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(Contd. on Cover Page 3)

[2020] 82 ITR (Trib) 289 (Delhi)

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

JINDAL REALTY P. LTD.

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

MS. SUSHMA CHOWLA *(Vice-President)* and
O. P. KANT *(Accountant Member)*

June 22, 2020.

SS ▸ ITA 1961, s 37
AY ▸ 2006-07
HF ▸ Assessee

BUSINESS EXPENDITURE—BUSINESS—SETTING UP OF BUSINESS OR COMMENCEMENT OF BUSINESS—REAL ESTATE BUSINESS—ASSESSEE CARRYING OUT SUBSTANTIAL ACTIVITIES, SUCH AS PURCHASE OF LAND, SINCE DATE OF INCORPORATION—BUSINESS SET UP AND EXPENSES ALLOWABLE—INCOME-TAX ACT, 1961, S. 37.

BUSINESS EXPENDITURE—DISALLOWANCE—INTEREST ON LOANS, ADMINISTRATIVE AND STATUTORY EXPENDITURE—EXPENDITURE ALLOWABLE ONCE BUSINESS SET UP AND COMMENCED—INCOME-TAX ACT, 1961, S. 37.

The assessee-company was engaged in the business of real estate. During the assessment year, the assessee accepted unsecured loans from various corporate bodies and utilised them for purchase of land, giving advances to various corporate bodies and persons for purchase of land. Besides this, it made aggregate investment in purchase of equity shares and deposited the balance funds with the bank and earned interest. The Assessing Officer treated the interest as income from other sources and the interest paid on borrowed capital and other expenses as preoperative business expenses as the assessee had not commenced any business activity. He therefore held that the expenditure incurred for the purpose of setting up of its business could not be allowed as deduction nor adjusted against any other head. The Commissioner (Appeals) confirmed this on the ground that the mere purchase of land itself would not result in either setting up of business or its commencement and this was only a preparatory stage in order to start the business. There were no salary expenses which showed that there were no employees in the company, nor did the assessee have any office or place of business, as evident from the schedule of assets. On appeal :

Held, *that the assessee carried out substantial activities since the date of incorporation. It acquired land for development of township. For this, it had raised loans from the banks and also entered into a joint development agreement. The assessee purchased 19 acres of land by itself and advanced money to the consortium associate entities to purchase land in their respective names to meet the land ceiling limits and entered into an agreement between the parties for joint development of land and advancement of monies for purchase of land. Further, a memorandum of understanding was signed with associates, authorising it to make such applications on their behalf as a lead applicant. The process of acquisition of land spread over a period of time and the application for obtaining the licence was filed in the month of July, 2008. It had purchased the land during the year 2006-07 itself which was held as stock-in-trade at the close of the year and hence the business had been set up and commenced. Further, the assessee had also invested a substantial amount in the purchase of another property in the year itself. Thus, setting up of its business as per its memorandum of understanding was done.*

WESTERN INDIA VEGETABLE PRODUCTS LTD. *v.* CIT [1954] 26 ITR 151 (Bom), CIT *v.* SAURASHTRA CEMENT AND CHEMICAL INDUSTRIES LTD. [1973] 91 ITR 170 (Guj), CIT *v.* DHOOMKETU BUILDERS AND DEVELOPMENT (P.) LTD. [2014] 368 ITR 680 (Delhi) *and* CIT *v.* ARCANE DEVELOPERS (P.) LTD. [2014] 368 ITR 627 (Delhi) *followed*.

The Commissioner (Appeals) held that the interest expenditure on loans taken for purchase of land during the previous year should be capitalised as work-in-progress and administrative and statutory expenditure was not allowable as revenue expenditure in the assessment year 2006-07 . On appeal :

Held, *that once the business had been set up and commenced, interest expenses and other expenses claimed by the assessee were to be allowed as business expenditure. The assessee had also parked certain funds temporarily in bank fixed deposit receipts, on which it earned interest. This interest was to be included as business income in the hands of the assessee.*

Cases referred to :

CIT *v.* Arcane Developers (P.) Ltd. [2014] 368 ITR 627 (Delhi) (para 18)

CIT *v.* Dhoomketu Builders and Development (P.) Ltd. [2014] 368 ITR 680 (Delhi) (para 17)

CIT *v.* Saurashtra Cement and Chemical Industries Ltd. [1973] 91 ITR 170 (Guj) (para 16)

Wall Street Construction Ltd. *v.* Jt. CIT [2006] 101 ITD 156 (Mum) (SB) ; [2006] 102 TTJ (Mumbai) 505 (SB) (para 2)

Western India Vegetable Products Ltd. *v.* CIT [1954] 26 ITR 151 (Bom) (para 15)

I. T. A. No. 1408/Delhi/2011 (assessment year 2006-07).

Rohit Jain, Advocate, and *Deepesh Jain*, Chartered Accountant, for the assessee.

J. Mishra, Commissioner of Income-tax Departmental representative, for the Department.

ORDER

The order of the Bench was pronounced by

MS. SUSHMA CHOWLA ***(Vice-President)***.—The appeal filed by the assessee is against the order of the Commissioner of Income-tax (Appeals)-XIII, New Delhi, dated December 24, 2010 relating to the assessment year 2006-07 against the order passed under section 143(3) of the Income-tax Act, 1961 (in short, the "Act"). 1

The assessee has raised the following grounds of appeal : 2

"1. That the Commissioner of Income-tax (Appeals)-XIII, New Delhi, has grossly erred on facts and in the circumstances of the case and in law in holding that the business of the appellant is not set up during the previous year relevant to the assessment year 2006-07.

2. That the Commissioner of Income-tax (Appeals)-XIII, New Delhi, has grossly erred on facts and in the circumstances of the case in holding that the interest expenditure of Rs. 3,92,54,952 (net of interest income of Rs. 79,00,208 on advances for purchase of land) on loans taken for purchase of stock-in-trade comprising of land during the previous year should be capitalised as work-in-progress and the same are not allowable as expenditure in the present year following the Special Bench decision of the Mumbai Tribunal in the case of *Wall Street Construction Ltd.* v. *Jt. CIT* [2006] 101 ITD 156 (Mum) [SB] ; [2006] 102 TTJ (Mumbai) 505 [SB].

3. That the Commissioner of Income-tax (Appeals)-XIII, New Delhi, has grossly erred on facts and in the circumstances of the case in holding that administrative and statutory nature of expenditure on electricity and water charges, insurance, legal and professional charges, audit fees, miscellaneous expenses, printing and stationery, rates and taxes, telephone expenses, filing fees, preliminary expenses write off and bank charges totalling at Rs. 35,97,061 are not allowable as revenue expenditure in the present year.

4. That the Commissioner of Income-tax (Appeals)-XIII, New Delhi, has grossly erred on facts and in the circumstances of the case and in law in further holding that administrative and statutory nature of expenditure on electricity and water charges, insurance, legal and professional charges aggregating to Rs. 33,24,980 in relation to the authorised transaction for purchase of property is to be capitalised to the cost of such property and further therefore allowed only the balance expenditure of Rs. 2,72,951 to be capitalised to work-in-progress.

5. That the Commissioner of Income-tax (Appeals)-XIII, New Delhi, has grossly erred on facts and in the circumstances of the case and in law in denying set off of interest income of Rs. 15,24,862 from banks against interest expenditure of Rs. 4,71,55,160."

3 The first issue raised vide ground of appeal No. 1 by the assessee is against the claim of the assessee that the business of the assessee was set up during the year under consideration.

