, page 20	Para 5.3, page 91
Para 7.1, page 20	Para 6, pages 91-92
Para 7.3, page 21	Para 6.1, page 92
Para 7.4, page 21	Para 6.2 page 93
Para 7.5, page 22	Para 6.3, page 93
Para 7.6, page 22	Para 6.4 page 94
Para 7.8, page 22	Para 6.5, page 95
Para 7.9, page 23	Para 6.6, page 95
Para 8, page 23	Para 2.9, page 128

10.7 It was emphasised that the assessment in the case of the assessee for the assessment years 2011-12 to 2013-14 stood completed under section 143(1) of the Act and the time-limit for issuing notices under section 143(2) of the Act stood expired as on the date of reopening of the assessment and that even if scrutiny assessments under section 143(3) of the Act were to have been made, the same would not fulfil the criteria laid down under section 142(2) of the Act since the Assessing Officer had not conducted any such independent enquiry of his own but had merely relied on borrowed satisfaction, on the basis of third party material/statements which could in no manner be termed to be incriminating in nature, even for the purpose of section 153A or 153C of the Act to render the same sufficient for the purpose of section 148 of the Act. Therefore, when none of the said material and/or statements were independently examined by the Assessing Officer so as to put such material to the assessee under section 142(3) or for that to even to sustain the addition under section 143(3) of the Act then how the same could have been utilised for reopening the assessment under section 148 of the Act in the assessee's case. It was submitted that what could not have been done directly was not permissible to be done obliquely, meaning thereby, whatever is prohibited by law to be done could not have been legally effected by an indirect and circuitous contrivance. Reliance was placed on the following case law :

- *CIT* v. *Kelvinator of India Ltd.* [2002] 256 ITR 1 (Delhi) [FB].

- *Windson Electronics (P.) Ltd.* v. *Union of India* [2004] 269 ITR 481 (Cal).
- *Smt. Durgabati and Smt. Narmadabala Gupta* v. *CIT* [1956] 30 ITR 101 (Patna).
- *Raja Yadvendra Datt Dube* v. *State of U. P.* [1964] 54 ITR 506 (All).
- *Babulal Lath* v. *Asst. CIT* [2002] 83 ITD 691 (Mum).

10.8 It was further submitted that as the third party material had no presumptive value with respect to section 292C of the Act then the burden of proof lies with the Department which had not been discharged and thus the said third party Departmental material/evidences/statements first have to be proved to have some sort of live casual nexus with the undisclosed income of the assessee to sustain the addition under section 148 of the Act, especially when the scope of what constitutes a "full and true" disclosure of material facts is also well-settled law where the assessee is only required to disclose the primary facts and nothing more. It was contended that the Assessing Officer was required to show that there existed a reason to believe (based on credible and tangible material) that the assessee has failed to fully and truly disclose the primary facts required for the purposes of assessing its case and such "reason to believe" for the purposes of reopening the assessment under section 147 of the Act read with section 148 of the Act cannot be based on surmises, conjectures or occasioned by a change in opinion but must be based on cogent material which establishes a live casual nexus between the information and inference so drawn by the Assessing Officer. Reliance was placed on the judgment of the hon'ble Delhi High Court in the case of *CIT* v. *Multiplex Trading and Industrial Co. Ltd.* [2015] 378 ITR 351 (Delhi) ; [2015] 63 taxmann.com 170 (Delhi). It was contented that the reasons recorded by the Assessing Officer were not reasonable and the same were vague in nature to establish that the income of the assessee had escaped assessment for reopening the assessment under section 148 of the Act. Therefore, the reassessment proceedings in the assessee's case were bad in law, void ab initio and consequent addition were unwarranted, unsustainable and deserves to be quashed.

11 In his rival submission the learned standing counsel strongly supported the impugned order passed by the learned Commissioner of Income-tax (Appeals) and further submitted that the Assessing Officer had the information that the assessee had wrongly claimed exempt income from sale of shares of various listed companies as such the income escaped the assessment. Accordingly, notice under section 148 of the Act was issued and the assessee did not raise any objection. It was further submitted that during

the second search on June 13, 2014 incriminating documents were found from the premises of Shri R. K. Kedia which were not doubted and established that the assessee's income escaped the assessment and thus documents/material found during the course of search could have been used for reopening the assessment under section 148 of the Act. It was further submitted that Shri Sanjay Singal in his statement recorded under section 132(4) of the Act offered the income for taxation which was later on retracted without any reason, therefore the Assessing Officer rightly held that the income of the assessee escaped the assessment and was justified in issuing the notices under section 148 of the Act as the income of the assessee escaped the assessment. It was accordingly submitted that the reassessment framed by issuing the notices under section 147 read with section 148 of the Act was fully justified.

As regards to the dropping of proceedings under section 153A of the Act **12**
in the assessee's case, it was submitted that the provision of section 153A of the Act could not be invoked unless documents seized, etc., belongs to a person other than the person searched. However the case of an assessee can be reopened under section 148 of the Act, where the documents seized in the case of searched person, i. e., other than the assessee gives rise to a reasonable inference of escapement of income in the hands of third person, i. e., the assessee. Thus, the independent power available to the Assessing Officer of the third person under section 147 of the Act cannot be artificially curtailed. It was further submitted that for usurping jurisdiction under section 147 of the Act the documents/papers found in the course of search need not belong to the person other than the person searched and mere demonstrable connection or live link to such third person revealing escapement of income is adequate to invoke the remedy under section 147 of the Act. It was stated that in contrast to the provision of section 153C of the Act the Assessing Officer can invoke the provision of section 147 of the Act independently on arriving at a conclusion of escapement of income for a given assessment year regardless of satisfaction of the Assessing Officer of the searched person and the two sections, i. e., 147 and 153C of the Act operate quite differently. And that the scheme of the Act does not suggest that mere search action revealing incriminating material against the person other than searched person would automatically oust the power of the Assessing Officer over the assessee concerned under section 147 of the Act. Therefore, the action of the Assessing Officer under section 147 of the Act in the assessee's case was within the four corners of law and could not be faulted.

13 It was further stated that in the assessee's case where the onerous proceedings under section 153C of the Act has not been invoked and could not possibly be invoked, there was no impediment of initiating the proceedings under section 147 of the Act by the Assessing Officer. Reliance was placed on the decision of the Income-tax Appellate Tribunal, Ahmedabad Bench "B" in the case of *Shailesh S. Patel* v. *ITO* reported at [2018] 97 taxmann.com 570 (Ahd.-Trib), copy of the same was furnished which is placed on record.

14 We have considered the submissions of both the parties and perused the material available on the record. In the present case, it is not in dispute that a search and seizure operation under section 132 of the Act took place on February 21, 2014 in the case of Bhushan Power and Steel Group to which the assessee belongs. The basis for the search was certain pre-existing third party material/statement. However, no incriminating material for the purpose of section 153A was found. The Assessing Officer issued the notice dated January 29, 2015 under section 153A of the Act to the assessee and also issued notice under section 142(1) of the Act dated August 12, 2015 seeking details of long-term capital gains claim in the income-tax return, ledger of purchaser/seller in the books of the assessee(s) and cash flow statement, the Assessing Officer also issued show-cause notice dated October 20, 2015 and November 9, 2015. Thereafter, the Assessing Officer sought approval from the learned Additional Commissioner of Income-tax vide letter dated January 8, 2016 for dropping the proceedings under section 153A of the Act in the case of the assessee and the approval was granted on January 13, 2016. Accordingly, the proceedings under section 153A of the Act in the case of the assessee were dropped but the Assessing Officer proceeded to issue notice under section 147 read with section 148 of the Act for reopening the assessment by issuing the notice dated March 26, 2016 and recording the reasons which are reproduced in para 3 at page Nos. 3 to 12 of the assessment order dated December 29, 2016.

15 On a perusal of the aforesaid reasons recorded in the assessment order it would be clear that the notice under section 153A of the Act dated January 29, 2015 for the assessment years 2008-09 to 2013-14 was issued to the assessee who in response to the said notice filed the submissions on February 23, 2015. Thereafter, notice under section 143(2) was issued and duly served upon the assessee on August 10, 2015. In the present case, the Assessing Officer noticed that the name of the assessee was not appearing on warrant of authorisation, he therefore request to the Assistant Commissioner of Income-tax to drop the notice issued under section 153A and approval for dropping the proceedings was received vide letter dated

January 13, 2016, accordingly the proceedings under section 153A of the Act were dropped. The Assessing Officer thereafter initiated the proceedings under section 147 of the Act and issued the notice dated March 26, 2016 to the assessee under section 148 of the Act on the basis that search and survey operation were conducted on numerous entry operators and their beneficiaries under section 132 of the Act. The Assessing Officer also mentioned that the income-tax returns of the assessee revealed that the assessee had claimed exempt income from sale of shares of various listed companies which shows that all the material on the basis of which the reopening under section 147 of the Act was done, was already available on the record, as the Assessing Officer himself admitted that the assessee claimed the long-term capital gains as exempt. Therefore, at the most if the addition was required to be made that could have been done in the regular assessment particularly when the notice under section 143(2) had already been issued to the assessee. However the Assessing Officer chose to issue the notice under section 148 of the Act on the basis of the information received from the Directorate of Investigation Wing, Ahmedabad and Delhi, etc.

15.1. On the issue relating to the reopening under section 148 of the Act on the basis of information received from the Investigation Wing, the hon'ble Delhi High Court in the case of *Pr. CIT* v. *G and G Pharma India Ltd.* (supra) held as under (headnote) :

> "The basic requirement of law for reopening an assessment is application of mind by the Assessing Officer, to the materials produced prior to reopening the assessment, to conclude that he has reason to believe that income has escaped assessment. Unless that basic jurisdictional requirement is satisfied a post mortem exercise of analysing materials produced subsequent to the reopening will not make an inherently defective reassessment order valid."

It has further been held as under (headnote) :

> "that once the date on which the so-called accommodation entries were provided was known, it would not have been difficult for the Assessing Officer, if he had in fact undertaken the exercise. To make a reference to the manner in which those very entries were provided in the accounts of the assessee, which must have been tendered along with the return, which was filed on November 14, 2004 and was processed under section 143(3) of the Act. Without forming a prima facie opinion, on the basis of such material, it was not possible for him to have simply concluded that it was evident that the assessee-company has introduced its own unaccounted money in its bank by way of

accommodation entries. The basic jurisdictional requirement was application of mind by the Assessing Officer to the material produced before issuing the notice for reassessment. Without analysing and, forming a prima facie opinion on the basis of material produced, it was not possible for the Assessing Officer to conclude that he had reason to believe that income had escaped assessment."

15.2 On a similar issue the hon'ble jurisdictional High Court in the case of *CIT* v. *Smt. Paramjit Kaur* (supra) has held as under (headnote) :

"that the Assessing Officer had not examined the information received from the survey circle before recording his own satisfaction of escaped income and initiating reassessment proceedings. The Assessing Officer had thus acted only on the basis of suspicion and it could not be said that it was based on belief that the income chargeable to tax had escaped income. The Assessing Officer had to act on the basis of 'reasons to believe' and not on 'reasons to suspect'. The Tribunal rightly concluded that the Assessing Officer had failed to incorporate the material and his satisfaction for reopening the assessment and, therefore, the issuance of notice under section 148 of the Act for reassessment proceedings was not valid."

15.3 Similarly, the hon'ble Delhi High Court in the case of *Sarthak Securities Co. P. Ltd.* v. *ITO* (supra) held as under (headnote) :

"that the formation of belief was a condition precedent as regards the escapement of the tax pertaining to the assessment year by the Assessing Officer. The Assessing Officer was required to form an opinion before he proceeded to issue a notice. The validity of reasons, which were supposed to sustain the formation of an opinion, was challengeable. The reasons to believe were required to be recorded by the Assessing Officer. Once the ingredients of section 147 were fulfilled, the Assessing Officer was competent in law to initiate the proceedings under section 147. The Assessing Officer was aware of the existence of the four companies with whom the assessee had entered into transaction. Both the orders showed that the Assessing Officer was made aware of the situation by the Investigation Wing and was no mention that these companies were fictitious companies. Neither the reasons in the initial notice nor the communication providing reasons remotely indicated independent application of mind. Though conclusive proof was not germane at this stage the formation of belief must be on the base or foundation or platform of prudence which a reasonable person was required to apply. From the perusal of the reasons recorded and the order of rejection objections, the names of the

companies were available with the authority their existence was not disputed. The assessee in its objections had stated that the companies had bank accounts and payments were made to the assessee through banking channel. The identity of the companies was not disputed. Under these circumstances, the initiation of proceedings under section 147 and issuance of notice under section 148 of the Act were to be quashed."

In the present case also, the Assessing Officer acted on the basis of **16** information received from the Investigation Wings of the Department and had not independently verified from the record available to him in the form of return of income filed by the assessee. So there was only suspicion that some income having escaped assessment which cannot by itself be sufficient to sustain the action under section 147 read with section 148 of the Act.

16.1 In the instant case, the Assessing Officer mentioned that the statement of Shri Sanjay Singal was recorded during the course of search under section 132(4) of the Act a disclosure was made amounting to Rs. 250 crores and subsequently in the course of his another statement recorded under section 132(4) of the Act bifurcation thereof to the extent of Rs. 159.61 crores was made by Shri Sanjay Singal. Later on the said statement was withdrawn while filing the returns in response to the notices issued under section 153A of the Act that the proceedings in the assessee's case were dropped. In this regard it is relevant to discuss the Central Board of Direct Taxes Circular No. F. No. 286/2/2003-IT (Investigation) dated March 10, 2003 and F. No. 286/98/2013-IT dated December 18, 2014 which clearly state that the assessment made pursuant to search operation are required to be based on the incriminating material discovered as the result of search operation in the case of the assessee and that no reliance should be placed on confessions/admissions of undisclosed income obtained in the course of search since such confession, if not based upon credible evidence are later retracted by the concerned assessee while filing the return of income and in these circumstances such confession during the course of search and seizure/survey operation do serve any useful purpose or have any evidentiary value. In the present case, the statement under section 132(4) of the Act by Shri Sanjay Singal was withdrawn before recording the reasons under section 147 of the Act in the assessee's case by the Assessing Officer

16.2. In the instant case, the reopening of the assessment in the assessee's case was based solely on the borrowed satisfaction which is clear from the reasons recorded in the body of the assessment order by the

Assessing Officer wherein the facts recorded in the assessment orders passed under section 153A of the Act in the cases of Shri Sanjay Singal, Smt. Aarti Singal and Shri Aniket Singal had been mentioned which is clear from the details submitted by the assessee in the form of the chart reproduced in the former part of this order at page Nos. 18 and 19.