4 Briefly, in the facts of the case, the assessee-company was incorporated on August 25, 2005, was engaged in the business of real estate. The assessee filed e-return declaring a total loss of Rs. 4,13,60,684 on November 30, 2006. The case of the assessee was taken up for scrutiny. The Assessing Officer noted that during the year under consideration, the assessee had accepted unsecured loans aggregating to Rs. 318.80 crores from various corporate bodies. The list of the parties along with amount of interest paid to them is tabulated at pages 1 and 2 of the assessment order. The Assessing Officer further noted that the aforesaid loans were utilised for purchase of land for Rs. 10,94,97,662, in giving advance aggregate amounting to Rs. 3,15,34,79,267 to various corporate bodies and persons for purchase of land besides the assessee made aggregate investment to the tune of Rs. 39,97,486 in purchase of 1,568 equity shares of Rs. 10 each of DSP Merrily Lynch Limited (investment of Rs. 33,59,780) and in purchase of 48,784 equity shares of Rs. 10 each of JCT Limited (investment of Rs. 6,37,706). The balance fund to the tune of Rs. 126.50 crores were with HDFC Bank and on which it earned interest income of Rs. 15,24,863. The Assessing Officer noted that the assessee had not adduced any evidence with regard to commencement of its business activities during the relevant year. The Assessing Officer noted as under :

"The assessee claimed to have earned interest income of Rs. 94,25,071 including bank interest of Rs. 15,24,863 and interest from other of Rs. 79,00,208. The assessee-company has also received dividend income of Rs. 35,694. The assessee-company claimed to

have incurred administrative and other expenses aggregating to Rs. 33,62,870 on account of electricity and water charges Rs. 2,57,029, insurance Rs. 2,79,951, legal and professional charges Rs. 27.88 lakhs, audit fees Rs. 22,448, miscellaneous expenses Rs. 5,385, printing and stationery Rs. 2,990, rates and taxes Rs. 200, telephone expenses Rs. 5,567 and filing fee Rs. 1,300 besides interest payment of Rs. 4,71,55,160 to the corporate bodies as detailed supra and bank charges of Rs. 1,46,381 and preliminary expenses Rs. 87,810 to arrive at the business loss of Rs. 4,13,20,059 after claiming depreciation of Rs. 28,602 on the fixed assets. The assessee-company has neither hired any person for running day-to-day activities nor paid any remuneration to the directors."

5 The Assessing Officer concluded by holding as "I hold that the interest earned on loans and advances given to various persons and corporate bodies and bank interest FDRs is income from other sources as the company has not commenced any business activity during the year and since its business had not started, there could not be any computation of business income or loss incurred by the assessee in the relevant accounting year. In such a situation, the expenditure incurred by the assessee for the purpose of setting up its business could not be allowed as deduction nor could it be adjusted against any other income under any other head."

6 The Assessing Officer also held that interest income earned by the assessee was income from other sources against which business expenses should not be claimed ; hence a sum of Rs. 94,25,071 was assessed as income from other sources in the hands of the assessee. The interest paid on borrowed capital and other expenses were held to be preoperative business expenses, as the assessee had not started its business during the year under consideration, hence the expenses were not allowed in the year under consideration.

7 The Commissioner of Income-tax (Appeals) with regard to the setting up of the business held as under :

"4.1. I have carefully considered the submissions made on behalf of the appellant, the findings of the Assessing Officer and the facts on record. From the paper book filed by the assessee, the financial statements and the findings in the assessment order it is apparent that during the previous year the appellant has borrowed monies for purchase of land at Sonepat district for the real estate township project and incurred interest expenditure of Rs. 4,71,55,160. Further it has utilised such borrowings for purchase of land in its name as well as advanced monies to associate parties for purchase of land by them for

the township project at Sonepat district. On the moneys so advanced for purchase of land for the project it has earned interest income of Rs. 79,00,208. Besides it has also earned interest on bank deposits of Rs. 15,24,863 and dividend income of Rs. 35,694 in the relevant year. Further, such land acquired for the project is shown as stock-in-trade in the financial statements of the appellant and associate companies. From the main object clause of the 'memorandum of association' it is seen that the assessee is in the line of business of purchasing, selling and developing plot/flats whether residential, commercial, rural or urban. For this purpose the land purchased is initially required to be consolidated and developed after obtaining necessary licence from the concerned Government agency and then only the appellant can undertake the activity of selling such developed plots or the bungalows, offices/flats constructed on them to the prospective buyers. There is no denying the fact that in the year under consideration the assessee has merely acquired raw land worth around Rs. 10.94 crores from certain parties by making first purchase on January 12, 2006. Apart from this there is a board resolution dated March 1, 2006 whereby the appellant has been sanctioned to enter into development agreement and financial assistance with their associate companies for acquisition of land. The development agreements with the associate companies have been entered in the next financial year and application for licence for developing township at sectors 33, 34, and 35, Sonepat, has been made by the appellant before the Director, Town and Country Planning, Chandigarh in July 2008. Prior to this on October 21, 2005 and October 26, 2005 the appellant has entered into agreement to sell for purchase of a property at 5, Man Singh Road, New Delhi. Considering the above sequence of events in my considered view, the mere purchase of land in itself would not result in either setting up of business or its commencement. Rather this is only a preparatory stage in order to start the business. This fact is also evidenced by the fact that there are no salary expenses which shows that there are no employees in the company, nor the appellant has any office or place of business, as seen from the schedule of assets. The case law relied upon by the appellant are for other nature of business and that as per the judicial decisions on the subject, it is a question of fact as to when a business is set up which has to be determined separately for each line of business. Accordingly ground No. 1 of the appellant is dismissed."

Coming to the second issue of holding the expenses preoperative in nature, the Commissioner of Income-tax (Appeals) held that since no project had commenced during the year, interest expenses were to be capitalised and were not allowable in the year. It was further held that the set off of interest income which against the interest expenditure can be allowed partly. The Commissioner of Income-tax (Appeals) directed that interest income of Rs. 79,00,208 (which has accrued on account of advances to associate consortium entities for purchase of land) be set off against interest expenditure of Rs. 4,71,55,160 (incurred on account of borrowals for purchase of land) and the balance amount of Rs. 3,92,54,952 only shall be capitalised. At the cost of repetition it is again reiterated that the capitalisation of this interest had to be with each of the specific project as well as property at 5, Man Singh Road and Kurukshetra, etc., for which too advance had been given during the year from the borrowed loans, on which the interest expenditure had been claimed. Thus, the capitalisation of interest for Rs. 3,92,54,952 had to proportionately done according to the amount of investment in the projects and properties by way of loans and advances (assets) totalling Rs. 315.34 crores during the year. **8**

The assessee is in appeal against the order of the Commissioner of Income-tax (Appeals). **9**

The learned authorised representative for the assessee pointed out that the assessee-company was incorporated on August 25, 2005. Our attention was drawn to page 6 of the appellate order, wherein the details of the activities undertaken during the year itself are tabulated. He took us through the event of the year, i. e., purchase of land at Sonepat and then the second purchase of land at Man Singh Road property. The assessee pointed out that the major investments were made for purchase of property in order to launch the project of more than 100 acres at Sonepat and similarly, substantial amount totalling Rs. 116.67 crores was paid for purchase of the property at Man Sing Road. Our attention was invited to the relevant documents which are placed in the paper book. Then he pointed out that board resolution was passed on March 1, 2006 for entering into development agreement which was entered into at the start of the next year. The learned authorised representative for the assessee also pointed out that the abovesaid projects were approved in the succeeding years and this was in line with the business activity undertaken by the assessee. He then referred the balance-sheet placed at pages 30 and 36 of the paper book, wherein, assets were shown under loans and advances. Undoubtedly, no income was generated during the year but the assessee had actually commenced the business and not only set up the business. It was **10**

reiterated by the learned authorised representative for the assessee that funds were borrowed, portion of land was acquired and advance was given for acquisition of balance land and steps were taken to enter into development agreement. He further referred to various case law to point out that in line with aforesaid steps taken, the business could be said to have commenced. He stressed that purchase of land itself was start of business activity and specially where funds were borrowed and land was acquired, substantial activities having been taken place, it could not be said that there was no commencement of business.

11 The learned Departmental representative for the Revenue pointed out that the question was whether the business was set up or had commenced. He pointed out that the case of the assessee was that when set up was done, the business was commenced. The learned Departmental representative for the Revenue strongly relied upon the order of the Commissioner of Income-tax (Appeals).