17 From the above said facts it would be clear that the reopening in the assessee's case by the Assessing Officer was merely based on the borrowed satisfaction drawn from the cases of Shri Sanjay Singal, Smt. Aarti Singal, Shri Aniket Singal which was not sufficient for the purposes of sustaining any addition made under section 147 read with section 148 of the Act. In the instant case the Assessing Officer in the reasons recorded has mentioned that the search conducted on numerous entry operators and their beneficiaries revealed that the assessee had received huge amount of accommodation entries in the garb of exempt long-term capital gains. Therefore, if any action was required to be done on the basis of certain documents found from other persons during the course of search then the assessment could have been framed under section 153C of the Act but no such action was taken in the assessee's case rather the action was taken indirectly under section 147 read with section 148 of the Act. On a similar issue, their Lordships of the hon'ble Delhi High Court in the case of *CIT* v. *Kelvinator of India Ltd.* (supra) observed at page No. 15 that "it is well settled principle of law that what cannot be done directly cannot be done indirectly".

17.1 Similarly, the hon'ble Gujarat High Court in the case of *Cargo Cleaning Agency (Gujarat)* v. *Jt. CIT* [2008] 307 ITR 1 (Guj) held as under (headnote) :

> "The entire scheme for bringing to tax income which has escaped assessment under sections 147 to 153 of the Act specifically relates to a specific assessment year and different time limits are provided at different stages which are all interlinked and commence from the end of the relevant assessment year. The definition of 'assessment year' as provided in section 2(9) of the Act means the period of 12 months commencing on the first day of April every year. This definition cannot be made applicable to the term 'block period' which has been defined by section 158B(a) of the Act. On a plain reading the concept of block period could not take within its fold the meaning of an assessment year. Similarly, the term 'assessment year' by its very definition, could not be read to mean 'block period'.
>
> The entire scheme under Chapter XIV of the Act, more particularly from sections 147 to 153 of the Act pertaining to reassessment and

the special procedure for assessing the undisclosed income of the block period under Chapter XIV-B of the Act are not only separate and distinct from each other, but if an effort is made to incorporate the scheme under Chapter XIV of the Act for the purpose of assessment of the block period there is a conflict between the provisions which becomes apparent on a plain reading. In the circumstances, by the established rules of interpretation, unless and until a plain reading of the two streams of assessment procedure does not result in the procedures being independently workable, the question of resolving the conflict would not arise. But in the light of the provisions of section 158BH of the Act once there is a conflict between the two streams of procedure the provisions of Chapter XIV-B of the Act shall prevail and have primacy. Once assessment has been framed under section 158BA of the Act in relation to undisclosed income for the block period as a result of search there is no question of the Assessing Officer issuing notice under section 148 of the Act for reopening such assessment as the said concept is repugnant to the special scheme of assessment of undisclosed income for the block period. The first proviso under section 158BC(a) of the Act specifically provides that no notice under section 148 of the Act is required to be issued for the purpose of proceedings under Chapter XIV-B."

17.2 On a similar issue the co-ordinate Bench of the Income-tax Appellate Tribunal, Delhi Bench "A" in the case of *Adarsh Agrawal* v. *ITO* [2020] 77 ITR (Trib) (S.N.) 52 (Delhi) in I. T. A. No. 777/Delhi/2019 for the assessment year 2010-11 vide order dated January 14, 2020 by following the decisions of the Income-tax Appellate Tribunal, Visakhapatnam Bench in the case of *G. Koteswara Rao v. Dy. CIT* [2015] 64 taxmann.com 159 (Vizag) and the Income-tax Appellate Tribunal Amritsar Bench in the case of *ITO* v. *Arun Kumar Kapoor* [2011] 140 TTJ 249 (Asr) held in paras 8.2 and 8.3 as under :

"8.2. Since Shri Naresh Sabharwal has retracted from the fact of taking any loan from the assessee and genuineness of the agreement is itself in doubt which was found during the course of search and is not corroborated by any evidence or material on record, therefore, such photo copy of the agreement cannot be relied upon by the Assessing Officer for the purpose of initiating the reassessment proceedings in the case of the assessee. It is an admitted fact that in the present case the agreement in question was found during the course of search in the case of Shri Naresh Sabharwal and proceedings under section 153A have been initiated against him. Therefore, the

agreement in question have been transferred by the Assessing Officer of the person searched to the Assessing Officer of the assessee for the purpose of taking remedial action in the matter. It is well-settled law that in the case of assessment made on the assessee consequent to the search in another case, the Assessing Officer is bound to issue notice under section 153C and thereafter proceed to assess the income under section 153C and if Assessing Officer had proceeded with reassessment under section 147/148 of the Income-tax Act and passed the order under section 143(3)/148 of the Income-tax Act, the same would be illegal and arbitrary and without jurisdiction. We rely upon the order of the Income-tax Appellate Tribunal, Visakhapatnam Bench in the case of *G. Koteswara Rao* (supra). In the case of *ITO* v. *Arun Kumar Kapoor* [2011] 140 TTJ 249 (Asr-ITAT) (paper book at page 71), the Income-tax Appellate Tribunal, Amritsar Bench held as under :

'On a perusal of section 153C, it would be clear that the provisions of this section are applicable which supersedes the applicability of provisions of sections 147 and 148. In the instant case, the documents were seized during the search under section 132 and the same were sent to the Assessing Officer of the assessee and, thus, the Commissioner (Appeals) has correctly observed that only the provision in which any assessment could be made against the assessee was section 153C, read with section 153A. It was also apparent from the record that the officer at Delhi had mentioned in his letter that the necessary action may be taken as per law under section 153C/148. Hence, notice issued under section 148 and proceedings under section 147 by the Assessing Officer were illegal and void ab initio. In view of the provisions of section 153C, section 147/148 stands ousted. In the instant case, the procedure laid down under section 153C has not been followed by the Assessing Officer and, therefore, assessment has become invalid. The Commissioner (Appeals) was justified in following the ratio laid down by the Supreme Court in the case of *Manish Maheshwari* v. *Asst. CIT* [2007] 289 ITR 341 (SC) ; 159 Taxman 258 (SC) wherein it has been held that if the procedure laid down in section 158BD is not followed, block assessment proceedings would be illegal. The Commissioner (Appeals) has correctly observed that the provisions of section 153C are exactly similar to the provisions of section 158BD in block assessment proceedings. Thus, considering the entire facts and the circumstances of the case, the

Commissioner (Appeals) was fully justified in quashing the reassessment order.'

8.3. The other decisions relied upon by the learned counsel for the assessee are on the same proposition. Considering the facts of the case in the light of the above decisions, it is clear that loan agreement was found during the course of search in the case of Shri Naresh Sabharwal which is handed-over to the Assessing Officer of the assessee and addition is made only on that basis. Therefore, there was no justification for the Assessing Officer to have been initiated proceedings under section 147/148 of the Income-tax Act. The correct course of action would have been to proceed against the assessee under section 153C of the Income-tax Act. Therefore, initiation of reassessment proceedings under section 147/148 of the Income-tax Act is wholly invalid, void and bad in law. Since the correct procedure have not been adopted by the Assessing Officer and there is no justification to initiate the reassessment proceedings against the assessee, we set aside the orders of the authorities below and quash the reopening of the assessment. Resultantly, all additions stands deleted."

18 In the present case also, if any material was found relating to the assessee during the course of search on third parties then the correct course of action would have been to proceed against the assessee under section 153C of the Act and there was no justification for the Assessing Officer to initiate the proceedings under section 147 read with section 148 of the Act. So respectfully following the aforesaid referred to orders of the co-ordinate Benches of the Income-tax Appellate Tribunal, we are of the view that there was no justification on the part of the Assessing Officer to initiate the reassessment proceedings under section 147 read with section 148 of the Act against the assessee. Accordingly, the said order of the Assessing Officer is set aside and quashed.

19 Since we have quashed the assessment order dated December 29, 2016 under section 147 read with section 148 of the Act on the legal ground raised by the assessee therefore no findings are given on other ground raised on the merits by the assessee.

20 The facts in other assessment years, i. e., the assessment years 2012-13 and 2013-14 in I. T. A. Nos. 703 and 704/Chd/2018 are similar as were involved in I. T. A. No. 702/Chd/2018 for the assessment year 2011-12, therefore our findings given in the former part of this order shall apply mutatis mutandis.

21 Before parting, we may add that the order could not be pronounced earlier due to non-functioning of the Benches on account of curfew/lockdown

in the wake of COVID-19 Pandemic in the Union Territory of Chandigarh. It is also relevant to point out that in similar circumstances the Income-tax Appellate Tribunal, Mumbai "F" Bench in I. T. A. No. 6103/Mum/2018 for the assessment year 2013-14 in the case of *Dy. CIT* v. *JSW Ltd.* [2020] 79 ITR (Trib) 585 (Mumbai) vide order dated May 14, 2020 observed as under (page 591) :

> "However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on January 7, 2020, this order thereon is being pronounced today on 14th day of May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income-tax (Appellate Tribunal) Rules 1963, which deals with pronouncement of orders, provides as follows :
>
> '(5) The pronouncement may be in any of the following manners :—
>
> (a) The Bench may pronounce the order immediately upon the conclusion of the hearing ;
>
> (b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement ;
>
> (c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily (emphasis supplied by us now) be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.'
>
> Quite clearly, 'ordinarily' the order on an appeal should be pronounced by the Bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression 'ordinarily' has been used in the said rule itself. This rule was inserted as a result of directions of the hon'ble jurisdictional High Court in the case of *Shivsagar Veg. Restaurant* v. *Asst. CIT* [2009] 317 ITR 433 (Bom) wherein their Lordships had, inter alia, directed that 'We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the apex court in the case of *Anil Rai* v. *State of Bihar* [2001] 7 SCC 318 and to issue appropriate administrative directions to all the

Benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile (emphasis, by underlining, supplied by us now), all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment'. In the ruled so framed, as a result of these directions, the expression 'ordinarily' has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any 'extraordinary' circumstances.

Let us in this light revert to the prevailing situation in the country. On March 24, 2020, the hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income-tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial work all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that the hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated May 6, 2020 read with order dated March 23, 2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that 'In case the limitation has expired after March 15, 2020 then the period from March 15, 2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown'. The hon'ble Bombay High Court, in an order dated April 15, 2020, has, besides extending the validity of all interim orders, has also observed that, 'It is also clarified that while calculating time for disposal of matters made time-bound by this court, the period for which the order dated March 26, 2020 continues to operate shall be added and time shall stand extended accordingly',

and also observed that 'arrangement continued by an order dated March 26, 2020 till April 30, 2020 shall continue further till June 15, 2020'. It has been an unprecedented situation not only in India but all over the world. The Government of India has, vide notification dated February 19, 2020, taken the stand that, the corona virus 'should be considered a case of natural calamity and FMC, (i. e., force majeure clause) may be invoked, wherever considered appropriate, following the due procedure . . . .'. The term 'force majeure' has been defined in *Black's Law Dictionary*, as 'an event or effect that can be neither anticipated nor controlled'. When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an 'ordinary' period.

In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time-limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act, 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of *Otters Club v. DIT(E)* [2017] 392 ITR 244 (Bom), the hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days but then in the present situation the hon'ble Bombay High Court itself has, vide judgment dated April 15, 2020, held that directed 'while calculating the time for disposal of matters made time-bound by this court, the period for which the order dated March 26, 2020 continues to operate shall be added and time shall stand extended accordingly'. The extraordinary steps taken suo motu by the hon'ble jurisdictional High Court and the hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary

period during which the normal time limits are to remain in force. In our considered view, even without the word 'ordinarily', in the light of the above analysis of the legal position, the period during which lockout was in force is to be excluded for the purpose of time limits set out in rule 34(5) of the Income-tax (Appellate Tribunal) Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the Benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalised, but then, in our considered view, no such exercise was required to be carried out on the facts of this case."

In the result, the appeals of the assessee are allowed. 22

Order pronounced in the open court on June 19, 2020 23

[2020] 81 ITR (Trib) 419 (Chandigarh)

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

BLUE COAST INFRASTRUCTURE DEVELOPMENT P. LTD.

v.

DEPUTY COMMISSIONER OF INCOME-TAX

N. K. SAINI ***(Vice-President)*** and
SANJAY GARG ***(Judicial Member)***

December 11, 2019.

SS ▸ ITA 1961, ss 147, 148
AY ▸ 2008-09
HF ▸ Assessee

REASSESSMENT—CAPITAL GAINS—ASSESSING OFFICER AWARE THAT NECESSARY ENQUIRIES MADE INTO CAPITAL GAINS ARISING TO ASSESSEE NOT ONLY BY HIS OFFICE BUT ALSO BY INVESTIGATION WING—NO REASON TO BELIEVE TO FORM INCOME HAD ESCAPED ASSESSMENT—CONSEQUENT REASSESSMENT ILLEGAL—INCOME-TAX ACT, 1961, SS. 147, 148.

CAPITAL GAINS—CAPITAL ASSET—AGRICULTURAL LAND—PERMISSION FOR CHANGE OF USER GRANTED BY VILLAGE PANCHAYAT OR LAND REVENUE AUTHORITIES—NOT SUFFICIENT TO CLASSIFY LAND AS RESIDENTIAL LAND UNTIL AND UNLESS NATURE AND USER OF LAND ACTUALLY

CHANGED BY AN OVERT ACTIVITY—ASSESSEE NOT SHOWING POSITIVE INCOME—NOT ENOUGH TO HOLD THAT ASSESSEE DID NOT CARRY OUT ANY AGRICULTURAL ACTIVITY—INCOME-TAX ACT, 1961.

The assessee declared its income for the year 2008-09 at Rs. 57,000. The Assessing Officer subsequently gathered information that the assessee had purchased land in the financial year 2001-02, which the assessee sold during the financial year 2007-08 relevant to the assessment year 2008-09 but the assessee had not offered any capital gains on the transaction. He reopened the assessment holding that mere purchasing of agricultural land would not make the assessee an agriculturist and that the assessee could not establish that the land was not chargeable to capital gains tax. He computed the capital gains and made the addition to the income of the assessee. The Commissioner (Appeals) confirmed the addition. On appeal :

Held, *(i) that the fact that the assessee-was a construction company and that the land was not purchased with an intention to carry out agricultural activities was not sufficient to hold that the land was not an agricultural land. The assessee had proved on the file with sufficient documents in the shape of revenue records that the land till date had been classified as orchard zone. Even when the earlier owner in the year 1994 had applied for change of user of land from agriculture to residential, an actual survey at site was carried out by the Land Revenue authorities who reported that the land was a mixed garden. No evidence had been pointed out to show that the nature of land had ever been changed either by the earlier purchaser or by the assessee. Merely because permission for change of user was granted by the village panchayat or the Land Revenue authorities, that itself was not sufficient to classify the land as residential land until and unless the nature and user of the land was actually changed by an overt activity. Though the permission for change of user was granted and renewed from time to time the nature of the land was never changed. The Assessing Officer had mentioned that permission for construction on the land was renewed from time to time up to the year 2009 and thereafter also. The fact that the change of land user was applied for and renewed till the sale of the land by the assessee proved that the user or to say the nature of the land was not changed and that was why the renewal of the permission was sought from time to time. Had the nature of the land ever changed to residential by any of the occupier of the land, there was no question of seeking and granting of renewal of the permission for change of land user. Even the fact that the land was an orchard had not been denied or refuted by the Revenue authorities. The assessee had also explained that since the land was situated within 200 meters of the river Mandova, no*

construction could be carried out. The previous owner had retained the portion of the land which was 200 metres away from the river Mandova. Though initially the intention of the assessee might have been to develop some construction project, due to the practical problems in implementing it, the assessee decided not to change the user of the land and, therefore, continued to maintain it in its original and actual form, that was as an orchard. The assessee furnished the evidence before the authorities that it had employed two employees and further developed the orchard by putting efforts, i. e., by weeding undesired growth of wild plants, by clearing bushes grown between the food bearing trees, pruning the food bearing trees and to further develop and enhance the yield of fruit crops such as cashew, mangoes, jackfruit and coconut. The Assessing Officer could not differentiate between traditional agriculture and horticulture. The case of the assessee specifically was that it had been developing and maintaining an orchard. Merely because the assessee did not show positive income from the agricultural activity that itself was not enough to hold that the assessee did not carry out any agricultural activity.