12 We have heard the rival contentions and perused the record. The first issue which arises in the present appeal is against the claim of the assessee as to setting up of business during the year under consideration itself. The assessee-company was incorporated on August 25, 2005 and the nature of the business was to be engaged in the business of real estate. During the instant assessment year, the assessee had acquired land for development of township at sectors 33, 34, 35 at Sonepat. For this, the assessee raised loans from the banks and also entered into joint development agreement. The minimum area requirement for residential colony was 100 acres and the assessee along with its associates together acquired 161.3811 acres in order to fulfil the minimum area norms for plotted colony at Sonepat. The said land was acquired in consortium with other associate company due to ceiling on holdings of land as per the Haryana Ceiling on Holdings Act, 1972. The assessee purchased 19 acres of land by itself and advanced money to the consortium associate entities to purchase land in their respective names to meet with the land ceiling limits. An agreement was entered into between the parties for joint development of land and advancement of monies for purchase of land. Further, memorandum of understanding was signed between the assessee-company and associates, authorising it to make such application/s on their behalf as lead applicant. The process of acquisition of land was spread over a period of time and the application for obtaining licence was filed in the month of July, 2008. The claim of the assessee was that it had purchased the land during the year itself which was held as stock-in-trade at close of the year and hence the business had commenced. In order to establish its case of start of business, the assessee

has filed a list of the events before the Commissioner of Income-tax (Appeals) which is reproduced at page 6 and reads as under :

Timeline of activities of Jindal Realty Pvt. Ltd. during assessment year 2006-07			
Sl. No.	*Particulars*	*Reference*	*Date*
1	Formation of the company	Under section 12 of the Companies Act, 1956	25-08-2005
2	Board's sanction for property acquisition	Board resol	11-10-2005
3	Board's sanction for borrowings for land acquisition	Board resol	11-10-2005
4	First loan transaction for land purchase	Bank statement	13-10-2005
5	First purchase of land	Title deed	12-01-2006
6	Copy of agreements to sell for purchase of Man Singh Road property		21-10-2005 & 26-10-2005
7	Board sanction for execution of development agreement and financial assistance for land acquisition	Board resolution	01-03-2006
8	Entering into development agreement	Board resolution dated 01-03-2006	03-04-2006 14-04-2006 20-04-2006 08-05-2006 18-05-2006 05-06-2006 28-08-2006 & 20-10-2007
9	Application for licence		23-07-2008
10	Receipt of letter of intent		20-07-2009

A perusal of the said list of events along with the relevant documents **13**
placed in the paper book establishes that the first land was purchased at Sonepat vide deed dated January 12, 2006 and the said land had been reflected as stock-in-trade in the balance-sheet as on March 31, 2006. Further, the board resolution dated March 1, 2006 was passed for execution of development agreement and for obtaining financial assistance for land acquisition. The copy of the letter is placed at pages 80 and 81 of the paper book. The assessee entered into development agreement in the initial month of the succeeding year and the copy of the development agreement is placed at pages 138 to 180 of the paper book. Once the land bank was collected by the assessee and its associate as per the requirement of

Haryana laws, an application for grant of licence was moved on July 23, 2008, copy of which is placed at pages 182 to 317 of the paper book. The letter of intent was received on July 20, 2009 which is placed in the paper book. Another investment was made by the assessee was entering in agreement for purchase of Man Sing Road property, wherein agreement of sale was entered dated October 25, 2005 placed at pages 332 onwards. The assessee has also filed details of land purchased at pages 83 to 101 of the paper book.

14 The question which arises for adjudication is whether set up of business is only set up or is also commencement of business. Looking at the facts in entirety what transpires is that the assessee had established its company, borrowed funds for purchase of portion of land in its own name and further gave loan to the associates for acquisition of land and then entered into development agreement for the development of township at Sonepat.

15 The hon'ble Bombay High Court in *Western India Vegetable Products Ltd.* v. *CIT* [1954] 26 ITR 151 (Bom) has laid down the proposition that there was a clear distinction between a person commencing a business and a person setting up a business and for the purpose of the Indian Income-tax Act, the setting up of the business and not the commencement of the business, is to be considered. It is only after the business is set up in the previous year, the business commences and any expenses incurred prior to the setting up of a business would not be a permissible deduction. When a business is established and is ready to commence business then it cannot be said that business had not set up. There may however be an interval between the setting up of the business and the commencement of the business and all expenses incurred during that interval would be permissible deductions.

16 The hon'ble Gujarat High Court in *CIT* v. *Saurashtra Cement and Chemical Industries Ltd.* [1973] 91 ITR 170 (Guj) held that "business" connotes a continuous course of activities. All the activities which go to make up the business need not be started simultaneously in order that the business may commence. The business would commence when the activity which is first in point of time and which must necessarily precede all other activities is started.

17 The hon'ble Delhi High Court in the case of *CIT* v. *Dhoomketu Builders and Development (P.) Ltd.* [2014] 368 ITR 680 (Delhi) was considering the case of a person engaged in real estate business, who had participated in an auction to acquire a piece of land. It was noted that in order to bid for the land, loan was obtained from its holding company and the same was deposited as earnest money to bid for the land. However, there was no

success in auction, but the interest paid on borrowed loans and interest received on earnest money was net off and the loss was claimed to be carried forward. The Tribunal held in such facts there was setting off of business and the same was held to be finding of facts by the hon'ble High Court.

The hon'ble Delhi High Court in *CIT* v. *Arcane Developers (P.) Ltd.* [2014] 368 ITR 627 (Delhi) while deciding the issue of allowability of interest expenditure on borrowed loan held that when the business of the assessee had commenced/was set up, on obtaining loan for making investment, it was held that "date of setting up of business" and "date of commencement of business" may be two separate dates. However, the date of setting up of business depends upon facts and the nature of the business. In the facts of the said case, where the assessee-company was incorporated for carrying on the business of developers and promoters, then where a memorandum of understanding was entered into for arrangement of funds, then the hon'ble High Court held as under : **18**

> "Memorandum of understanding is culmination of the negotiations started and undertaken earlier and subsequently fructified on payment by the respondent-assessee into the joint venture agreement. Setting up of business takes place when the business is ready and first steps are taken. In the case of real estate business, the said setting up of business was complete when first steps were taken by the respondent-assessee to look around and negotiate with parties. There can be a gap between setting up and when first steps were taken by the respondent and finalisation of the first written agreement. Business activities of the respondent did not require construction of a factory, machinery, etc. Negotiations are required to enter into a written understanding and it is obvious that the loan was taken for business and to proceed further and conclude the deal. The aforesaid facts have been examined and highlighted by the first appellate authority. The said findings of fact have been affirmed by the Tribunal. A pragmatic and a practical view has to be taken."

The hon'ble High Court thus held that setting up of business takes place then the business is ready and the first steps are taken, which in the case of real estate business were when the assessee looks around and negotiate with party. In such a scenario, the assessee was held entitled to claim of interest as business expenditure. **19**

Applying the abovesaid proposition to the facts of the present case, we hold that in the case of the assessee where substantial activities were carried out by the assessee, since the date of incorporation which had **20**

culminated in raising loans, making investment in purchase of land, which was reflected as stock-in-trade and also advancing loans to associate concerns for purchasing different pieces of land, in order to fulfil the condition of land bank of 100 acres or more, to develop the township in Haryana and where the assessee is entered into development agreement at the close of the present year/beginning of the next year, then the assessee can be said to have set up and commenced its business. Further, the assessee having also invested substantial amount in the purchase of another property in the year itself, thus, set up of its business as per its memorandum of understanding was done, since it was engaged in the business of real estate. It is held that there is no merit in the order of the authorities below in this regard and the same are reversed. Accordingly, we hold that the assessee having not only set up its business but had also commenced its business during the previous year itself. Hence, ground No. 1 of the assessee is allowed.

21 Now coming to the second issue raised by the assessee, it is consequent to the first issue raised in the present appeal. Once the business had been set up and also commenced in the instant year itself, then the interest expenses claimed by the assessee and any other expenditure claimed by the assessee is to be allowed as business expenditure. The assessee had also parked certain funds temporarily in the bank FDRs, on which it had earned interest which is to include also as business income in the hands of the assessee. Accordingly, ground Nos. 2 and 3 raised by the assessee also stand decided in the favour of the assessee and the same is dismissed.

22 Ground No. 4 is an alternate claim prayer made by the assessee does not require any adjudication.

23 The last issue raised vide ground No. 5 is taxability of interest income, which we have already held as business income ; even otherwise the said interest income needs to be set up of against interest expenditure as funds have been borrowed by the assessee and only surplus borrowed funds have been invested in bank FDRs. Accordingly, ground No. 5 raised by the assessee is allowed.

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

Order pronounced in the open court on June 22, 2020.

[2020] 82 ITR (Trib) 301 (Delhi)

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

AIR FRANCE

v.

ADDITIONAL COMMISSIONER OF INCOME-TAX

(and vice versa)

N. K. BILLAIYA *(Accountant Member)* and
MS. SUCHITRA KAMBLE *(Judicial Member)*

May 22, 2020.