(ii) That although the Assessing Officer had information coming into his possession that the assessee had sold the property but had not returned or paid the capital gains tax, he was also aware that the necessary enquiries were made in this respect not only by his office but also by the Investigation Wing that too not only during the survey action at the premises of the assessee carried out under section 133A but also thereafter. The assessee duly explained the transaction and explained that the land being agricultural and not falling within the definition of capital asset under section 2(14) hence was not exigible to capital gains tax. The Assessing Officer based his reasons for reopening of the assessment on the information received from the Deputy Commissioner which did not support the reasoning given by the Assessing Officer. When the very reasons on the basis of which the reopening, allegedly, could not form the basis of forming the belief by the Assessing Officer that the income of the assessee had escaped assessment, the consequential reassessment order formed by the Assessing Officer under section 147 was illegal and the order was accordingly quashed.

Cases referred to :

CIT *v.* Maltibai R. Kadu (Smt.) [2015] 374 ITR 531 (Bom) (para 14)

CIT *v.* Satinder Pal Singh [2010] 188 Taxman 54 (P&H) (para 14)

CIT (Asst.) *v.* Sunil G. Mathreja (I. T. A. No. 6562/Mumbai/2011 dated March 7, 2014) (para 14)

ITO *v.* Chaganlal Lalji Aswin (I. T. A. No. 857/Mds/2011 dated October 21, 2011) (para 14)

ITO *v.* Lakhmani Mewal Das [1976] 103 ITR 437 (SC) (para 10)

ITO *v.* Ranjit Rattan Mehra (HUF) (I. T. A. No. 442/Asr/2011 dated July 18, 2012) (para 14)

Kishinchand Chellaram *v.* CIT [1980] 125 ITR 713 (SC) (para 5)

Tek Ram *v.* CIT [2013] 357 ITR 133 (SC) (para 5)

I. T. A. No. 652/Chd/2017 (assessment year 2008-09).

Sudhir Sehgal, Advocate, for the assessee.

Chandrajit Singh, Commissioner of Income-tax-Departmental representative, for the Department.

ORDER

The order of the Bench was pronounced by

1 SANJAY GARG ***(Judicial Member)***.—The present appeal has been preferred by the assessee against the order dated February 13, 2017 of the Commissioner of Income-tax (Appeals), Shimla, Himachal Pradesh (hereinafter referred to as "the CIT(A)").

2 The brief facts relevant to the issue are that the assessee-company filed its return of income on September 30, 2008 declaring its income for the year under consideration at Rs. 57,000. The Assessing Officer (in short, "the AO"), subsequently gathered information that the assessee had purchased a land in Goa in the financial year 2001-02, which was sold during the financial year 2007-08 relevant to the assessment year 2008-09, but the assessee had not offered any capital gains on the abovesaid transaction. The Assessing Officer, therefore, reopened the assessment for the year under consideration assessment year 2008-09.

3 During the reopened assessment proceedings, the Assessing Officer noted that the assessee-company had purchased land measuring 1,31,425 square metres in survey No. 87/1A at Varem, Reis Magos, Goa from M/s. Reis Magos Estates Pvt. Ltd. on July 26, 2001 vide registered sale deed for a consideration of Rs. 9,76,00,000. The assessee-company kept this land with it for a period of six years. The company further sold the said land for a consideration of Rs. 60 crores to M/s. Delanco Home and Resorts Pvt. Ltd. on April 9, 2007. On being asked to explain by the Assessing Officer as to why no capital gains were returned in the income-tax return in respect of the above said transaction, the assessee-company explained that the land in question was an agricultural land situated at a distance of more than eight kilometer from the municipal limits of Panaji and falls in the revenue jurisdiction of village Reis Magos, having population of less than ten thousands. It was, therefore, contended that the said land did not fall in the definition of capital asset, hence, was exempt from capital gains tax as per

the provisions of section 2(14) of the Income-tax Act, 1961 (in short, "the Act").

The Assessing Officer, however, did not agree with the above contention of the assessee. He observed that the land in question was classified as residential land by the District Administration/Land Revenue Authorities in the year 1994. That the village Panchayat of Reis Magos had issued permission for construction of residential complex on the aforesaid land in the year 1995-96, i. e., prior to the purchase of land by the assessee and that even the said permission was renewed from time to time up to year 2009. The Assessing Officer further observed that the intention of the assessee-company was never to use the land for agricultural purposes. That the assessee-company was in the business of real estate and the land was purchased by the assessee-company for development of hotel project/housing project. The Assessing Officer in this respect relied upon the clauses of agreement to sale. The Assessing Officer further observed that even the assessee-company could not prove with convincing evidence that agricultural operations were carried out on the said land. The Assessing Officer further observed that even the said land was within eight kilometer of the municipal limits of Panaji and that the population of Panaji was more than ten thousand persons as per census of 2001. He, therefore, observed that the land in question was not exempt from taxation as per the provisions of section 2(14) of the Income-tax Act. He further observed that though the population of village Reis Magos was less than ten thousands but since the land fell within eight kilometer of municipal limits of Panaji, hence, the contention of the assessee that the land did not fall within the definition of the capital asset as per section 2(14)(iii) of the Act was not factually correct. He further observed that the contention of the assessee-company that the distance was to be measured by road was erroneous. He held that the distance can be measured either by mettled (pucca) road or by an unmettled road (kuchcha road). He further observed that even neither the assessee nor the buyer of the land were agriculturist. That mere purchasing of agricultural land would not make the assessee an agriculturist. He, therefore, concluded that the assessee could not establish that the land in question was not chargeable to capital gains tax. He, accordingly computed the capital gains and made the impugned addition to the income of the assessee. **4**

Being aggrieved by the above order of the Assessing Officer, the assessee filed the appeal before the Commissioner of Income-tax (Appeals) but remained unsuccessful. Hence, the assessee has come in appeal before this Tribunal raising the followings concise grounds of appeal : **5**

"1. That the worthy Commissioner of Income-tax (Appeals) has erred in confirming the action of the Assessing Officer with regard to reopening of the case under section 148.

2. (a) That there was no reason to believe that the income of the assessee had escaped assessment and further, there was no cogent material with the Assessing Officer for forming the belief for the purpose of reopening of the case under section 148.

(b) That the reasons in itself as recorded by the Assessing Officer are vague and without any substance for the purpose of taking recourse to section 148 of the Income-tax Act, 1961

3. Notwithstanding the above said ground of appeal, the learned Commissioner of Income-tax (Appeals) has erred in confirming the action of the Assessing Officer that the land in question, as sold by the assessee cannot be classified as agricultural land since as per the revenue records, it is an agricultural land and agricultural operations have been carried out and further no construction activity had been carried out on the said land by the assessee, till its sale after six years of purchase to the other party.

4. That the reliance by the Assessing Officer and the Commissioner of Income-tax (Appeals) on the statement of Sh. Suresh Parulekar recorded at the back of the assessee, is totally unjust and against the principles of natural justice and also against the principles laid down by the hon'ble Supreme Court in the case of *Kishinchand Chellaram* v. *CIT* as reported in [1980] 125 ITR 713 (SC) and in the case of *Tek Ram* v. *CIT* as reported in [2013] 357 ITR 133 (SC).

5. That the numerous details and documentary evidences in the form of various certificates from Village Panchayat and office of the Mamlatdar, affidavit of registered land valuer and numerous other evidences had been furnished, which confirms that the land in question was more than 10 kilometers away from the limits of the "Panaji" and, as such, the Commissioner of Income-tax (Appeals) having considered and examined all such documentary evidence should have given categorical finding that the land in question was more than 10 kilometers away from the municipal committee, rather than holding that the issue is only an academic as nothing adverse has been pointed out by the Commissioner of Income-tax (Appeals) against such documentary evidence.

6. That all such evidence confirm that the land in question was agricultural land and is more than 10 kilometers away from the Municipal Committee and, as such, the Commissioner of Income-tax

(Appeals) has erred in holding that the land was capital asset, which is against the facts and circumstances of the case.

7. That the appellant craves leave to add or amend the grounds of appeal before the appeal is finally heard or disposed of."

We have heard the rival contentions and have also gone through the record. Our finding in respect of the issues raised in this appeal is as under. Firstly, we take up the legal issue raised vide ground Nos. 1 and 2. 6

Ground Nos. 1 and 2

The assessee through the above grounds of appeal has contested the validity of the reopening of the assessment under section 147 read with section 148 of the Income-tax Act. The learned counsel for the assessee in this respect has invited our attention to the reasons recorded by the Assessing Officer for reopening of the assessment, which read as under : 7

"M/s. BLUE COAST INFRASTRUCTURE DEVELOPMENT LTD.,

7, SHOPPING COMPLEX, SECTOR-1, PARWANOO

Assessment year 2008-09

Reasons : Dated : 8-5-2012

In this case, information was received from the Deputy Commissioner of Income-tax, Central Circle, Panaji that a search was carried out at the residence of Sh. Suresh V. Parulekar on November 17, 2009, wherein a copy of sale deed between M/s. Blue Coast Infrastructure Development Ltd. and M/s. Delanco Home and Resorts Pvt. Ltd. was found. During search operation, it was stated by Sh. Parulekar that his company M/s. Reis Magos Estates Pvt Ltd., had sold land of 131425 square metres in survey No. 87/1-A, Verem, Reis Magos, Goa to M/s. Morepen Holiday Resorts Ltd. (now M/s. Blue Coast infrastructure Development Ltd.) on July 26, 2001 for a consideration of Rs. 9,76,00,000. which was subsequently sold to M/s. Delanco Home and Resorts Pvt. Ltd. on April 9, 2007 for a consideration of Rs. 60,00,00 000.

According to article 4.1(1) of the sale deed, the abovesaid land falls under S2 Zone as per the Master Development Plan of Goa which is approved for residential purposes. On enquiring the status of the land, it was gathered that no agricultural operations had been carried on the said land for the last 20-30 years and the land is situated within four kilometers of the Panaji Municipality. Further, it has been noticed that the assessee-company is in the business of infrastructure development for the hospitality sector and carrying out agricultural operation is not its objective. Further, the company had also not

disclosed any agriculture income from the said land in its returns of income filed after purchase of the land.

The assessee-company had filed its returns for the assessment year 2008-09 (relevant to the period during which the said land was sold) on September 30, 2008, however, the income of Rs. 60,00,00,000 has not been reflected.

In the given facts and circumstances of the case, I have reasons to believe that due to failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment of its total income for the assessment year 2008-09, income to the extent of Rs. 60 crores has escaped assessment for which proceedings under section 147 are being initiated.

Issue notice under section 148 for the assessment year 2008-09.

Sd/-

(Anshuman Sharma)

Dy. Commissioner of Income-tax Circle,

Parwanoo."

8 A perusal of the above reasons recorded by the Assessing Officer for reopening of the assessment reveals that the Assessing Officer had received information from the Deputy Commissioner of Income-tax, Central Circle, Panaji that during the search action carried out at his residence of Sh. Suresh V. Parulekar, a copy of sale deed of land between M/s. Delanco Home and Resorts Pvt. Ltd. and the assessee was found. In his statement Sh. Parulekar stated that his company M/s. Reis Magos Estate Pvt. Ltd. had sold the aforesaid land to the assessee-company for Rs. 9,76,0,000 which was subsequently sold to M/s. Delanco Home and Resorts Pvt. Ltd. on April 9, 2007 for a consideration of Rs. 60 crores. The Assessing Officer, however, has reproduced the relevant part of the statement of Sh. S. V. Parulekar in the assessment order which is further reproduced as under :

"Relevant portion of the statement of Mr. Suresh Parulekar recorded on February 26, 2010 is extracted as under :

'*Q. No. 3* Please furnish details of transaction with Ms. Morepen Holiday Resorts Ltd., which is now renamed as M/s. Blue Coast Infrastructure Ltd.

Ans : M/s. Reis Magos Estates Pvt. Ltd. has sold land of approximately 1,30,000 square metres in survey No. 87/IA at Reis Magos, Bardez Taluka, Goa to the above company.

The sale deed was registered in 2002 or there about in their name. This company belongs to the group of M/s. Park Hyatt Hotels.

Q. No. 4 Please furnish details of the acquisition of the above land by M/s. Reis Magos Estates Pvt. Ltd.

Ans. M/s. Reis Magos Estates Pvt. Ltd. has purchased this land in the year 1994. The land in Survey No. 87/1A was about 1,30,000 sq. mtrs was sold to M/s. Morepen Holiday Resorts Ltd., which is now renamed as M/s. Blue Coast Infrastructure Ltd.

Q. No. 5 Please furnish the details of all the agricultural operations curried on by the M/s. Reis Magos Estates Pvt. Ltd., prior to its sale to M/s. Morepen Holiday Resorts Ltd., which is now renamed as M/s. Blue Coast Infrastructure Ltd.

Ans. The above land which is sold is sloppy and terrain is hilly. Approximately in the year 1995-96, this land was converted into settlement zone for the residential purpose. Have not carried out any agricultural operation at any lime on the above land which is sold to M/s. Morepen Holiday Resorts Ltd., which is now renamed as M/s. Blue Coast Infrastructure Ltd. We have sold the converted land along with all the conversion approvals to M/s. Morepen Group.

Q. No. 6 Have you claimed any exemption on the profit from sale of land to M/s. Morepen Group.

Ans. Now we have declared the profit on the sale of the above land at Reis Magos as business Income and paid tax.

Q. No. 7 Please furnish the details of the present status of the land.

Ans. This land is adjacent to INS Manadovi. I heard that it was subsequently sold to M/s. DLF Group."

A perusal of the above statement recorded of Mr. Suresh Perulekar, **9** director of M/s. Reis Magos Estates Pvt. Ltd. reveals that during the search action at their premises what was found was the copy of the sale deed executed between M/s. Reis Magos Estates Pvt. Ltd. and the assessee. However, the Assessing Officer in the reasons recorded for reopening of the assessment has mentioned that during the search action executed between the assessee and M/s. Delanco Home and Resorts Private Limited was found. This fact mentioned by the Assessing Officer is contrary to the effect coming out of the statement of Mr. Perulekar. In his reply to question No. 7, Mr. Perulekar has stated that he has heard that the land has been subsequently sold by the assessee to M/s. DLF Group. Mr. Perulekar did not show any direct or specific knowledge about the fact the sale of land or

as to the terms of the sale deed of sale consideration settled. From the above facts, it is apparent that the Assessing Officer has wrongly mentioned that during research action a copy of the sale deed between the assessee and M/s. Delanco Home and Resorts Private Limited was found or that Mr. Perulekar in his statement had stated that the assessee had sold the land at a sale consideration of Rs. 60 crores to M/s. Delanco Home and Resorts Pvt. Ltd. Hence, the very basis of information leading the Assessing Officer to form belief that the income of the assessee had escaped assessment is wrongly and falsely mentioned by the Assessing Officer.