AY ▸ 2004-05 to 2006-07
HF ▸ Assessee/Department

NON-RESIDENT—TAXABILITY IN INDIA—ASSESSEE OPERATING AIRCRAFT IN INTERNATIONAL TRAFFIC—TECHNICAL HANDLING SERVICES PROVIDED TO INTERNATIONAL AIRLINES TECHNICAL POOL MEMBERS—NO BAR ON MEMBER AIRLINE TO PROVIDE SERVICE TO NON-INTERNATIONAL AIRLINES TECHNICAL POOL MEMBER—ENTIRE RECEIPTS COLLECTED BY BRANCH OFFICE REMITTED TO HEAD OFFICE AFTER MEETING LOCAL EXPENDITURE—RECEIPTS OF BRANCH OFFICE FROM PUBLIC AT LARGE AND NOT FROM RENDERING OF SERVICES TO HEAD OFFICE—NO PERMANENT ESTABLISHMENT IN INDIA—INCOME FROM POOLING ACTIVITY NOT FEES FOR TECHNICAL SERVICES—NOT TAXABLE IN INDIA—INCOME-TAX ACT, 1961—DOUBLE TAXATION AVOIDANCE AGREEMENT BETWEEN INDIA AND FRANCE, ART. 8(2).

The assessee, a non-resident, rendered technical handling services to international airlines technical pool members. According to the assessee, it was a pooling activity and was not liable tax in India. The Assessing Officer treated the technical income as fees for technical services covered under section 115A read with section 44D of the Income-tax Act, 1961 and taxed the amount at 20 per cent. of the gross receipts. The Commissioner (Appeals) sustained the taxability to the extent of Rs. 3,70,098 under article 7 of the Double Taxation Avoidance Agreement between India and the France and rejected the claim under article 8 of the Agreement. On appeal :

Held, *that the Indian branch office was merely in the operation of aircraft in international traffic. There were no specific services referred to between the head office and the branch office. The entire receipts collected by the branch office were remitted to the head office, after meeting the local expenditure and the receipts of the branch office were from the public at large and not from rendering of services to the head office. Thus, the assessee did not have any*

permanent establishment in India. Further, the assessee was a member of the international airlines technical pool and the airline companies to whom it provided services were also members of the international airlines technical pool. There was no bar on member airlines to provide service to non-international airlines technical pool members and in fact, even if non-international airlines technical pool members availed of such services from a pool that would be considered a pool service to them. Article 8(2) specifically mentions that the Agreement will apply to the profits derived by an enterprise of a contracting State from the operation of aircraft in international traffic from the participation in a pool, a joint business or an international operating agency and shall be taxable only in that contracting States. In the present case, the contracting State was France and though under the domestic law the assessee had to pay tax in India while deriving income from Indian territory, because of article 8(2) the assessee was exempted from payment of any tax in India as its services or activities and profit therefrom were derived from pool participation. The assessee's income from ground handling and technical handling services was covered by article 8 being a pool member and providing service in that capacity to the guest members.

DIT *v.* KLM ROYAL DUTCH AIRLINES [2017] 392 ITR 218 (Delhi) *relied on.*

(ii) That the Assessing Officer had prima facie reason to believe that there was escapement of income as no return was filed by the assessee which was an admitted fact. Thus, initiation of proceedings under section 148 was just and proper.

Cases referred to :

British Airways PLC *v.* Addl. CIT (I. T. A. No. 3198/Delhi/2009 dated October 30, 2009) (para 2)

British Airways PLC *v.* Dy. CIT [2003-TII-23-ITAT-DEL-INTL] (para 7)

DIT *v.* KLM Royal Dutch Airlines [2017] 392 ITR 218 (Delhi) (paras 6, 8, 13)

DIT *v.* Lufthansa German Airlines [2017] 392 ITR 218 (Delhi) (paras 6, 8)

KLM Royal Dutch Airlines *v.* DIT (I. T. A. Nos. 403, 404 and 4811/Delhi/2010) dated January 28, 2011) (para 6)

Lufthansa German Airlines *v.* Dy. CIT [2004] 90 ITD 310 (Delhi) (paras 4, 6, 10)

I. T. A. Nos. 5008 and 5009/Delhi/2011 and 1786 and 2212/Delhi/2012 (assessment years 2004-05 to 2006-07).

Salil Aggarwal, Advocate, for the assessee.

G. K. Dhall, Commissioner of Income-tax-Departmental representative (International Taxation), for the Department.

ORDER

The order of the Bench was pronounced by

Ms. SUCHITRA KAMBLE ***(Judicial Member)***.—There are two appeals which are filed by the assessee against the assessment order dated October 4, 2011 passed by the Assessing Officer under section 143(3) read with section 144C of the Income-tax Act, 1961 as confirmed by the Dispute Resolution Panel vide its order dated August 2, 2011 for the assessment years 2004-05 and 2005-06 respectively and the two appeals are filed by the assessee and the Revenue against the orders dated February 6, 2012 passed by the Commissioner of Income-tax (Appeals)-XI, New Delhi for the assessment year 2006-07. 1

Firstly, we are taking up the appeals for the assessment year 2006-07 being I. T. A. No. 1786/Delhi/2012 and I. T. A. No. 2212/Delhi/2012 as the same was argued firstly by both the parties. The grounds of appeal are as under : 2

I. T. A. No. 1786/Delhi/2012 (assessee's appeal)

"1. That the learned Commissioner of Income-tax (Appeals) has grossly erred in not appreciating the true and correct facts of the case before passing the impugned order.

2. That the learned Commissioner of Income-tax (Appeals) has grossly erred in not appreciating that the appellant does not render any ground handling services and only render technical handling services even though it has been held that both are covered under article 8 of the Double Taxation Avoidance Agreement if rendered to international airlines technical pool members.

3. That the learned Commissioner of Income-tax (Appeals) has grossly erred in concluding that the services rendered to one non-international airlines technical pool member would be taxable in the hands of the appellant to the extent of the revenue earned from the said customer under article 7 of the Double Taxation Avoidance Agreement.

4. That the appellant seeks to alter, modify and add any of the ground, as the case may be."

I. T. A. No. 2212/Delhi/2012 (Revenue's appeal)

"1. On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) has erred in deleting the addition of Rs. 1,78,09,378 made by the Assessing Officer, by holding the assessee's income from ground handling and technical handling services to third party airlines are within the ambit of 'operation of aircraft' in international traffic and hence covered by article 8 of the Indo-French Double Taxation Avoidance Agreement.

2. On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) has erred in deleting the addition made by the Assessing Officer on account of receipts from rendering engineering and ground handling services to third party airlines, even though such receipts are not covered under article 8 of the Double Taxation Avoidance Agreement between India and France.

3. On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) has erred in deleting the addition made by the Assessing Officer on account of receipts from rendering engineering and ground handling services to third party airlines are not directly connected to operation of aircrafts in international traffic as envisaged in article 8 of the Indo-France Double Taxation Avoidance Agreement and accordingly, the receipts from such activities are taxable in India.

4. On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) has erred in deleting the addition made by the Assessing Officer on account of receipts from rendering engineering and ground handling services to third party airlines, by relying upon the decisions of the Income-tax Appellate Tribunal, New Delhi in the cases of *Lufthansa German Airlines* and *KLM Royal Dutch Airlines*, while ignoring the decision of the hon'ble Income-tax Appellate Tribunal in the case of *British Airways PLC* v. *Addl. DIT* (I. T. A. No. 3198/Delhi/2009 dated October 30, 2009), which is squarely applicable in the present case.

5. The appellant craves to add, amend, modify or alter any grounds of appeal at the time or before hearing of the appeal."

3 During the hearing, the learned Departmental representative pointed out that the tax limit in the appeal being I. T. A. No. 2212/Delhi/2012 filed by the Revenue is below Rs. 50 lakhs which squarely falls within the ambit of Circular No. 17 of 2019 dated August 8, 2019[1] issued by the Central

Board of Direct Taxes prescribing the tax effect for preferring appeals before the Tribunal by the Revenue and subsequent clarification issued by the Central Board of Direct Taxes on August 20, 2019. Therefore, I. T. A. No. 2212/Delhi/2012 filed by the Revenue is dismissed.