Now, the question that arises as to if the Assessing Officer did not form his belief from the information, if any received from the Deputy Commissioner of Income-tax, Panaji, as alleged in the reasons recorded, then what was the source of information to the Assessing Officer of the sale deed entered into by the assessee with M/s. Delanco Home and Resorts Pvt. Ltd. The learned counsel for the assessee in this respect has invited our attention to the earlier correspondence of the assessee with the other income tax authorities. At page 25 of the paper book, there is a copy of the letter dated March 4, 2010 issued by the Deputy Commissioner of Income-tax, Circle Parwanoo, (Assessing Officer) wherein, it has been mentioned that a survey action under section 133A of the Income-tax Act was carried out at the premises of the assessee during the course of which some documents regarding the sale of land by the assessee M/s. Delanco Home Resorts Private Limited have been found. The Assessing Officer, accordingly, through this letter called for information regarding the above aforesaid sale deed asking the assessee to furnish the date of purchase and the name of party from whom the land was purchased, the area of the land, the copy of the sale deed, amount of sale consideration received, whether any capital gains tax has been paid in respect of the aforesaid sale transaction and further the relevant documents like income-tax return, profit and loss account, balance-sheet, etc., along with other related details and information. The assessee vide letter dated March 4, 2010 replied to the queries raised by Assessing Officer, whereby, it was explained that the land in question being rural agricultural land not falling in the definition of capital asset as defined under section 2(14) of the Act and hence, the income earned from the sale of said land was not exigible to capital gains tax. Hence, no capital gains tax had been paid. A certificate from the office of Talathi of Reis Magos was also enclosed to the effect that the land was beyond eight kilometers of the limits of nearest Municipal Council of Panaji. No further correspondence in continuation of the aforesaid correspondence between the assessee and the Deputy Commissioner of

Income-tax, Parwanoo (Assessing Officer) has been brought on record by either of the parties. The learned counsel for the assessee has further invited our attention to page 30 of the paper book, which is a copy of letter dated May 17, 2010 issued by the Office of the Deputy Director of Income tax (Investigation), Himachal Pradesh, Shimla, whereby, the assessee has been asked to attend to the proceedings before him and produce the necessary documents and details as asked for. A copy of letter dated September 3, 2010 has been placed on the file whereby the Deputy Director of Income-tax (Investigation), Himachal Pradesh, Shimla, has asked the assessee to furnish the required details relating to the purchase and sale of land in question. The assessee has also been asked to explain as to why not any capital gains tax has been paid on the sale of the land in question. The perusal of the above aforesaid letter dated September 30, 201 0 reveals that the learned Deputy Director of Income-tax (Investigation), Himachal Pradesh, Shimla, has raised all the queries and doubts that have been mentioned by the Assessing Officer in the reasons recorded for reopening of the assessment and has asked the assessee to give his explanation about the same. The contents of the letter dated September 3, 2010 of the Deputy Director of Income-tax (Investigation), Himachal Pradesh, Shimla, for the sake of ready reference, are reproduced as under :

"*Sub* : Enquiry proceedings—Regarding

Please refer to your letter dated June 15, 2010.

In your above letter it was mentioned that a survey under section 133A of the Act was conducted by Assessing Officer Parwanoo and during the survey proceedings the Assessing Officer had called for information on various points including details of your ,bank statements which were furnished to him.

This office has obtained copies of the records pertaining to survey action conducted under section 133A of the Income-tax Act, 1961 from the office of the Deputy Commissioner of Income-tax, Parwanoo. It has been gathered that you had purchased the land measuring 1,31,425 sq. mtrs. out of 1,48,150 square metres in survey No. 87/1-A, Verem, Reis Magos, Goa from M/s. Reis Magos Estates Pvt. Ltd on July 26, 2001 by way of registered sale deed for a sale consideration of Rs. 9,7600,000 and land was subsequently sold by you to M/s. Delanco Home and Resorts Pvt. Ltd. on April 9, 2007 by way of registered sale deed for a consideration of Rs. 60,00,00,000. As it is gathered, that you have not paid the tax on capital gain on the sale of the said land.

It was claimed by you that it was an agricultural land and the profit on the sale of the above land are exempt. However, you have not been able to substantiate your claim of the sale deed the above land falls under S2 development zone as per the master development plan of Goa and the above land is approved for residential purposes. The land is situated within four kilometres of the Panaji municipality and is in a developed area. The provisions of section 45 of the Income-tax Act, 1961 are attracted in your case since the sale of this land amounts to transfer of capital assets. As per section 2(14) of the Income-tax Act 1961, capital asset has been defined as "capital asset" means property of any kind held by an assessee whether or not connected with his business or profession, but does not include . . .

(iii) agricultural land in India, not being land situate—

(a) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation notified area committee, town committee or by any other name) or a cantonment board and which has a population of not less than ten thousand according to the last preceding census of which the relevant figures have been published before the first day of the previous year, or

(b) in any area within such distance, not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a), as the Central Government may, having regard to the extent of, and scope for, urbanisation of that area and other relevant considerations, specify in this behalf by notification in the Official Gazette . . .

The following points are also brought into your kind notice :

(a) The land of 1,31,425 square metres in survey No. 87/1-A at Verem Reis Magos is classified as residential land by the district revenue administration in 1994.

(b) The village panchayat Reis Magos issued permission for constructing residential complexes on the above land in 1995-96 and renewed the same from time to time unto the year 2009.

(c) The earlier owner of the above land M/s. Reis Magos Estates Pvt. Ltd. (which held the land for seven years) has claimed that the land is non-agricultural and has not claimed and exemption on the profit on sale of the above land.

(d) You have not actually carried out agricultural operations on the above land and there is no documentary evidence to prove that actual agricultural operations were carried out.

(e) You have not declared any agricultural income in your returns of income filed before the Department for any assessment year. Even the consideration received and profit on sale of the land were not disclosed in the profit and loss account for the year ending March 31, 2008. They were routed through the balance-sheet only.

(f) The purchase consideration of Rs. 9,76, 00,000 is not paid for the purchase of the agricultural land but was actually paid for the residential land. You have not purchased the above land for agricultural purposes.

(g) The sale consideration of Rs. 60 crores cannot be paid for an agricultural land. The buyer M/s. Delanco Home and Resorts Pvt. Ltd. has not purchased the above land for agricultural purposes.

(h) The land is situated within four kilometres of the Panaji municipality and is in a developed area.

(i) Neither you nor M/s. Delanco Home and Resorts Pvt. Ltd., i. e., neither the seller nor the buyer of the above land are agriculturalists.

In view of the above discussion, you are hereby required to show-cause why the claim of exemption be not rejected and the capital gains be computed as under for the assessment year 2008-09.

Sale consideration	60,00,0,000
Less indexed cost of the land	13,88,62,347
10,73,60,000*551/426	
Long-term capital gains	476,11,37,653

Your case is fixed for hearing on October 18, 2010.

Sd/-

(Shashisaklani)

Dy. Director of Income-tax (Inv.)

Shimla"

The assessee vide its letter dated October 13, 2010 replied to the enquiries and doubts raised by the Deputy Director of Income-tax (Investigation), Himachal Pradesh, Shimla. The assessee in support of its claim also furnished copies of the official land revenue records. No document has been brought on the file to show that if any further action was taken in respect of the matter by the Deputy Director of Income-tax (Investigation), Himachal Pradesh, Shimla. 10

However, thereafter the Assessing Officer on May 8, 2012 recorded the reasons for reopening of the assessment mentioning the same grounds that have been mentioned in detail in the letter dated September 30, 2010 of the Deputy Director of Income-tax (Investigation), Himachal Pradesh, Shimla. From the above facts coming out of the documents mentioned above, it appears that after considering the reply of the assessee-Deputy Director of Income-tax (Investigation), Himachal Pradesh, Shimla dropped further proceedings in respect of the matter. Even if it is assumed that the Deputy Director of Income-tax (Investigation), Himachal Pradesh, Shimla, further referred the matter to the Assessing Officer of the assessee, it is not clear as to what prevented the Assessing Officer for not mentioning about the report or reference received by him in this respect from the office of Deputy Director of Income-tax (Investigation), Himachal Pradesh, Shimla. Though, the Assessing Officer in the reasons recorded has mentioned all the facts, circumstances, reasons and doubts as have been raised by the Deputy Director of Income-tax (Investigation), Himachal Pradesh, Shimla, however, the Assessing Officer has mentioned the basis of information as information received from the Deputy Commissioner of Income-tax, Central Circle, Panaji, without any reference to the survey action carried out at the premises of the assessee and further correspondence made by his predecessor about the sale deed in question vide his letter dated March 4, 2010 (supra) and the reply of the assessee thereto vide letter dated April 4, 2010. The facts on the file reveal that after the receipt of information from the Deputy Commissioner of Income-tax, Panaji, a survey action was carried out at the premises of the assessee from where the sale deed in question was found. Thereafter, not only the Assessing Officer, as discussed above, but also the Deputy Director of Income-tax (Investigation), Himachal Pradesh, Shimla, carried out investigation in respect of the matter. However, the Assessing Officer has conveniently overlooked or to say skipped the above facts and events in the reasons recorded. Had the Assessing Officer mentioned about the aforesaid fact and events of investigation by his office as well by the office of the Deputy Director of Income-tax (Investigation), Himachal Pradesh, Shimla, he should have been required to meet or to say deal with the reply and explanations furnished by the assessee to his predecessor Assessing Officer as well as with the result/report on the investigation carried out by the Deputy Director of Income-tax (Investigation), Himachal Pradesh, Shimla, and had to point out as to why he was not satisfied with the reply and explanations furnished by the assessee and the report thereof, if any, of his predecessor (Assessing Officer) and also with the report of the Deputy Director (supra), if any, on the investigation

carried out by him in respect of the matter. However, the Assessing Officer in the reasons recorded simply picked up the contents of the letter dated September 30, 2010 even without making any reference of the said letter. Under the circumstances, it cannot be said that the Assessing Officer had reasons to believe that the income of the assessee has escaped assessment. Without meeting with the reply and explanation of the assessee in respect of the matter as well as with the report/opinion of his predecessor as well that of the Deputy Director of Income-tax (Investigation), Himachal Pradesh, Shimla, the Assessing Officer simply reopened the assessment, which action in our view, neither can be held to be legally valid nor justified. As per the provisions of section 147 of the Act the Assessing Officer is authorised to reopen the assessment proceedings, if he has reason to believe that any income chargeable to tax has escaped assessment. The courts of law have time and again held that such a reason to believe that the income of the assessee has escaped assessment should be based on some tangible material which comes to the knowledge of the Assessing Officer. An assessment cannot be reopened under section 147 of the Act on the basis of mere suspicion. It is a well settled proposition that reason to believe must have a material bearing on the question of escapement of income. It does not mean a purely subjective satisfaction of the assessing authority, such reason should be held in good faith and cannot merely be a pretense. Furthermore, the reasons to believe must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Assessing Officer and the formation of belief regarding escapement of income. The powers of the Assessing Officer to reopen an assessment, though wide, are not plenary. The words of the statute are "reason to believe" and not "reason to suspect". There can be no manner of doubt that the words "reason to believe" suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income-tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Income-tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The court can always examine this aspect, though the declaration or sufficiency of the reasons for the belief cannot be investigated by the court. The entire law as to what would constitute "reason to believe" had summed up by the Supreme Court in *ITO* v. *Lakhmani Mewal Das* [1976] 103 ITR 437 (SC).

In the case in hand, although the Assessing Officer had information coming into his possession that the assessee had sold the property in question but had not returned/paid the capital gains tax, however, he was also aware that the necessary enquiries were made in this respect not only by his office but also by the Investigation Wing that too not only during the survey action at the premises of the assessee carried out under section 133A of the Act but also thereafter. The assessee duly explained about the transaction and explained that the land being agricultural and not falling within the definition of capital asset under section 2(14) of the Act, hence, was not exigible to capital gains tax. The Assessing Officer, without having met with the reply and explanations given by the assessee and even not mentioning a word about reports thereof of the concerned officers, proceeded to reopen the assessment on the same premise. The Assessing Officer, fully knowing that if he will rely upon those proceedings, he will have to meet and discard the reply and explanations of the assessee and also the reports, if any, given by his predecessor and by the concerned investigation authorities and under the circumstances his action of reopening might not pass the test of "reasons to believe", hence, he skipped the entire episode of earlier proceedings, based his reasons for reopening of the assessment on the alleged information received from the Deputy Commissioner of Income-tax, Central Circle, Panaji, which even, as discussed above, does not support the reasoning given by the Assessing Officer. When the very reasons on the basis of which the reopening, allegedly, could not form the basis of forming the belief by the Assessing Officer that the income of the assessee had escaped assessment, the consequential reassessment order formed by the Assessing Officer under section 147 of the Act is illegal and the same is accordingly quashed.

Grounds Nos. 3 to 7

11 Though we have quashed the reassessment order as per our adjudication on the issue of validity of reopening of the assessment, however, as both the parties have argued the case on facts also, hence, we deem it appropriate to adjudicate the matter on factual matrix of the case also.

The Assessing Officer has based his findings on the following points :

(i) The land falls under development zone as per the master plan and has been approved for residential purposes by way of grant change of land user certificate (CLU).

(ii) The assessee-company had purchased the land not with the intention to carry out agricultural activities, rather, for construction purposes. That even the purchase and sale consideration was very excessive as compared to the price value of the agricultural land.

(iii) The earlier owner has not claimed the said land as agricultural, rather, has returned the income from the sale of land as its business income. That even the subsequent purchaser has also not purchased the land for agriculture purposes, but for residential project. Neither the assessee nor the buyer is agriculturist.

(iv) The assessee had not carried out any agricultural activities on the land and that the natural growth on land does not tantamount to agriculture operations. The assessee had failed to establish that any agricultural operations were carried out by the assessee. Even the assessee has not shown any agricultural income in the return of income.

(v) The land is situated within eight kilometers (about four kilometers) from the Panjim Municipal Committee.

12 The learned Commissioner of Income-tax (Appeals) has also relied upon the above points while confirming the order of the Assessing Officer. Apart from that, the learned Commissioner of Income-tax (Appeals) has also observed that the evidences furnished by the assessee of the sale of fruit/ agricultural crop do not inspire confidence as the payments and receipts have been shown in cash and the vouchers are self-made vouchers. Neither the receipts nor the payments were through cheque. That the assessee neither purchased the land with any intention to carry out any agricultural activity on the said land nor ever carried out the same. There has to be a series of operations like tilling of land, irrigation, management, etc., which alltogether constitute agriculture activity, but the assessee has failed to prove the carrying of such activity.

13 We have heard the rival contentions of the parties in respect of each of the point and have also minutely gone through the record. Though the contention of the Revenue that the assessee-company is a construction/ development company and that the land in question was not purchased with an intention to carry out agricultural activities seems to be true, however, this fact in itself, in our view, is not sufficient to hold that the land was not an agricultural land. The assessee has proved on the file with sufficient documents in the shape of revenue records that the land till date has been classified as orchard zone. Even when the earlier owner in the year 1994 had applied for change of user of land from agriculture to residential, an actual survey at site was carried out by the Land Revenue authorities who reported that the land in question was a mixed garden. Not an iota of evidence has been pointed out to show that the nature of land in question has ever been changed either by the earlier purchaser or by the assessee. Merely because permission for change of user was granted by the village

panchayat or the Land Revenue authorities, that itself is not sufficient to classify the land as residential land until and unless the nature and user of the land is actually changed by an overt activity. Though the permission for change of user was granted and renewed from time to time but the nature of the land was never changed. The Assessing Officer has mentioned that permission for constructing the land were renewed from time to time up to year 2009 and thereafter also. The fact that the CLU was applied and renewed till the sale of the land by the assessee proves that the user or to say the nature of the land was not changed and that is why the renewal of the permission was sought from time to time. Had the nature of the land ever changed to residential by any of the occupier of the land, there was no question of seeking and granting of renewal of the permission for change of land user. Even the fact that the land is an orchard has not been denied or refuted by the revenue authorities. The assessee had also given the explanation that since the land is situated within 200 meters of the river Mandova, within which no construction could be carried out and due to the said reason neither the previous owner could carry out construction nor the assessee was able to do so. The previous owner that is M/s. Reis Magos Pvt. Ltd. had retained the portion of the land which was 200 metres away from the river Mandova. Though initially the intention of the assessee might have been to develop some construction project, however due to the practical problems in implementing the same, the assessee decided not to change the user of the land and, therefore, continued to maintain it in its original and actual form, that is, as an orchard. The assessee furnished the evidence before the lower authorities that it had employed two employees and further developed the orchard by putting efforts, i. e., by weeding undesired growth of wild plants, by clearing bushes grown between the food bearing trees, pruning the food bearing trees and to further develop and enhance the yield of fruit crops such as cashew, mangoes, jackfruit and coconut. The Assessing Officer has denied the relief on the ground that the assessee could not produce the evidence of tilling and ploughing of the fields and harvesting of crop, etc. The Assessing Officer, in our view, could not differentiate between traditional agriculture and horticulture. The case of the assessee specifically is that it has been developing and maintaining an orchard.

14 The next issue raised by the lower authorities is that the assessee had not shown any positive income from the of aforesaid agricultural/horticulture activity. The assessee duly explained to the lower authorities that the total expenditure incurred by the assessee on the aforesaid activity was almost equal to the income earned from the agricultural activity. The

assessee also produced the relevant bills and vouchers to show that it had sold the fruit crops in the local market. In our view, merely because the assessee did not show positive income from the agricultural activity that itself is not enough to hold that the assessee did not carry out any agricultural activity. The assessee has produced evidence on the file that it did not change the nature of the land, continued and developed the orchard, employed two employees for the development and maintenance of the orchard and also produced the evidence of expenditure and income on the said activity. Merely because the payments received were in cash, that itself, in our view, cannot be a reason to discard that evidence. As it is generally known that in horticulture sector where the crops are generally sold to private parties in the market, the payments and receipts on the sale of crops by the farmers is normally done in cash. The fact that agricultural operation did not result in surplus and no agricultural income was declared in the return, cannot be a ground to treat the land as non-agricultural land. The fact on the file is that though the assessee had purchased the property in question with an intention to develop a residential or hotel project, however, the assessee did not rather to say could not proceed with its such intentions, rather, maintained and developed the original form of the land, i. e., of an orchard. The assessee continued with the horticulture activity which is a branch of the agriculture, hence, it cannot be said that the land was not an agricultural land at the time of its sale by the assessee. Even the assessee has further claimed that the nature of the land even has not been changed till date. The assessee in this respect has relied upon the report of Sh. Vineet Raut Desai, Engineer-cum-Land Valuer, who along with Sh. VK Jain, Sh. Rajeev Jain and Sh. Gaurav Jain (counsels for the assessee) who visited the land in question, measured the distance from the outer skirts of the municipal limits and also noted and photographed the actual vegetation on the land. Some of the photographs have been placed on the file to show that the land on the date of visit on July 10, 2016 was a neglected orchard. He has further deposed in his affidavit that the distance from the municipal limits to the land in question by shortest route was 10 kilometers, whereas via the most common and convenient road it was 19 kilometers. He also obtained a certificate from the office of "Mamlatdar" (the authorised officer to collect land revenue in respect of agricultural land) who certified that the land in question under the survey No. 87/1-A situated at Reis Magos village was at a distance of 10.5 kilometers from outer Panaji municipal limits. Apart from that, the assessee has also furnished the certificate from village panchayat that the land in question has been situated at a distance of more than 10 kilometers from Panaji Municipal

Council. A certificate from the Directorate of Census Operations, Goa has been furnished to the effect that the population of the village Reis Magos is less than 10,000. It is pertinent to mention here that during the appellate proceedings, the Assessing Officer claimed that he himself had visited the spot. However, it has not been mentioned that what route was followed by him ? whether the road was a motorable road ? whether any notice was issued to the assessee ? whether he has taken along any official of the Income-tax Department at Goa ? whether he had met any Government official or other respectable person to prove the veracity and truthfulness of his claim ? Even the Assessing Officer has not denied the claim of the assessee that the land in question till date was an orchard and its nature has not been changed. The assessee has proved beyond doubt not only the nature and classification of the land being an orchard and filing within the definition and scope of an agricultural land and further that it has been situated at a distance of more than 10 kilometers from the municipal limits of Panaji. The Assessing Officer in the assessment order has himself mentioned that he has not taken into consideration the motorable or pucca road to measure the distance of the land in question from the municipal limits of Panaji. He has mentioned that the approach by road would be an erroneous way to compute such distance. However, the law has been settled in this respect. Although an amendment has been brought to the relevant provisions of section 2(14) of the Income-tax Act with effect from April 1, 2014, whereby, it has been provided that the aerial distance from the municipal limits to the property has to be taken into consideration, however, the said amendment has been made with prospective effect as clarified vide Central Board of Direct Taxes Circular No. 17 of 2015[1] dated October 6, 2015, pursuant to the order of the hon'ble Bombay High Court (Nagpur Bench) dated March 30, 2015 passed in I. T. A. No. 151 of 2013 in the case of *CIT* v. *Smt. Maltibai R Kadu* [2015] 374 ITR 531 (Bom). Prior to the said amendment of 2014, the law was settled through various case law that the distance between the municipal limits and assessed property is to be measured as per approach road/motorable road. The learned authorised representative in this respect has relied upon the decision of the Chennai Bench of the Tribunal in *ITO* v. *Chaganlal Lalji Aswin* order dated October 21, 2011 in I. T. A. No. 857/Mds/2011 and the Income-tax Appellate Tribunal, Amritsar Bench in the case of *ITO* v. *Ranjit Rattan Mehra (HUF)* order dated July 18, 2012 in I. T. A. No. 442/Asr/2011 and the Income-tax Appellate Tribunal, Mumbai Bench in the case of *Asst. CIT* v. *Sunil G. Mathreja* order dated March 7, 2014 in I. T. A. No. 6562/Mumbai/2011 and

1. See [2015] 378 ITR (St.) 27.

another and of the hon'ble Punjab and Haryana High Court in the case of *CIT* v. *Satinder Pal Singh* [2010] 188 Taxman 54 (P&H). The assessee in this case has placed certificates from Gram Panchayat and Land Revenue officials, apart from the report and affidavit of registered land valuer-cum-engineer to the effect that the land in question is situated at a distance of about 10.5 kilometers from the Panaji municipal limits, whereas, the Department has relied upon the vague and uncertain statements of the Income-tax Inspector and that of the Assessing Officer, which as discussed above cannot be relied upon. Moreover, the certificate procured by the Assessing Officer during appellate proceedings from the office of Municipal Council, Mapusa-Goa States the distance of village Reis Magos from the Municipal Corporation Goa and not of the land of the assessee. Even the learned Commissioner of Income-tax (Appeals) has also not given any finding that the evidence furnished or relied upon by the Assessing Officer inspires any confidence. Rather, he has opined from the appraisal of the evidence on the file that it is a disputed issue and has chosen to base his findings on the first issue holding that the land in question is not an agricultural land. However, in the light of reliable evidence furnished by the assessee, it can be safely concluded that the land is situated beyond 8 kilometers from the municipal limits of Panaji.

So far as the observation of the lower authorities that the earlier purchaser has not claimed the said land as agricultural land not falling in the definition of capital asset is concerned, it is to be noted that Reis Magos Estate Pvt. Ltd. has not paid any capital gains tax on the sale of the said land to the assessee. The said seller has returned the income from the above sale of land as business income, which means that the said company has treated the land as stock-in-trade and not as an investment or a capital asset. The question of exemption from capital gains tax would have arisen, if the previous owner would have treated the said land as an investment asset and not as stock-in-trade. Further, even though the said company did not continue to maintain and develop the land as orchard for the purpose of earning agricultural income, yet, the fact on the file is that it even did not alter its character. If the previous owner did not carry out agricultural activity on an agricultural land, however did not alter or change its nature and character, but the subsequent owner of land starts the agricultural activity on the said land, under the circumstances, it can be safely held that the land remains the agricultural land and has not lost its original characteristic. In view of the above discussion of the matter, the issue on factual matrix is also decided in favour of the assessee. **15**

16 In the result the appeal of the assessee is, hereby allowed and consequently the additions made/confirmed by the lower authorities stand deleted.

17 Order pronounced in the open court on December 11, 2019.

[2020] 81 ITR (Trib) 440 (Delhi)

[Before the Income-tax Appellate Tribunal — Delhi "D" Bench]

DEPUTY DIRECTOR OF INCOME-TAX

v.

YUM! RESTAURANTS (ASIA) PTE. LTD.

Ms. Sushma Chowla ***(Vice-President)*** and
Prashant Maharishi ***(Accountant Member)***

July 6, 2020.

AY ▸ 2008-09
HF ▸ Assessee

Non-resident—Taxability in India—Royalty—Fees for technical services—Assessee entering into technology licence agreement for licence of technology and system with Indian entity—Indian entity appointing various franchisees for operating restaurants in India—Deputation of employee of non-resident to Indian company—Reimbursement of salary by Indian company—No services "make available" and payment not fees for technical services—Lien on employment with Indian concern which paid his salary and taxed in India—Assessee had no permanent establishment in India and no business undertaking in India—Reimbursement of salary not income and not taxable—Income-tax Act, 1961—Double Taxation Avoidance Agreement between India and Singapore, arts. 5(2), 12.

The assessee a non-resident in the business of franchising certain restaurant brands for a number of territories in the Asia Pacific region including India. For the operation of the restaurant outlets, it entered into a technology licence agreement for licence of the technology and system with YRIPL. YRIPL in turn had appointed various franchisees for operating the restaurants in India under the brand name KFC and Pizza Hut. YRIPL also operated the company owned KFC restaurants in India. The assessee received royalty under the agreement which was offered to tax in India on the basis of the tax rates prescribed in the Double Taxation Avoidance Agreement between India

and Singapore, i. e., at 10 per cent. V was deputed to India. The Assessing Officer took the view that the person employed by the assessee, working under the Indian entity, was seconded to India ; the salary of the person was reimbursed by the Indian entity and hence was taxable in the hands of the assessee. He treated the salary reimbursement cost as fees for technical services holding that the services rendered by the seconded employee were technical in nature and taxable as fee for technical services under article 12 of the Agreement. He found that V was the employee of the assessee and services were being provided to YRIPL by V on behalf of the assessee. The Commissioner (Appeals) held that V was under the control of YRIPL and was working for it and was not the employee of the assessee and hence there was no right or lien over his employment and hence, there was no service permanent establishment. On appeal :

Held, *that the expenses of salary cost needed to be deducted from the business income generated by the permanent establishment in India, which in the present case would be nil. In other words, there would be no income attributable to the permanent establishment. The issue was whether payment for services of technical nature were taxable as fees for technical services under article 5(6) read with article 12 of the Agreement. The existence of service permanent establishment and provision of technical services could not co-exist. In any case under article 12 of the Agreement, the clause of "make available" needed to be fulfilled to hold the existence of permanent establishment for technical services. In the absence of fulfilment of the "make available" clause, there was no taxability of fee for technical services under article 12 of the Agreement. Further, the Assessing Officer was wrong in treating the reimbursement received by the assessee from YRIPL on account of salary payment as fee for technical services. V was working as an employee of YRIPL and not as an employee of the assessee. The reimbursement of salary had no element of income and was not taxable. In any case since V had already paid taxes in India on the salary, the salary amount being taxed as fee for technical services in the hands of the assessee would amount to double taxation. The marketing activities undertaken by YRMPL were on behalf of YRIPL and its franchisees and in the absence of any link whatsoever with the business of the assessee, the contribution made by the independent third-party franchisees could not be attributed to constitute permanent establishment of the assessee in India. The assessee had no permanent establishment in India and no business undertaken in India, and hence no fixed place permanent establishment.*

Centrica India Offshore Pvt. Ltd. *v.* CIT [2014] 364 ITR 336 (Delhi) *distinguished*.

Cases referred to :

Burt Hill Design (P.) Ltd. *v.* Dy. DIT (I. T.) [2017] 164 ITD 697 (Ahd) (para 8)

Centrica India Offshore Pvt. Ltd. *v.* CIT [2014] 364 ITR 336 (Delhi) (para 11)

CIT *v.* Anjum M. H. Ghaswala [2001] 252 ITR 1 (SC) (para 2)

DIT (Asst.) *v.* E-funds IT Solutions Inc. [2017] 399 ITR 34 (SC) (para 14)

DIT *v.* Jacabs Civil Incorporated [2011] 330 ITR 578 (Delhi) (para 2)

DIT (International Taxation) *v.* Morgan Stanley and Co. Inc. [2007] 292 ITR 416 (SC) (para 10)

I. T. A No. 6018/Delhi/2012 (assessment year 2008-09).

Satpal Gulati, Commissioner of Income-tax-Departmental representative, for the Department.

Ms. Ananya Kapoor, *Ms. Sakshi Jain* and *Sidharth Kanwar*, Advocates, for the assessee.

ORDER

The order of the Bench was pronounced by

1 Sushma Chowla ***(Vice-President)***.—The present appeal filed by the Revenue is against the order of the Commissioner of Income-tax (Appeals)-XXIX, New Delhi, dated September 18, 2012 relating to the assessment year 2008-09 against the order passed under section 143(3) read with section 144C of the Income-tax Act, 1961 (in short, "the Act").