Now, we are taking up I. T. A. No. 1786/Delhi/2012. The assessee is a **4** foreign company, engaged in the operation of aircraft in international traffic. The assessee is a tax resident of France and is liable for taxation in France. The assessee filed its return of income for the assessment year 2006-07 on March 31, 2008, declaring nil taxable income as the assessee claimed that the entire income earned by the assessee in India is exempt from taxation under section 90 of the Income-tax Act, 1961. Thereafter, the case of the assessee was fixed for scrutiny under section 143(2). The assessee in India derives income from the following sources ;

(i) Carriage of passage.

(ii) Carriage of cargo.

(iii) Interest income from funds directly connected with the operation of aircraft in international traffic.

(iv) Income from technical handling to other international airlines technical pool members.

During the course of assessment, the assessee was directed to furnish details in respect of the technical handling undertaken by it for other carriers along with the details of income from cargo passage and interest, etc. The assessee furnished the details. The assessee submitted that the case of the assessee was squarely covered by the judgment of the Tribunal in the case of *Lufthansa German Airlines* v. *Dy. CIT* [2004] 90 ITD 310 (Delhi) and since the assessee was rendering technical handling services only to international airlines technical pool members, it is a pooling activity and not liable to be taxed in India. The Assessing Officer passed an assessment order thereby treating the technical income as "fee for technical services" at Rs. 1,81,79,476 covered under section 115A read with section 44D and taxed the same at 20 per cent. of the gross receipts.

Being aggrieved by the assessment order the assessee filed an appeal **5** before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals) partly allowed the appeal of the assessee.

The learned authorised representative submitted that as per the general **6** rules specified under the *International Airlines Technical Pool Manual*, wherein, for activities covered, under "ground maintenance equipment and aircraft recovery" is identified under standard agreements is "E" whereas

1. See [2019] 416 ITR (St.) 106.

the identification to be affixed on such standard agreements at the time of entering into such agreements by the member airlines for line maintenance services, the code is to be used "L" and which has been consistently done and followed by the assessee-airlines. Everywhere on the agreement and the description of the services being made is that of technical services. Thus, it is clear that no "ground handling activity" is undertaken or carried out by the assessee-airlines. The learned authorised representative further submitted that only "technical handling services" has been undertaken. Local company with AF (HO) as a shareholder and a local Indian company as the other shareholder had floated a private limited company in the name and style of Air France Ground Handling India Pvt. Ltd. which was for the object and main purpose of being undertaking "ground handling activities" and not "technical handling activities". This was a separate entity incorporated under the Companies Act, 1956 and was for "ground handling services" which never took off and was wound up subsequently. The assessee-airlines is providing services on a per-flight basis. The services offered by the assessee-airlines varies in quality and coverage and it is offering facilities like "storage" to some of the airlines, "loan of equipment" to some airlines providing "qualified man power", etc., to different airlines. The learned authorised representative further submitted that the rates charged by the servicing airlines to the service receiver airlines is dependent on a number of flights handled, discount offered due to handling a number of flights and determination of cost sharing rules, which is determined according to the general rules of the *International Airlines Technical Pool Manual*. Wherein, based on a number of flights handled, global flights handled and agreement between airlines under the pooling arrangement charge applicable rates, as may be determined by the member airlines and it is not the case wherein, by charging varied rates, the member airlines do not fall part of the International Airlines Technical Pool. The international airlines technical pool does not prescribe the rates to be charged from other member airlines. During the assessment year 2006-07, the assessee-airlines had serviced only one airline, i. e., Iberworld, who was not a member airline but was of the status of a guest airlines covered under the international airlines technical pool. The learned authorised representative further submitted that ad hoc agreements with Etihad Airlines, Air Canada, Jet Airways, Air India, TNT Airways and Cambata Aviation, etc., have been entered into, has mentioned by the Revenue. Thus, airlines with which commencement of contract with third parties provided technical assistance during the financial year 2006-07. The learned authorised representative submitted that even ad hoc basis agreements are agreements

which are not continuous in nature and are for a limited time period and entered of and on by the member airlines depending on the requirements and was not without any agreements. The learned authorised representative submitted that the *International Airlines Technical Pool Manual* provides raising direct invoices between the member airlines as per the manual and hence such invoices are in accordance with the *International Airlines Technical Pool Manual*. The learned authorised representative further submitted that deduction of TDS is merely a recovery procedure and not a levy of tax. There are only notional credits and debits between the member airlines and there is no transaction of money and provision of TDS does not make any receipt as taxable. The learned authorised representative further submitted that service tax is a levy which is different from the Income-tax Act and is levied on services being provided by one part to another and such services are chargeable to service tax in India. In the instant case, it is not a dispute and other services being rendered by the assessee-airlines but on the other hand, the dispute is whether the services rendered by the assessee-airlines is part and parcel as pool arrangement and subjected to tax at home base rather than source. It is not a dispute as to whether service has been rendered by the assessee-airlines to other airlines or not. The learned authorised representative further submitted that no monies were paid or received in India on account of services rendered by the assessee-airlines to other airlines which are part and parcel of pool. But only notional credits and debits are given through pool accounting mechanism, i. e., international air transport association clearing house. The facilities extended by the assessee-airlines are in the nature of line maintenance facilities and these are predominantly with the view to assist the airlines as a means of collaborating the air transport enterprises. The learned authorised representative relied upon the decision of the Tribunal in the case of *Lufthansa German Airlines* [2004] 90 ITD 310 (Delhi) and since the assessee was rendering technical handling services to international airlines technical pool members, it is a pooling activity and not liable to be taxed in India. The learned authorised representative also relied upon the decision of *KLM Royal Dutch Airlines* v. *DIT* decided in I. T. A. Nos. 403, 404 and 4811/Delhi/2010 of the Tribunal and the hon'ble High Court decision in the case of *DIT* v. *KLM Royal Dutch Airlines and Lufthansa German Airlines* [2017] 392 ITR 218 (Delhi). The learned authorised representative also furnished the comparison of the Double Taxation Avoidance Agreement between UK, Netherlands, Germany and France. The learned authorised representative submitted that the provisions of article 8(4) of the Indo-German Treaty and article 8(2) of the Indo-France Treaty

and article 8(3) of the Indo-Netherlands Treaty are identically worded as under :

"The provisions of paragraph (1) shall also apply from the participation in a joint business or an international operating agency."

Whereas article 8(2) of the Indo-UK Treaty is differently worded as under :

"The provision of paragraph (1) of this article shall likewise apply in respect of participation in pools of any kind enterprises engaged in air transport."

Thus, the learned authorised representative submitted that the Commissioner of Income-tax (Appeals) was not right in sustaining taxability to the extent of Rs. 3,70,098 under article 7 of the Double Taxation Avoidance Agreement and rejecting the claim of article 8 of the Double Taxation Avoidance Agreement.

7 The learned Departmental representative submitted that one of the activities from which the assessee derived income during the years under appeal is technical handling. Although the assessee has been claiming that it has provided "technical handling" services as per the agreements produced, the nature of services has been described as "ground handling". The assessee provides its services on a "per-flight" basis for fixed duration. The services on offer also vary on quality and coverage. The learned Departmental representative further submitted that the assessee also provides a multitude of other facilities. The assessee does not follow a uniform pricing policy for the services provided by it and the rates charged for the same type of aircraft, i. e., A-330 vary from airlines to airlines. Similarly, there are different rates on the basis of duration of services as well as for additional services as reflected in the table produced during the hearing. The learned Departmental representative further submitted that the assessee provides its services both to airlines who are members of international air transport association/international airlines technical pool as well as members who are not members of international airlines technical pool. The assessee also provides its services under bilateral service agreements as well as on an ad hoc basis without any agreements. The assessee raised direct invoices specifying the amount payable on the basis of actual usage of services as well as the period, i. e., 30 days within which such amount is payable. The assessee also receives service charges directly from the service recipients. The agreements for the provision of services with certain airlines have in-built provision for TDS and Austrian Airlines have deducted TDS too. Similarly, the amount received from Austrian Airlines and others are subjected to service tax. The agreement with the Singapore Airlines has

in-built "termination clause" as well as provision for "annual pricing review". The agreement with the Singapore Airlines and Austrian Airlines also provides for the sub-contract of the services to KLM. However, while the assessee charges US dollar 625 and Euro 340 from Singapore and Austrian Airlines respectively for its services. The assessee also promoted a joint venture named Air France Ground Handling Pvt. Ltd. with Interglobe to assist it in the provision of ground handling services and pays to the said concern for the same. The activities involving provision of services and facilities are not only restricted to Delhi but has also taken commercial space at other airports like Chennai, Bangalore and Mumbai as per its website. Thus, services are offered at these stations as well. As evident from the above the bilateral agreements between the assessee and other airlines are varied both in terms of the nature and quality of services provided, service charges as well as other services conditions and no two agreements are identical. The result of the above well organised, independent and parallel commercial/business structure is the sure and constant increase in the revenue earned from the provision of services and facilities over the years. The assessee is also a member of various other pools like international air transport association fuel quality pool (IFQP), international air transport association's safety audit of ground operations (ISAGO) which is an internationally recognised system for assessing the operational management and control systems of an organisation that provides ground handling services for airlines and European Line Maintenance Organization (ELMO). The learned Departmental representative relied upon the decision of *British Airways PLC* v. *Dy. CIT* (I. T. A. No. 4653 to 4655/Delhi/1999 and 484 to 486/Delhi/2000 dated September 24, 2001) [2003-TII-23-ITAT-Del-INTL].