2 The Revenue has raised the following grounds of appeal :

> "1. Whether on the facts and in the circumstances of the case the learned Commissioner of Income-tax (Appeals) has erred in ignoring the dictum that the existence of a permanent establishment is a finding of fact and allowed relief relying upon case law distinguishable from the case on hand on facts, thus ignoring the whelming facts in support of the existence of permanent establishment.
>
> 2. Whether on the facts and in the circumstances of the case the learned Commissioner of Income-tax (Appeals) has erred in ignoring the facts that the seconded employee Mr. Mahboobani retained lien over his employment with Yum! Restaurants (Asia) Pte. Ltd. that his deputation agreement did not spelt out his terms of work and that

Yum! Restaurants (Asia) Pte. Ltd. continued to disburse his salary, all pointing to the existence of permanent establishment.

3. Whether on the facts and in the circumstances of the case the learned Commissioner of Income-tax (Appeals) has erred in concluding that there is no link between the royalty income earned by Yum! Restaurants (Asia) Pte. Ltd. and the functions performed by Mr. Mahboobani, when the stewardship activities of the employee of furthering the business of Yum! Restaurants (India) Private Limited through new equity stores, franchisees and business development contribute to increased royalty received by Yum! Restaurants (Asia) Pte. Ltd. and require no further evidence supporting the Assessing Officer's finding of permanent establishment.

4. Whether on the facts and in the circumstances of the case the learned Commissioner of Income-tax (Appeals) has erred in ignoring the detailed finding given by the Assessing Officer in the assessment order regarding the fact that the assessee has a place of management constituting a permanent establishment in India and reimbursement of salary and other expenses made by Yum! Restaurants (India) Private Limited to the assessee Yum! Restaurants (Asia) Pte. Ltd. is to be characterised as fee for technical services.

5. Whether on the facts and in the circumstances of the case the Commissioner of Income-tax (Appeals) has erred in holding that Indian affiliates, namely, Yum! Restaurants (India) Private Limited and YRMPL do not constitute DAPE or permanent establishment of the assessee in India despite the facts marshalled by the Assessing Officer to show the assignment of rights and obligations by Yum! Restaurants (India) Private Limited to Yum! Restaurants (Asia) Pte. Ltd. and that the Indian associated enterprises were working without compensation.

6. Whether on the facts and in the circumstances of the case the learned Commissioner of Income-tax (Appeals) has erred in not adjudicating the attribution of advertisement, marketing and promotion receipts of YRMPL to the assessee's permanent establishment, holding this ground to be infructuous and incorrectly concluding that the advertisement, marketing and promotion expenditure of independent franchisees cannot be held attributable to the assessee's permanent establishment.

7. Whether on the facts and in the circumstances of the case, the Commissioner of Income-tax (Appeals) has erred in law in holding that interest under section 234B was not chargeable in the assessee's

case, by relying upon the decision of the hon'ble Delhi High Court dated August 30, 2010 in the case of *DIT* v. *Jacabs Civil Incorporated* [2011] 330 ITR 578 (Delhi), without appreciating that the levy of interest under section 234B is mandatory as held in the case of *CIT* v. *Anjum M. H. Ghaswala* [2001] 252 ITR 1 (SC)."

3 The issue in the present appeal is against the addition on account of salary reimbursement cost treated as fee for technical services (in short, "FTS") taxable at 10 per cent. amounting to Rs. 1,47,35,151 and income from business and profession taxable at 40 per cent. amounting to Rs. 11,82,90,721.

4 Briefly in the facts of the case the assessee is a company incorporated in Singapore, which is engaged in the business of franchising KFC, Pizza Hut and Taco Bell brands for a number of territories in the Asia Pacific region (including India). For the operation of the restaurant outlets, the assessee entered into a technology licence agreement (in short, "TLA") for licence of "technology" and "system" with Yum! Restaurants (India) Private Limited (in short "YRIPL"). Yum! Restaurants (India) Private Limited in turn had appointed various franchisees for operating restaurants in India under the brand name KFC and Pizza Hut. Yum! Restaurants (India) Private Limited also operated the company owned KFC restaurants in India. As per the terms of the technology licence agreement, the assessee was to receive royalty as under :

- 2.079 per cent. (i. e., 33 per cent. of 6.3 per cent.) of sales of equity stores.
- 33 per cent. of royalty, initial fees and renewal fees collected from franchisee stores.

5 The royalty income was offered to tax in India on the basis of tax rates prescribed in the Double Taxation Avoidance Agreement between India and Singapore, i. e., at 10 per cent. There is no dispute with the regard to the same. The Assessing Officer was of the view that the person employed by the assessee, working under the Indian entity, were seconded to India ; the salary of the said person was reimbursed by the Indian entity and hence taxable in the hands of the assessee. The case of the assessee was that the said person had shifted to India and was working solely for the Indian concern whose salary was reimbursed. The Assessing Officer however, treated the salary reimbursement cost as fee for technical services. The Assessing Officer was of the view that furnishing of services by the seconded employee were technical in nature and taxable as fee for technical services under article 12 of the Double Taxation Avoidance Agreement between India and Singapore. The Assessing Officer came to a

finding that Mr. Vinod Mahboobani was the employee of the assessee-company and services were being provided to Yum! Restaurants (India) Private Limited by Mr. Vinod Mahboobani on behalf of the assessee-company.

6 The Commissioner of Income-tax (Appeals) after going through the clauses of the deputation agreement concluded that Mr. Vinod Mahboobani was under the control of Yum! Restaurants (India) Private Limited and was working for it. The Commissioner of Income-tax (Appeals) also held that he was not the employee of the assessee and hence there was no right/lien over his employment and hence, there was no service permanent establishment. He referred to the various evidence filed by the assessee in this regard and also referred to the clauses of the deputation agreement. The Revenue is in appeal against the findings of the Commissioner of Income-tax (Appeals) on this issue.

7 The learned Departmental representative for the Revenue pointed out that there is a technical licence agreement between the assessee and the Yum! Restaurants (India) Private Limited and also there is deputation of the employee of the assessee-company. He further stated that the person was in India, was seconded to India and the question was whether there was a permanent establishment or not. He referred to the findings of the Assessing Officer at pages 4 and 5 in this regard. He further stressed that the royalty which is offered to tax by the assessee, was on account of sales in India ; its employee and functions performed in India, benefits both the concerns. He also pointed out that the royalty was proportionate to sales in India. Referring to page 7 of the assessment order, the learned Departmental representative for the Revenue pointed out that the case put up by the Revenue was of service permanent establishment. He was of the view that since it was a case of ancillary permanent establishment, "make available" clause was not relevant ; hence it was a case of fee for technical services. He reiterated that the employee was in India to promote the business of the assessee-company. He stressed that it was a fact that there was no separate agreement and it was also a fact that person had been seconded. Referring to the order of the Assessing Officer at page 8, the learned Departmental representative for the Revenue referred to the second issue in the present appeal and pointed out that as per the Organisation for Economic Co-operation and Development guidelines, extraordinary expenses result in brand building. Again referring to the assessment order page 9, he stressed that it was a case of dependent agent permanent establishment and the Assessing Officer considered two per cent. as reasonable and applied three per cent. as income.

8 The learned authorised representative for the assessee on the other hand pointed out that the first issue raised in the present appeal was whether there was seconded employee of the assessee-company working for it resulting in service permanent establishment. She took us through various parts of the appellate order to establish the case of no right or lien. Our attention was drawn to clauses 2.1 and 2.2 of the deputation agreement under which deputation of the employee was given, but the lien on employment was with the Indian concern, which paid his salary. It was pointed out that in the absence of any separate service agreement between the Indian entity and the non-resident assessee-company, there was no question of any service permanent establishment. Coming to the ancillary clause of the deputation agreement, it was pointed out that the same was not the case of the Assessing Officer ; first thing to determine was, whose employee is seconded. Referring to the Double Taxation Avoidance Agreement between India and Singapore, our attention was drawn to article 5(8) and article 7, it was stressed that the provisions of article 7 of the Double Taxation Avoidance Agreement would be invoked since there was no income, as salary paid is expense. This argument was on, without prejudice basis and it was stressed that even if there was a permanent establishment, no income would be attributable to it as the expenses/salary would be deducted and hence there will be nil business income. It was further stressed that as per the Double Taxation Avoidance Agreement, income attributable to the permanent establishment only is taxable in India. Reliance was placed on the decision of the Ahmedabad Bench of the Tribunal in *Burt Hill Design (P.) Ltd.* v. *Dy. DIT (International Taxation)* [2017] 164 ITD 697 (Ahd).

9 Now, coming to the next aspect of the issue, it was pointed out that as per article 12 of the Double Taxation Avoidance Agreement, fee for technical services is taxable, i. e., if "make available clause" is fulfilled, which is not the case of the assessee. It was also pointed out that in the absence of any element of income, it is a case of cost to cost reimbursement and the same cannot be treated as fee for technical services. The learned authorised representative for the assessee prays that it was a case of pure reimbursement being received by the assessee-company and in the absence of any element of income, reimbursement per se was not taxable in the hands of the assessee-company. Further, the employee Mr. Vinod Mahboobani had already paid taxes on the said income in India and taxing the said amount as fee for technical services would amount to double taxation.

10 Coming to the second issue raised in the present appeal, i. e., attribution of business income to the permanent establishment on account of

marketing activities undertaken by the Indian affiliates on behalf of Yum! Restaurants (Asia) Pte. Ltd. taxable at 40 per cent., reference was made to paras 5.2.1 to 5.2.4 and para 6.2 of the Commissioner of Income-tax (Appeals) order) and no dependent agent permanent establishment (in short, "DAPE"). The case of the assessee is that there is no dependent agency permanent establishment (in short, "DAPE"). The learned authorised representative for the assessee referred to the condition prescribed in article 5(8) of the Double Taxation Avoidance Agreement and none of the said conditions were satisfied by the assessee-company. Referring to the order of the Commissioner of Income-tax (Appeals), para 5.2.2 onwards, the same was vehemently relied on for the proposition of non-applicability of article 5(8) to the facts of the case. The learned authorised representative for the assessee further pointed out that the contention of the Assessing Officer were factually incorrect. As the marketing activities were undertaken for the benefit of Yum! Restaurants (India) Private Limited and its franchisee ; the assessee was not party to any agreement between Yum! Restaurants (India) Private Limited and its franchisee and also the Indian franchisee was not the associated enterprises of the assessee-company. It is also stressed by the learned authorised representative for the assessee that in the absence of any permanent place of business in India wherein Yum! Restaurants (India) Private Limited was independent entity having own business and no business undertaken by Yum! Restaurants (India) Private Limited on behalf of the assessee-company, there was no fixed permanent establishment also. Reliance was also placed on the decision of the hon'ble Supreme Court in the case of *DIT (International Taxation)* v. *Morgan Stanley and Co. Inc.* [2007] 292 ITR 416 (SC).

It was also pointed out that the decision of the hon'ble Delhi High Court **11**
in *Centrica India Offshore Pvt. Ltd.* v. *CIT* [2014] 364 ITR 336 (Delhi) is not applicable to the facts of the present case and is distinguishable. Referring to para 34 of the judgment, the learned authorised representative for the assessee stated that in the facts of the said case, salary was the responsibility of foreign company which was reimbursed by the Indian concern, including direct costs ; and the personnel also returned back. However, in the facts of the present case, salary was paid by the Indian concern, including direct costs. Further, Mr. Vinod Mahboobani acted as director and signed all the financial statements. Further, the said person was not deputed for short period. Reference was made to the letter of deputation placed at page 429 and other documents at pages 430 to 433 of the paper book.

12 The learned Departmental representative for the Revenue referred to clause 2.2 of the seconded agreement. He further pointed out that additions on account of fee for technical services was under article 12 of the Double Taxation Avoidance Agreement between India and Singapore. He also placed reliance on the decision of the Delhi High Court in *Centrica India Offshore Pvt. Ltd.* (supra).

13 We have heard the rival contentions and perused the record. The year under appeal is the assessment year 2008-09. The assessee is a non-resident company incorporated in Singapore. It is engaged in the business of franchising KFC, Pizza Hut and Taco Bell brands for a number of territories in the Asia Pacific region (including India). It entered into a technology licence agreement with Yum! Restaurants (India) Private Limited under which it "licensed technology" and "system", for the operation of the restaurant outlets in India. The royalty received by the assessee-company under technology licence agreement is offered to tax and is not in dispute. As per the agreement between the two parties, Mr. Vinod Mahboobani was deputed to India. The relevant clauses of the deputation agreement are reproduced under para 4.1.9 of the appellate order. The question which arises for adjudication is whether Mr. Vinod Mahboobani was working for the assessee-company or Yum! Restaurants (India) Private Limited, who had the right or lien over his employment. The case of the assessee is that it had no right or lien over the employment of Mr. Vinod Mahboobani and consequently, that he was not the employee of the assessee-company. The relevant clauses of the deputation agreement read as under :

> "2.1. 'Home country Yum! entity shall not be responsible for the work of the international assignees or assume any risk for the results produced from the work performed by the international assignees while under deputation to Yum! Restaurants (India) Private Limited. The international assignees while under deputation to Yum! Restaurants (India) Private Limited shall not in any way be subject to any kind of instructions or control of home country Yum! entity. The international assignees shall function solely under the control, direction and supervision of Yum! Restaurants (India) Private Limited and in accordance with the policies, rules and guidelines generally applicable to the employees of Yum! Restaurants (India) Private Limited during the period of deputation. Home country Yum! entity will not have continuing obligation towards Yum! Restaurants (India) Private Limited with regard to the performance of the international assignees.

Rs. 5,82,73,571 after disallowance of claim of deduction under section 80-IA(4) of Rs. 4,44,39,344 and other disallowances. On examination of the case records, the Principal Commissioner observed that the assessee derived income from letting out of property and construction activity. In the year 2014-15, the assessee had offered an income of Rs. 2,93,68,495 on account of letting out of house properties. This was revised to Rs. 75,28,744 before finalisation of the assessment in the revised computation. No explanation nor any valid reason for drastic fall in the returned income had been offered by the assessee. The Principal Commissioner held that the relevant facts had not been examined by the Assessing Officer and he had simply accepted the submissions of the assessee and reproduced the facts without any application of mind. Therefore, he set aside the assessment order as erroneous in so far as it was prejudicial to the interests of the Revenue. On appeal :

Held, *that there was no discussion on the difference in figures between the original return and the corrected computation. In the entire order of the Assessing Officer, he had only extracted the submissions of the assessee in the original return and the revised computation and finally accepted them without any application of his mind. The decision must reflect the reasoning of the officer. In this case in the assessment order, the entire exercise was missing. Merely extraction of submissions could not show that the Assessing Officer had applied his mind. The Assessing Officer while accepting the documents submitted by the assessee had not conducted any specific enquiry into the facts of the case. In this case, the Assessing Officer had only done the work of extraction of submissions of assessee and nothing else and therefore, in fact the Assessing Officer had not formed any view. When no view has been taken, no enquiry had been conducted, and when no reasons on facts had been placed on record, the order of assessment was bound to be erroneous in so far as prejudicial to the interest of the Revenue.*

I. T. A. No. 562/Pune/2019 (assessment year 2014-15).

V. L. Jain for the assessee.

Smt. Kesang V. Sherpa for the Department.

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

[2020] 81 ITR (Trib) (S. N.) 50 (Pune)

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

R. K. AGRO PRODUCTS

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

R. S. SYAL *(Vice-President)* and
S. S. VISWANETHRA RAVI *(Judicial Member)*

August 3, 2020.