We have heard both the parties and perused all the relevant material **8**
available on record. It is pertinent to note that the assessee-company is claimed benefit under the Double Taxation Avoidance Agreement under article 8 of the treaty, since the entire revenue receipts are from operation of aircraft in international traffic as per the assessee before the Assessing Officer. The assessee also submitted during the assessment proceedings that the Indian branch office is merely a branch office of the foreign company, which is engaged in the operation of aircraft in international traffic. There are no specific services referred between the head office and the branch office as per the submissions of the assessee. The entire receipts collected by the branch office are remitted to the head office, after meeting the local expenditure and the said receipt of the branch office are from the public at large and not from rendering of services to the head office as per

the assessee. The Assessing Officer asked the assessee to submit sources of income including from ground handling, flight maintenance, etc. and asked to explain the taxability of the same vis-a-vis judgments of the authorities in the cases of *British Airways and Lufthansa Airlines* of the Tribunal. The assessee submitted that during the year under consideration Air France has provided technical handling services to other international airlines technical pool members aggregating to Rs. 1,81,79,476. The same is covered under article 8 of the provisions of the Double Taxation Avoidance Agreement between India and France (Double Taxation Avoidance Agreement). The assessee further submitted that it is part and parcel of the income covered under operation of aircraft of international traffic. The technical handling services are provided by Air France to only international airlines technical pool members. The Assessing Officer further asked the following queries :

(i) The nature of technical handling services and the steps involved in the same ?

(ii) Basis of figure of Rs. 1,81,79,476.

(iii) Taxability of the same vis-a-vis the decisions of the Income-tax Appellate Tribunal in the case of *British Airways* and *Lufthansa German Airlines* and also to show cause, why the receipts should not be taxed in India ?

(iv) The extent of technical services provided to its own aircrafts and the aircrafts of the other airlines.

The assessee provided the copies of invoices, contracts for technical handling to the Assessing Officer. The Assessing Officer after going through the contracts and invoices observed that the services are not mentioned in annexure B of the agreement. The assessee explained technical handling services as nothing, but verifying the technical parameters of the aircraft, after it has taken a journey to verify that the same is in an airworthy and safe conditions to fly again. Such examination airworthiness certificate is provided to the airlines by AF basis which flying is allowed. The assessee is a member of "international airlines technical pool" (IATP). As an international airlines technical pool member the assessee extends technical facilities (line maintenance facilities) to other international airlines technical pool members only during the year under consideration. No such facility or service has been provided by the assessee to any non-international airlines technical pool member during the year under consideration. The services as per the standard ground handling agreement 1998 main agreement along with annexure A and annexure B is as under :

"IATP FORM 55 LINE MAINTENANCE POOLING

Annexure B. 12/ OS-DEL

Location, agreed services and charges

To the standard ground handling agreement of April 1998

BETWEEN

Air France having its principal office at 45 Rue de Paris 95747 Roissy CDG Cedex France	And	Austrian Airlines having its principal office at Fortanastrasse : P. O. Boax 50 A-1107, Vienna Austria
And hereinafter referred to as "the Handling Company" Holding EASA ParT 145 approval Certificate Nbr : FR.145 010		And hereinafter referred to as "the Carrier"

Effective from	:	October 25,1998
This Annexure B for the location	:	Delhi (DEL)
Is valid from	:	April 1, 2006
And replaces	:	Annexure B 1 1 valid from April 1, 2005

PREAMBLE

This annexure B is prepared in accordance with the simplified procedure whereby the parties agree that the terms of the main agreement and annexure A of the SGHA of April 1998 as published by the international air transport association shall apply as if such terms were repeated here in full.

By signing this annexure B, the parties confirm that they are familiar with the aforementioned main agreement, annexure A and the International Airline Technical Pool Rules.

Paragraph 1-Services contracted

1.1 For a single ground handling consisting of the arrival and the subsequent departure at agreed timings of the same aircraft, the handling company shall provide the following services of annexure A at the following rates.

1.1.1	Section 2	2.2.1, 2.2.2.
	Section 6	6.3.1, 6.3.2. (a), (b), 6.6.1 (c)
	Section 7	7.1.3

Section 8	8.1.1., 8.1.2(b), 8.1.4, 8.1.5, 8.1.6, 8.1.9, 8.1.10, 8.1.11, 8.1.12, 8.2.1, 8.2.2, 8.2.3
Section 9	9.1.1, 9.1.2, 9.1.3, 9.1.4 (a), 9(b), 9.2.1 (see 1.2), 9.2.2, 9.2.3, 9.2.4, 9.2.5, 9.3.1(b), 9.3.2, 9.3.3 (to a limited extent).
Section 14	14.4.2(b5) (if required)

Aircraft type/engine type	*Turnaround inspection Line transit (Grd. Time < 5hrs.)*
A-330/PW 4168	Euros 340
A-340/CFM56	Euros 340

1.2 Service 9.2.1 is limited to a maximum of 2 man-hour—Additional work beyond the provision included in the flat rate will be charged at Euros 84 per man-hour."

Now, we are quoting the relevant article 8 of the Double Taxation Avoidance Agreement between India and France as follows :

"ARTICLE 8

Air transport

(1) Profits derived by an enterprise of a contracting State from the operation of aircraft in international traffic shall be taxable only in that contracting State.

(2) The provisions of paragraph (1) shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

(3) For the purpose of this article, interest on funds connected with the operation of aircraft in international traffic shall be regarded as profits derived from the operation of such aircraft, and the provisions of article 12 shall not apply in relation to such interest.

(4) The term 'operation of aircraft' shall mean business of transportation by air of passengers, mail, livestock or goods carried on by the owners or lessees or charterers of aircraft, including the sale of tickets for such transportation on behalf of other enterprises, the incidental lease of aircraft and any other activity directly connected with such transportation."

The Revenue contended that the assessee provides its services both to airlines who are members of international air transport association/international airlines technical pool as well as members who are not members of international airlines technical pool. The learned Departmental representative pointed out that the assessee does not receive any reciprocal services in India and considering the scale of activities both inside India as

well as outside and the collaborations with KLM and Air France Ground Handling Pvt. Ltd. to provide the services and facilities, it can be safely concluded that it is an independent commercial and business activity which is in no way ancillary or connected to the business in the operation of aircraft as defined by article 8(4) of the Double Taxation Avoidance Agreement between India and France. Therefore, the learned Departmental representative submitted that the Assessing Officer was right in rejecting the claim of the assessee under article 8 of the Double Taxation Avoidance Agreement between India and France.

While going through the submissions of both the parties, it is pertinent to note the relevant points of the decision in the case of the hon'ble High Court in the case of *DIT* v. *KLM Royal Dutch Airlines and Lufthansa German Airlines* [2017] 392 ITR 218 (Delhi) wherein while dismissing the appeals, the hon'ble High Court held that the assessee participated in the international airlines technical pool and earned certain revenues from such activities and also incurred expenditure. There was a clear reciprocity as to the extension of services ; membership was premised upon each participating member being able to provide facilities for which it was formed. As there was reciprocity in the rendering and availing of services, there was clearly participation in the pool ; in terms of the two Double Taxation Avoidance Agreements (between India and Germany and between India and the Netherlands) the profits from such participation were not taxable in India. While distinguishing the *British Airways* (supra) the hon'ble High Court in the case of *KLM Royal Dutch Airlines and Lufthansa German Airlines* (supra) extracted the Tribunal's decision as follows in para 31 (page 238) :

> "(i) British Airways provided engineering and ground handling services at IGI Airport, New Delhi to eleven other airlines, at Chennai to five other airlines and certain other airlines at Mumbai. It has not availed of any services/facilities from any airlines in India. Thus, there was no reciprocity in the agreement entered into between British Airways and other airlines ;
>
> (ii) British Airways had a separate establishment and separate office set up to monitor ground handling services and different establishment at international airports, New Delhi did not form part and parcel of the operation of British Airways pertaining to the operation of aircrafts in international traffic. There is no such finding in the present appeals.
>
> (iii) British Airways services and facilities in India to the other airlines was a commercial activity. The excess/idle capacity was provided

to various airlines at a price. The services provided in terms of the international airlines technical pool manual are not based on any consideration paid or received ; a system of credits has been created for international airlines technical pool members.

(iv) British Airways has a branch office in India, which constituted a permanent establishment ('PE') in India, and, therefore, the income derived from permanent establishment in India was taxable as the same was not covered under the double taxation avoidance agreement.

(v) Article 8(2) of the Double Taxation Avoidance Agreement between India and the UK provided that paragraph (1) of article 8 shall likewise apply in respect of participation in pools of any kind. The words 'pools of any kind' was interpreted by the Income-tax Appellate Tribunal by taking the dictionary meaning of the word "pool". These are missing in the two the double taxation avoidance agreements in question.

(vi) Article 8(3) of the Double Taxation Avoidance Agreement between India and the UK provided that the terms 'operation of aircraft' shall include '. . . 3. For the purposes of this article the term 'operation of aircraft' shall include transportation by air of persons, live-stock, goods or mail, carried on by the owners or lessees or charterers of aircraft, including the sale of tickets for such transportation on behalf of other activity directly connected with such transportation". These terms are not present in the two double taxation avoidance agreements in the present set of appeals.

(vii) After meeting the requirement of its own flights, the services of employees were required for handling other airlines operation for generating income.

Having regard to these facts, this court is of the opinion that the amplification of the term 'operation of aircraft' in article 8(1) through article 8(3), i. e., '. . . 3. For the purposes of this article the term "operation of aircraft" shall include transportation by air of persons, live-stock, goods or mail, carried on by the owners or lessees or charterers of aircraft, including the sale of tickets for such transportation on behalf of other enterprise, the incidental lease or aircraft on a charter basis and any other activity directly connected with such transportation' had the effect of limiting the nature of activities that could be comprehended in the pool envisioned in article 8(2) ; in other words, the expanded meaning of operation of aircraft included those activities in article 8(3) through the extended definition and no more. On

the other hand, there is no such limitation in the double taxation avoidance agreements in question, in these cases. This constituted the most significant difference between the two sets of cases on the one hand, and *British Airways* (supra) on the other. For these reasons, this court rejects the Revenue's contentions."

In the present case from the records, it can be seen that the Indian branch office is merely a branch office of the foreign/assessee-company, which is engaged in the operation of aircraft in international traffic. There are no specific services referred between the head office and the branch office as per the submissions of the assessee which appears to be correct and no distinguishing facts were brought on record by the Revenue before us. The entire receipts collected by the branch office are remitted to the head office, after meeting the local expenditure and the said receipt of the branch office are from the public at large and not from rendering of services to the head office. Thus, the assessee-company is not having any permanent establishment in India. Therefore, the observation of the Assessing Officer that the assessee-company is having permanent establishment in India and hence income arrived in India is taxable, is not correct finding according to the facts on record. Further, from the perusal of the submissions of both the parties and after going through the "international airlines technical pool" (IATP) agreement along with the standard handling agreement in consonance with the Double Taxation Avoidance Agreement between India and France, it can be seen that the assessee-company is a member of international airlines technical pool and the services provided by the assessee-company to the relevant air companies were also the member of the international airlines technical pool. There is no dispute on this aspect by the Assessing Officer in the assessment order though the learned Departmental representative is contending contrary that some of the airlines whom the services provided were not members of international airlines technical pool. But that is not the case in the present assessment year. In fact as per annexure "A" of *International Airlines Technical Pool Manual*, it is evidently clear that there is no bar on member airline to provide service to non-international airlines technical pool member and in fact, even non-international airlines technical pool members if takes such service from a pool would be considered as a pool service to them. Thus, the submission of the learned Departmental representative is factually incorrect. Now, coming to the Double Taxation Avoidance Agreement between India and France, it can be seen that article 8(2) specifically mentions that the Double Taxation Avoidance Agreement will apply to the profits derived by an enterprise of a contracting State from the operation of

aircraft in international traffic from the participation in a pool, a joint business or an international operating agency and shall be taxable only in that contracting States. In the present case, the contracting State is France and though under domestic law the assessee has to pay tax in India while deriving income from Indian territory, yet because of article 8(2) of the Double Taxation Avoidance Agreement agreement, Air France is exempted to pay any tax in India as its services/activities and profit thereof derives from pool participation. The hon'ble High Court in the case of *KLM Royal Dutch Airlines and Lufthansa German Airlines* (supra) clearly set out how the facts of the British Airways are distinguishable. In the present case, as well the ratio laid down in *British Airways* will not be applicable, as the assessee company is a member of international airlines technical pool and the Double Taxation Avoidance Agreement between India and France clearly set out that those who are members of the pool are exempt from tax in India. Thus, the Assessing Officer was not right in rejecting the claim of the assessee that profit from technical handling services is covered by article 8 and in treating the technical income as "fee for technical services" at Rs. 1,81,79,476 covered under section 115A read with section 44D and taxed the same at 20 per cent. of the gross receipts. The Commissioner of Income-tax (Appeals) rightly held that the assessee's income from ground handling and technical handling services is covered by article 8 of the Indo-French Double Taxation Avoidance Agreement. But the Commissioner of Income-tax (Appeals) further held that income earned from rendering service to Iberworld a non-international airlines technical pool member amounting to Rs. 3,70,098 would be taxed under article 7, that is what challenged before us by the assessee. The *International Airlines Technical Pool Manual* clearly set out that there is no bar on member airline to provide service to non-international airlines technical pool member and in fact, even non-international airlines technical pool members if takes such service from a pool would be considered as a pool service to them. Thus, the assessee being a pool member and providing service in that capacity to the guest members comes under the purview of article 8(2) of the Double Taxation Avoidance Agreement between India and France. Therefore, the Commissioner of Income-tax (Appeals) was not right in sustaining the taxability to the extent of Rs. 3,70,098 under article 7 of the Double Taxation Avoidance Agreement. Thus, the appeal of the assessee is allowed.

9 In the result, the appeal being I. T. A. No. 1786/Delhi/2012 filed by the assessee is allowed and the appeal being I. T. A. No. 2212/Delhi/2012 filed by the Revenue is dismissed.

Now, we are taking up grounds of the appeal for the assessment years 2004-05 and 2005-06. **10**

I. T. A. No. 5008/Delhi/2011

The assessment order dated October 4, 2011 as confirmed by the Dispute Resolution Panel vide its order dated August 2, 2011 wherein the income of the assessee has been assessed at Rs. 12,89,056 is being challenged to by the assessee under the provisions of section 253 of the Act, on the following grounds :

1. That the order passed under section 143(3), as directed under section 144C(13) has been passed without appreciating the true and correct facts and the legal position of the instant case.

2. That the order passed under section 143(3) along with section 144C(13) is time barred inasmuch as the order has been received on October 17, 2011 by the appellant company, which is beyond the period of one month as envisaged under the provisions of section 144C(13) and to that extent is bad in law.

3. That the learned Additional Director of Income-tax has wrongly assumed jurisdiction under section 148 of the Income-tax Act inasmuch there was no reason believe that there has been income escaping assessment within the meaning of section 147.

4. That the assessee objects to the passing of the order under section 148 read with section 143(3) of the Act as there was no fresh material on record by virtue of which it could be said that there has been income escaping assessment within the meaning of section 147.