AY ▸ 2015-16
HF ▸ Assessee

GROSS PROFITS—ESTIMATION—FALL IN GROSS PROFIT—NO FINDING AGAINST BOOKS OF ACCOUNT AND STOCK REGISTER—AUDITED BOOKS OF ACCOUNT NOT REJECTED—ESTIMATE OF GROSS PROFIT BY COMPARISON TO EARLIER YEARS—AD HOC ADDITION NOT JUSTIFIED—INCOME-TAX ACT, 1961.

The assessee declared a total income of Rs. 2,36,94,540 for the assessment year 2015-16. In scrutiny the Assessing Officer added Rs. 7 lakhs on account of ad hoc addition for not substantiating the fall in gross profit. The Commissioner (Appeals) restricted the addition to 50 per cent. On appeal :

Held, *that the assessee had declared gross profit at 10.34 per cent. and 8.61 per cent. for the assessment years 2014-15 and 2013-14 whereas for the current year it had declared only 6.12 per cent. There was no finding by the Assessing Officer against the books of account and stock register and even the books of account had not been rejected by the authorities. Therefore, when the books of account and stock register were filed and the books of account were audited in the absence of any objection regarding the books of account and stock register, there was no substance in estimating the gross profit, by comparison to the assessment years 2014-15 and 2013-14. Therefore the Commissioner (Appeals) was not justified in confirming the ad hoc addition to an extent of Rs. 3,50,000 in the facts and circumstances of the case.*

I. T. A. No. 1410/Pune/2019 (assessment year 2015-16).

None appeared for the assessee.

Smt. Shraddha Nichal/Nishtha Tiwari for the Department.

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

[2020] 81 ITR (Trib) (S. N.) 51 (Ahmedabad)

[Before the Income-tax Appellate Tribunal — Ahmedabad Virtual Court "A" Bench]

DEPUTY COMMISSIONER OF INCOME-TAX (EXEMPTIONS)

v.

GANDHINAGAR URBAN DEVELOPMENT AUTHORITY

Rajpal Yadav *(Vice-President)* and
Waseem Ahmed *(Accountant Member)*

July 31, 2020.

SS ▸ ITA 1961, ss 147, 148
AY ▸ 2009-10, 2010-11
HF ▸ Assessee

Reassessment—Charitable purpose—Exemption—All information called for relating to important activities, income claimed under section 11 submitted—Books of account supported by bills and vouchers produced before Assessing Officer for verification—Reasons not mentioning adverse facts coming to light in order to reopen original assessment or information or fresh evidence in possession of Assessing Officer—Reopened assessment merely on basis of same set of facts already available on record—Reopening wrong and null and void—Income-tax Act, 1961, ss. 147, 148.

The assessee was an entity established by the Government of Gujarat. It was engaged in the development of urban areas in Gandhinagar which was in the nature of advancement of general public utility. The assessee was granted registration under section 12AA of the Income-tax Act, 1961. In reassessment proceedings the Assessing Officer denied the exemption under section 11 on the ground that the activities of the assessee fell outside the scope of section 2(15) because the assessee earned income by rendering services for a fee or consideration and activities could not be said to be charitable and it was not eligible for exemption under section 11. The Commissioner (Appeals) held that the reassessment order was based on the material available to the Assessing Officer during the original assessment. No fresh material was with him so as to attract the provisions of section 147/148 and that the reassessment proceedings were initiated merely on the basis of the same set of facts which were otherwise available during the original assessment and such reassessment was bad in law and accordingly he nullified the reassessment order. On appeal :

Held, *that the Assessing Officer recorded a finding that after discussion and from the data made available during the course of hearing nothing adverse had been found. All the information called for relating to the important activities, and income claimed under section 11 was submitted before the Assessing Officer for verification as were the books of account supported by bills and vouchers. In the reasons recorded there was no mention of adverse facts coming to light in order to reopen the original assessment, nor of any information or fresh evidence in the possession of the Assessing Officer. The assessment was reopened merely on the basis of the same set of facts, which were already available on record. Therefore, the action of the Assessing Officer in reopening of the assessment was wrong and null and void.*

I. T. A. Nos. 1560-61/Ahd/2017 and C. O. Nos. 5-6/Ahd/2019 (assessment years 2009-10 and 2010-11).

Virendra Ojha, Commissioner of Income-tax-Departmental representative, for the Department.

Mehul K. Patel, authorised representative, for the assessee.

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

[2020] 81 ITR (Trib) (S. N.) 52 (Kolkata)

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

THE RAJLAXMI COTTON MILLS P. LTD.

v.

DEPUTY COMMISSIONER OF INCOME-TAX

A. T. VARKEY *(Judicial Member)* and
DR. ARJUN LAL SAINI *(Accountant Member)*

July 31, 2020.

SS ▶ ITA 1961, s 37
AY ▶ 2013-14
HF ▶ Assessee

BUSINESS EXPENDITURE—MOTOR CAR EXPENSES, CONVEYANCE EXPENSE AND MISCELLANEOUS EXPENSES—AD HOC DISALLOWANCE WITHOUT REJECTING BOOKS OF ACCOUNT—THOUGH ASSESSEE'S ACCOUNTS AUDITED, ASSESSING OFFICER MAKING A VAGUE OBSERVATION THAT ASSESSEE NOT PRODUCING SATISFACTORY SUPPORTING EVIDENCE FOR VERIFICATION—DISALLOWANCE NOT JUSTIFIED—SALES PROMOTION EXPENSES—

Disallowance simply because assessee incurred expenditure in cash not justified—Income-tax Act, 1961, s. 37.

The assessee was in the business of manufacturing textiles, handloom and powerlooms. It returned its income disclosing a total income of Rs. 1,03,09,960. The Assessing Officer noted that along with the return the assessee had filed the tax audit report. He observed that the assessee in its profit and loss account had debited an amount of Rs. 14,47,268 as miscellaneous expenses. However, since no satisfactory supporting evidence was produced for verification, he disallowed 10 per cent. of the expenses. Likewise, he noted that the assessee had debited an amount of Rs. 30,09,296 as motor car expenses, sales promotion expenses of Rs. 14,07,972 and conveyance expenses of Rs. 9,26,476 and since no satisfactory supporting evidence was produced for verification, 10 per cent. of motor car expenses and conveyance expenses was disallowed. Out of the sales promotion expenses of Rs. 14,07,972 claimed by the assessee, the Assessing Officer observed that Rs. 2,96,300 was paid in cash and since there was no satisfactory supporting evidence to support these transactions, he disallowed an amount of Rs. 2,96,300. The Commissioner (Appeals) observed that motor car expenses of Rs. 10 lakhs had been paid in cash and Rs. 20 lakhs by bank cheque, sales promotion expenses of Rs. 12 lakhs had been paid by cheque and Rs. 2 lakhs had been paid in cash and conveyance expenses to the tune of Rs. 92,648, the Commissioner (Appeals) observed that all expenses were made in cash. He noted that the total income shown by the assessee was at Rs. 1,61,72,539 and the expenses claimed towards motor car expenses was at Rs. 30,09,296 and since the assessee had expended Rs. 10 lakhs in cash, which needed verification he confirmed the addition made by the Assessing Officer on the ground that the payments were made mostly in cash. On appeal :

Held, *(i) that the Assessing Officer had made ad hoc disallowances in respect of motor car expenses, conveyance expense and miscellaneous expenditure claimed by the assessee. The assessee was a private limited company and its accounts were audited. When the assessee claimed any expenditure, it was bound to keep documents as proof of expenditure incurred by it. So when the Assessing Officer called for verification of the bills and invoices, the assessee was supposed to furnish the bills, vouchers and invoices before the Assessing Officer. The Assessing Officer was at liberty to disallow the expenditure if there was deficiency in the vouchers, bills or invoices supporting the incurring of expenditure on the ground that the expenditure was non-genuine and could be disallowed item-wise. However, the action of the Assessing Officer to disallow the expenditure on ad hoc basis and that too*

without rejecting the books of account could not be accepted. The Assessing Officer had made a vague observation that the assessee had not produced satisfactory supporting evidence for verification and disallowed 10 per cent. of the motor car expenses, conveyance expenses and miscellaneous expenses. This action of the Assessing Officer could not be countenanced since the Assessing Officer could not have proceeded to estimate the expenses without rejecting the books of account. The ad hoc additions of Rs. 3,00,930, Rs. 92,648 and Rs. 1,44,727 on account of motor car expenses, conveyance expenses and miscellaneous expenses were arbitrary exercise of power and to be deleted.

(ii) That regarding the sales promotion expenses, the action of the Assessing Officer to disallow the expenditure simply because the assessee had made the payment in cash could not be accepted. Since the Assessing Officer had not disallowed the expenditure incurred by cash for violation of tax deduction at source provisions or the payment having been made on account of any prohibition by law, the expenses could not be disallowed. If cash payment was incurred for an expenditure, and if the assessee fails to produce bills or invoices supporting the incurring of expenditure, the Assessing Officer was at liberty to disallow the expenditure as non-genuine. However, he could not disallow the expenditure simply because the assessee incurred expenditure in cash. Therefore, the addition of Rs. 2,96,300 which was made towards sales promotion expenses was deleted.

I. T. A. No. 2071/Kolkata/2019 (assessment year 2013-14).

P. K. Himmat Singhka, authorised representative, for the assessee.

Supriyo Pal, learned Additional Commissioner of Income-tax, Departmental representative, for the Department.

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

[2020] 81 ITR (Trib) (S. N.) 55 (Delhi)

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

ROOP KISHORE MADAN

v.

DEPUTY COMMISSIONER OF INCOME-TAX

MS. SUSHMA CHOWLA *(Vice-President)* and
DR. B. R. R. KUMAR *(Accountant Member)*

July 29, 2020.

SS ▸ ITA 1961, ss 74, 132(4)
AY ▸ 2011-12
HF ▸ Assessee

SEARCH AND SEIZURE—ASSESSMENT IN SEARCH CASES—SHORT-TERM CAPITAL GAINS OFFERED IN STATEMENT RECORDED DURING SEARCH—LOSS—SHORT-TERM CAPITAL LOSS—BROUGHT FORWARD SHORT-TERM CAPITAL LOSS ALLOWED BY DEPARTMENT IN EARLIER YEARS—ASSESSEE FILING COMPUTATION OF INCOME CORRECTLY—COMPUTATION FILED IN TERMS OF SCHEME OF COMPUTATION PROVIDED IN ACT—ELIGIBLE TO BE SET OFF AGAINST SHORT-TERM CAPITAL GAINS OF CURRENT YEAR DECLARED BY ASSESSEE—SET OFF OF LOSS NOT TO BE DENIED ON GROUND NOT CLAIMED IN STATEMENT RECORDED DURING SEARCH—INCOME-TAX ACT, 1961, ss. 74, 132(4).

The assessee offered short-term capital gains of Rs. 15.22 crores during the search and seizure proceedings under section 132(4) of the Income-tax Act, 1961. In the computation of income filed with the return, he filed the same amount under the head "short-term capital gains" for the year. Out of the declared and returned short-term capital gains, he set off unabsorbed short-term capital gains which had been brought forward from the assessment year 2008-09 and allowed to be carried forward for the assessment year 2010-11. The Assessing Officer disallowed the set off of such brought forward short-term capital loss of Rs. 49,83,312 against the short-capital gains declared during the year on the grounds that in his statement recorded under section 132(4), the assessee had not claimed the adjustment of brought forward loss on account of the short-term capital gain declared. The Commissioner (Appeals) supported the contention of the Assessing Officer on the grounds that the additional income offered by the assessee was intended to be offered to tax, the entire amount of Rs. 15.22 crores while making allowances for all such provisions provided for computation of total income under the Act. He

held that the use of the word "additional" had to be taken categorical, unambiguous and unequivocal. On appeal :

Held, *(i) that view of the Assessing Officer that the assessee had not claimed adjustment of brought forward loss in the statement recorded under section 132(4) was not sustainable. The Assessing Officer can neither expect the assessee to suo motu seek such set off against the brought forward losses nor expect the authorised officer recording the statement to pose a question regarding any brought forward losses, during the process of recording of the statement on oath during the search and seizure operation. Hence, the rationale given by the Assessing Officer while disallowing the set off was not statutorily tenable.*

(ii) That the assessee had filed the computation of income correctly. The computation filed was as per the scheme of computation provided in the Act. The provisions of section 74 clearly provide for set off of short-term capital losses which can be allowed to be carried forward and set off against income, if any, under the head "Capital gains" assessable for the assessment year in respect of any other capital asset. The statute permits carry forward and set off of losses and this cannot be denied in the absence of any specific provisions or conditions laid down in the statute to disallow such benefits. The short-term capital loss which had been incurred in the assessment year 2007-08 and the loss had been allowed by the Department to be carried forward till the assessment year 2010-11. Hence, set off of the loss against the short-term capital gain earned by the assessee during the assessment year 2011-12 could not be disallowed.

I. T. A. No. 2789/Delhi/2015 (assessment year 2011-12).

Salil Agarwal, Advocate, for the assessee.

Ms. Sunita Singh, Commissioner of Income-tax, Departmental representative, for the Department.

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

[2020] 81 ITR (Trib) (S. N.) 57 (Ahmedabad)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — AHMADABAD VIRTUAL COURT "D" BENCH]

GUJARAT MINERAL DEVELOPMENT CORPORATION LTD.

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

WASEEM AHMED *(Accountant Member)* and
MS. MADHUMITA ROY *(Judicial Member)*

July 28, 2020.

SS ▸ ITA 1961, s 14A ; ITR 1962, r 8D
AY ▸ 2014-15, 2015-16
HF ▸ Assessee

INCOME—DISALLOWANCE OF EXPENDITURE INCURRED IN RELATION TO EARNING EXEMPT INCOME—ONLY INVESTMENTS WHICH YIELDED EXEMPT INCOME DURING RELEVANT PERIOD TO BE CONSIDERED FOR COMPUTING AVERAGE VALUE OF INVESTMENT—ASSESSING OFFICER TO RECOMPUTE DISALLOWANCE—INCOME-TAX ACT, 1961, S. 14A—INCOME-TAX RULES, 1962, R. 8D.

During the assessment proceedings upon a perusal of the balance-sheet of the assessee it was found that huge investment in shares and mutual funds were made. The assessee had earned exempt income, i. e., dividend income to the tune of Rs. 5,51,68,066. The assessee suo motu had disallowed an amount of Rs. 59,05,592 under section 14A of the Income-tax Act, 1961 read with rule 8D of the Income-tax Rules, 1962 and added the amount in the statement of total income. According to the Assessing Officer the calculation made by the assessee was not justifiable in the absence of any proof or specific explanation other than working out the disallowance at .5 per cent. of the average value of investment. Further, the assessee had only considered certain specific investments for the purpose of disallowance under section 14A read with rule 8D and had not considered the value of the entire investment in terms of section 14A read with rule 8D. He, therefore, determined the disallowance under section 14A read with rule 8D at 0.5 per cent. on the average value of total investment of Rs. 2,21,56,37,775. The disallowance was worked out at Rs. 1,10,78,189. Since the assessee had already made disallowance under section 14A amounting to Rs. 59,05,592 the balance of Rs. 51,72,597 was added to the total income of the assessee which was confirmed by the Commissioner (Appeals). On appeal :

Held, *that only those investments were to be considered for computing the average value of investment which yielded exempt income during the year. Thus, the issue was remanded to the Assessing Officer for recomputing the disallowance under section 14A.*

ASST. CIT *v.* VIREET INVESTMENT PVT. LTD. [2017] 58 ITR (Trib) 313 (Delhi) [SB] *followed*.

I. T. A. Nos. 2277 and 2278/Ahd/2018 (assessment years 2014-15 and 2015-16).

S. N. Soparkar, Senior Advocate, and *Parin Shah*, authorised representative, for the assessee.

Vinod Tanwani, Senior Departmental representative, for the Department.

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

[2020] 81 ITR (Trib) (S. N.) 58 (Hyderabad)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — HYDERABAD "B" BENCH]

VITECH SYSTEMS ASIA PVT. LTD.

v.

INCOME-TAX OFFICER

SMT. P. MADHAVI DEVI *(Judicial Member)* and
A. MOHAN ALANKAMONY *(Accountant Member)*

July 15, 2020.

SS ▸ ITA 1961, s 92CA
AY ▸ 2010-11
HF ▸ Assessee

INTERNATIONAL TRANSACTIONS—TRANSFER PRICING—ARM'S LENGTH PRICE—EXCHANGE RATE FLUCTUATIONS—FOREIGN EXCHANGE LOSS ON ACCOUNT OF EXCHANGE RATE FLUCTUATIONS ARISING IN NORMAL COURSE OF BUSINESS TRANSACTION—TO BE TAKEN PART OF OPERATING MARGIN—INCOME-TAX ACT, 1961, S. 92CA.

The assessee was engaged in the business of software development. It filed its return for the assessment year 2010-11 declaring nil income. Initially the return was processed and thereafter the case was taken up for scrutiny and finally the assessment was completed by the Assessing Officer making several additions including the upward adjustment under section 92C(3) of the Income-tax Act, 1961 for Rs. 73,44,622. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal :

Held, *that the foreign exchange loss on account of exchange rate fluctuations arose in the normal course of business transaction. Therefore, while computing the margin for determining the arm's length price, the foreign exchange loss had to be taken as part of the operating margin.*

I. T. A. No. 619/Hyd/2016 (assessment year 2010-11).

C. P. Ramaswamy for the assessee.

Sunil Kumar Pandey, Departmental representative, for the Department.

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

[2020] 81 ITR (Trib) (S. N.) 59 (Hyderabad)

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

BHAGATRAM

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

A. MOHAN ALANKAMONY *(Accountant Member)*

July 28, 2020.

SS ▸ ITA 1961, s 132
AY ▸ 2009-10
HF ▸ Assessee

INCOME FROM UNDISCLOSED SOURCES—ACCOMMODATION ENTRIES—INCRIMINATING MATERIALS FOUND IN SEARCH SHOWING SALE OF GOLD AND GOLD JEWELLERY TO ASSESSEE—ONUS ON ASSESSEE TO ESTABLISH GENUINENESS OF SUPPLIERS—ASSESSEE NOT SUBMITTING ANY MATERIAL OTHER THAN BILLS AND VOUCHERS AND BANK STATEMENTS TO ESTABLISH GENUINENESS OF TRANSACTION—ESTIMATE OF ADDITIONAL INCOME AT 10 PER CENT. ON BOGUS PURCHASES MADE FROM GREY MARKET JUSTIFIED—ENTIRE BOGUS PURCHASES NOT TO BE TREATED AS INCOME OF ASSESSEE BECAUSE ASSESSEE MADE PURCHASES APPARENTLY FROM ACCOUNTED MONEY AS PAYMENTS MADE THROUGH BANKING CHANNELS—INCOME-TAX ACT, 1961, S. 132.

The assessee was an individual engaged in the business of trading in gold ornaments. He filed his return for the assessment year 2009-10 declaring a total income of Rs. 9,76,501. A search and seizure operation under section 132 of the Income-tax Act, 1961 was conducted in the case of certain persons by the Investigation Wing which revealed that these individuals were

providing accommodation entries for the purchase of gold and gold jewellery including to the assessee's proprietary concern. It was further revealed that the assessee had obtained accommodation entries for the purchase of gold and gold jewellery from the parties aggregating to Rs. 93,04,866. The assessee could not prove the creditworthiness of the persons who had sold the gold and gold jewellery to him. The assessee could only furnish the bank statements to substantiate his claim that the payments were made by cheque. The assessee also did not take any serious steps to prove the genuineness of the suppliers. Therefore, the Assessing Officer held that the purchases made by the assessee from those individuals were bogus transactions. Thereafter, the Assessing Officer estimated 10 per cent. of the bogus purchase as the undisclosed income of the assessee which worked out to Rs. 9,30,487 (10 per cent. of Rs. 93,04,866). The Commissioner (Appeals) took the view that the entire bogus purchase of Rs. 93,04,866 had to be added to the income of the assessee and enhanced the addition. On appeal :

Held, *that from the facts of the case the assessee had not submitted any material other than the bills and vouchers and the bank statement to establish the genuineness of the transaction. The Department had come across various incriminating materials during the course of search and seizure operations with respect to the persons who had purported to have sold gold and gold jewellery to the assessee. Gold and gold jewellery were often purchased by traders in the gray market in order to avoid taxes and customs duty. In this situation, the onus was on the assessee to establish the genuineness of the suppliers. Though the payment made by the assessee towards the purchases were through banking channels, it was also revealed that the suppliers were issuing bogus bills and vouchers to various parties. In this situation, the bills and vouchers and evidence of the payment made through cheque alone would not establish that the transactions were genuine. Therefore, the Assessing Officer was right in estimating the additional income at 10 per cent. on the bogus purchases made from the grey market which worked out to Rs. 9,30,487. The order of the Commissioner (Appeals) to enhance the addition treating the entire bogus purchases as the income of the assessee was not appropriate because the assessee had made purchases apparently from his accounted money as the payments had made through banking channels. Further the gold and jewellery purchased were either sold by the assessee or remained with the assessee as his closing stock, since there were no other contrary findings by the Department. Therefore, the order of the Commissioner (Appeals) was set aside and the order of the Assessing Officer was confirmed.*

I. T. A. No. 1753/Hyd/2018 (assessment year 2009-10).

K. C. Devdas for the assessee.

Sunil Kumar Pandey for the Department.

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

[2020] 81 ITR (Trib) (S. N.) 61 (Delhi)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — DELHI "B" BENCH]

GUJARAT GUARDIAN LTD.

v.

DEPUTY COMMISSIONER OF INCOME-TAX

R. K. PANDA *(Accountant Member)* and
KULDIP SINGH *(Judicial Member)*

July 27, 2020.

SS ▸ ITA 1961, ss 14A, 80-IA ; ITR 1962, r 8D
AY ▸ 2012-13
HF ▸ Assessee

INCOME—EXPENDITURE INCURRED IN RELATION TO EXEMPT INCOME—ASSESSEE MAKING INVESTMENT IN DEBT MUTUAL FUND OUT OF ITS OWN TAX-FREE SURPLUS FUNDS DURING RELEVANT YEAR AND MAKING SUO MOTU DISALLOWANCE TOWARDS 25 PER CENT. OF SALARY OF ONE ACCOUNTING PERSON AND 5 PER CENT. REMUNERATION OF FINANCE DIRECTOR—ASSESSING OFFICER REQUIRED TO RECORD HIS CATEGORICAL DISSATISFACTION WITH WORKING OF DISALLOWANCE GIVEN BY ASSESSEE—IN THE ABSENCE OF MANDATORY SATISFACTION—NO QUESTION OF DISALLOWANCE—INCOME-TAX ACT, 1961, S. 14A—INCOME-TAX RULES, 1962, R. 8D.

INDUSTRIAL UNDERTAKING—SPECIAL DEDUCTION—CLAIM OF ASSESSEE REJECTED AT THRESHOLD WITHOUT VERIFYING AMOUNT OF PROFITS DERIVED BY INDUSTRIAL UNDERTAKING—ASSESSING OFFICER TO VERIFY CLAIM BY EXAMINATION OF AUDITED ACCOUNTS OF INDUSTRIAL UNDERTAKING AND THEN GRANT DEDUCTION IN ACCORDANCE WITH LAW—INCOME-TAX ACT, 1961, S. 80-IA.

The assessee was in the business of manufacturing and selling float glass. During the previous year relevant to the assessment year 2012-13, the assessee earned dividend income of Rs. 15,44,59,467. The Assessing Officer invoking section 14A of the Income-tax Act, 1961 read with rule 8D of the Income-tax Rules, 1962 made a disallowance of Rs. 1,18,86,898 and reducing the sum declared by the assessee as expenses in this regard of Rs. 4,86,374 the

net disallowance came to Rs. 1,14,00,524 on the ground that earning of exempt income was not in the nature of passive activity. The Commissioner (Appeals) confirmed the deduction. The Assessing Officer also made a disallowance of Rs. 21,57,22,785 claimed by the assessee as deduction under section 80-IA(4)(iv). The Commissioner (Appeals) confirmed the deduction on the ground that no books of account were maintained nor was the requirement of audit as contained under section 80-IA(7) fulfilled. On appeal :

Held, *(i) that the assessee had earned exempt dividend income of Rs. 15,44,59,467 from investment in debt mutual fund made out of its own tax-free surplus funds of Rs. 4,54,99,30,057 during the year 2012-13 and had made suo motu disallowance of Rs. 4,86,374 towards 25 per cent. of the salary of one accounting person along with 5 per cent. remuneration of the finance director. The Assessing Officer was required to record his categorical dissatisfaction with the working of the disallowance given by the assessee and state that the working was not correct. The Assessing Officer had invoked the provisions contained under section 14A read with rule 8D on the basis of general principles, inter alia, that the earning of exempt income was not in the nature of passive activity having no input and that the assessee's claim that he had not incurred any expenditure to earn dividend income was not acceptable.When the Assessing Officer had failed to comply with the mandatory requirement of section 14A(2) read with rule 8D(2)(ia) to record his satisfaction, the question of applying rule 8D(2)(iii) did not arise. Thus, the disallowance made by the Assessing Officer and confirmed by the Commissioner (Appeals) was not sustainable.*

GODREJ AND BOYCE MANUFACTURING COMPANY LTD. *v.* DY. CIT [2017] 394 ITR 449 (SC) *and* MAXOPP INVESTMENT LTD. *v.* CIT [2012] 347 ITR 272 (Delhi) *applied.*

(ii) That when the assessee had substantial interest-free surplus funds of its own of Rs. 4,54,99,30,057 there was no question of incurring expenditure by way of interest.

(iii) That the claim of the assessee had been rejected at the threshold itself without verifying the amount of profits derived by the industrial undertaking during the previous year relevant to the assessment year 2012-13. The assessee had submitted that these details were placed before the Assessing Officer. Thus the issue was remanded to the Assessing Officer with a direction to verify the claim of the assessee by examination of the audited accounts of the industrial undertaking and then grant deduction under section 80-IA in accordance with the law.

I. T. A. No. 5794/Delhi/2016 (assessment year 2012-13).

Neeraj Jain, Advocate, *Mrs. Shaily Gupta* and *Akshay Uppal*, Chartered Accountants, for the assessee.

Ms. Sunita Singh, Commissioner of Income-tax-Departmental representative, for the Department.

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

[2020] 81 ITR (Trib) (S. N.) 63 (Delhi)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — DELHI "G" BENCH]

THOMSON PRESS INDIA LTD.

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

ANIL CHATURVEDI *(Accountant Member)* and
MS. SUCHITRA KAMBLE *(Judicial Member)*

July 27, 2020.

SS ▸ ITA 1961, s 40(a)(ii)
AY ▸ 2007-08
HF ▸ Assessee

BUSINESS EXPENDITURE—DISALLOWANCE—TAX OR RATES ON PROFITS—EDUCATION CESS AND HIGHER AND SECONDARY EDUCATION CESS—THOUGH CESS MAY BE COLLECTED AS PART OF INCOME-TAX NOT RATE OR TAX WHICH ATTRACTS DISALLOWANCE UNDER SECTION 40(a)(ii)—INCOME-TAX ACT, 1961, S. 40(a)(ii).

For the assessment year 2007-08 the Assessing Officer reopened the assessment of the assessee for two reasons : firstly, that the assessee had claimed and had been allowed deduction of cess on income-tax of Rs. 14,21,208, which according to him was not allowable under section 40(a)(ii) of the Income-tax Act, 1961, and secondly, that the assessee had made a provision for doubtful debt amounting to Rs. 2,02,10,084 in the profit and loss account but while computing the total income, it had added only Rs. 96,72,559 resulting in underassessment of income by Rs. 1,05,37,525 on that count. In the reassessment order the Assessing Officer made the additions of two amounts. The Commissioner (Appeals) out of the two additions deleted the addition made on account of provision made for doubtful debt but upheld the addition on account of education cess on income-tax. On appeal :

Held, *that education cess and higher and secondary education cess were eligible for deduction while computing income chargeable under the head of profits and gains of business. Though cess may be collected as part of*

income-tax that did not render such cess either a rate or a tax on profits which could not be deducted in terms of provision of section 40(a)(ii). The Assessing Officer was not justified in disallowing the amount of cess paid on income-tax.

SESA GOA LTD. *v.* JT. CIT [2020] 423 ITR 426 (Bom) *relied on*.

I. T. A. No. 2561/Delhi/2017 (assessment year 2007-08).

Sunil Agarwal, Advocate and *Sailesh Gupta*, Advocate, for the assessee.

Saras Kumar, Senior Departmental representative, for the Department.

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

[2020] 81 ITR (Trib) (S. N.) 64 (Kolkata)

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

A. J. MILL STORE AGENCY PVT. LTD.

v.

INCOME-TAX OFFICER

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

July 27, 2020.

SS ▸ ITA 1961, s 250
AY ▸ 2013-14
HF ▸ Assessee

APPEAL TO COMMISSIONER (APPEALS)—DUTY OF COMMISSIONER (APPEALS)—DUTY TO DISPOSE OF APPEAL BY ORDER IN WRITING STATING POINTS FOR DETERMINATION, DECISION THEREON AND REASONS FOR DECISION—EX PARTE ORDER WITHOUT COMPLYING WITH REQUIREMENT—COMMISSIONER (APPEALS) TO DISPOSE OF APPEAL AFRESH ON MERITS IN ACCORDANCE WITH LAW AFTER GIVING PROPER AND SUFFICIENT OPPORTUNITY OF BEING HEARD TO ASSESSEE—INCOME-TAX ACT, 1961, S. 250.

The assessee was in the business of trading in welding electrodes and accessories. On the basis of information received by the Assessing Officer, a notice under section 148 of the Income-tax Act, 1961 was issued to the assessee for the assessment year 2013-14. In response to the notice, the assessee filed the return declaring a total income of Rs. 3,65,370. In the assessment, the Assessing Officer determined the total income of the assessee at