5. That the learned Additional Director of Income-tax, in the assessment order as per directions issued by the Dispute Resolution panel have failed to appreciate the true and correct facts and circumstances of the case of the appellant and has framed an assessment by making additions on a issue which is already covered in favour of the appellant company by the judgment of this hon'ble Income-tax Appellate Tribunal in the case of *Lufthansa German Airlines* reported in [2004] 90 ITD 310 (Delhi) as also the case of *KLM Royal Dutch Airlines*.

6. That the learned Additional Director of Income-tax in the assessment order has grossly erred in holding that the income by way of adjustment of book entries is liable to be taxed in India.

7. That the learned Additional Director of Income-tax in assessment order has failed to appreciate the fact that the income earned from technical handling was covered by the Double Taxation

Avoidance Agreement between India and France and as such was exempt income and could not have been brought to tax in India.

8. That the learned Additional Director of Income-tax in the assessment order has grossly erred in not appreciating the fact that the case of the appellant is in pari materia with the case of *Lufthansa German Airlines* and totally distinguishable from the facts and circumstances of the case of *British Airways PLC* and has totally ignored and brushed aside the replies and details filed by the appellant in this regard.

9. That the learned Additional Director of Income-tax in the assessment order has grossly erred in relying upon the judgment of the hon'ble Tribunal in the case of *British Airways PLC* which judgment in any case is totally distinguishable from the facts and circumstances of the appellant company and completely inapplicable to the facts and circumstances of the appellant.

10. That the learned Additional Director of Income-tax has grossly erred in not appreciating the commentary of Organisation for Economic Co-operation and Development relied upon by the appellant and has further erred in observing that Organisation for Economic Co-operation and Development commentary is not binding on India as India is not a member of Organisation for Economic Co-operation and Development. In the process has ignored various judgments and pronouncements passed by various courts upholding the contrary view of the courts and other appellate authorities on the issue.

11. That the learned Additional Director of Income-tax in the assessment order has grossly erred in not appreciating that Organisation for Economic Co-operation and Development commentary is the guiding principle for Indian courts as has been held in the judicial pronouncements relied upon by the appellant-company.

12. That the Additional Director of Income-tax has grossly erred in interpreting the provisions of the Double Taxation Avoidance Agreement in a very narrow and one sided manner contrary to various judgments and pronouncements by various courts on similar issue.

13. The learned Additional Director has completely misread and misunderstood the provisions of article 8(1), article 8(3) and article 8(4) of the Double Taxation Avoidance Agreement between India and France and has grossly erred in applying the same to the facts and circumstances of the appellant-company.

14. That learned Additional Director in the assessment order has grossly erred in concluding that pool activity of airlines is not part of operation of aircraft in international traffic.

15. That the learned Additional Director has completely ignored the fact that only revenue pool envisaged in the aviation industry which affects the appellant-company is international airlines technical pool. That too is duly recognised and covered under article 8 of the Double Taxation Avoidance Agreement and income arising therefrom is exempt from taxation in India.

16. That the learned Additional Director and the Dispute Resolution Panel has grossly erred in proposing to tax revenue earned by the appellant under the provisions of article 7 of the Double Taxation Avoidance Agreement between India and France. Although the same is covered under article 8 of the Double Taxation Avoidance Agreement.

17. That the learned Additional Director in the assessment order notwithstanding and without prejudice has grossly erred in estimating expenses incurred at 40 per cent. of the earnings and which in any case is without any basis and is completely arbitrary.

18. That the learned Additional Director has grossly erred in treating the income, from technical handling accruing to the appellant during the year under consideration, as being covered under article 7 while as in the assessment year 2007-08 the same had been taxed by the very same Assessing Officer under article 13 of the Double Taxation Avoidance Agreement as fees for technical service.

19. That the learned Additional Director of Income-tax in the assessment order has grossly erred in initiating penalty proceedings under section 271(1)(c).

20. That the learned Additional Commissioner has in the assessment order grossly erred in charging interest under section 234 of the Income-tax Act.

21. That the appellant may add, alter, and amend any of if so required.

I. T. A. No. 5009/Delhi/2011

The assessment order dated October 4, 2011 as confirmed by the Dispute Resolution Panel vide its order dated August 2, 2011 wherein the income of the assessee has been assessed at Rs. 12,89,056 is being challenged to by the assessee under the provisions of section 253 of the Act on the following grounds :

1. That the order passed under section 143(3), as directed under section 144C(13) has been passed without appreciating the true and correct facts and the legal position of the instant case.

2. That the order passed under section 143(3) along with section 144C(13) is time barred inasmuch as the order has been received on October 17, 2011 by the appellant-company, which is beyond the period of one month as envisaged under the provisions of section 144C(13) and to that extent is bad in law.

3. That the learned Additional Director of Income-tax has wrongly assumed jurisdiction under section 148 of the Income-tax Act inasmuch there was no reason believe that there has been income escaping assessment within the meaning of section 147.

4. That the assessee objects to the passing of the order under section 148 read with section 143(3) of the Act as there was no fresh material on record by virtue of which it could be said that there has been income escaping assessment within the meaning of section 147.

5. That the learned Additional Director of Income-tax, in the assessment order as per the directions issued by the Dispute Resolution Panel have failed to appreciate the true and correct facts and circumstances of the case of the appellant and has framed an assessment by making additions on a issue which is already covered in favour of the appellant company by the judgment of this hon'ble Income-tax Appellate Tribunal in the case of *Lufthansa German Airlines* reported in [2004] 90 ITD 310 (Delhi) as also the case of *KLM Royal Dutch Airlines*.

6. That the learned Additional Director of Income-tax in assessment order has grossly erred in holding that the income by way of adjustment of book entries is liable to be taxed in India.

7. That the learned Additional Director of Income-tax in assessment order has failed to appreciate the fact that the income earned from technical handling was covered by the Double Taxation Avoidance Agreement between India and France and as such was exempt income and could not have been brought to tax in India.

8. That the learned Additional Director of Income-tax in the assessment order has grossly erred in not appreciating the fact that the case of the appellant is in pari materia with the case of *Lufthansa German Airlines* and totally distinguishable from the facts and circumstances of the case of *British Airways PLC* and has totally ignored and brushed aside the replies and details filed by the appellant in this regard.

9. That the learned Additional Director of Income-tax in assessment order has grossly erred in relying upon the judgment of the hon'ble Tribunal in the case of *British Airways PLC* which judgment in any case is totally distinguishable from the facts and circumstances of the appellant-company and completely inapplicable to the facts and circumstances of the appellant.

10. That the learned Additional Director of Income-tax has grossly erred in not appreciating the commentary of Organisation for Economic Co-operation and Development relied upon by the appellant and has further erred in observing that Organisation for Economic Co-operation and Development commentary is not binding on India as India is not a member of Organisation for Economic Co-operation and Development. In the process has ignored various judgments and pronouncements passed by various courts upholding the contrary view of the courts and other appellate authorities on the issue.

11. That the learned Additional Director of Income-tax in assessment order has grossly erred in not appreciating that Organisation for Economic Co-operation and Development commentary is the guiding principal for Indian court as has been held in the judicial pronouncements relied upon by the appellant-company.

12. That the Additional Director of Income-tax has grossly erred in interpreting the provisions of the Double Taxation Avoidance Agreement in a very narrow and one sided manner contrary to various judgments and pronouncements by various courts on similar issue.

13. The learned Additional Director has completely misread and misunderstood the provisions of article 8(1), article 8(3) and article 8(4) of the Double Taxation Avoidance Agreement between India and France and has grossly erred in applying the same to the facts and circumstances of the appellant-company.

14. That the learned Additional Director in the assessment order has grossly erred in concluding that pool activity of airlines is not part of operation of aircraft in international traffic.

15. That the learned Additional Director has completely ignored the fact that only revenue pool envisaged in the aviation industry which affects the appellant-company is international airlines technical pool. That too is duly recognised and covered under article 8 of the Double Taxation Avoidance Agreement and income arising therefrom is exempt from taxation in India.

16. That the learned Additional Director and the Dispute Resolution Panel has grossly erred in proposing to tax revenue earned by the appellant under the provisions of article 7 of the Double Taxation Avoidance Agreement between India and France. Although the same is covered under article 8 of the Double Taxation Avoidance Agreement.

17. That the learned Additional Director in the assessment order notwithstanding and without prejudice has grossly erred in estimating expenses incurred at 40 per cent. of the earnings and which in any case is without any basis and is completely arbitrary.

18. That the learned Additional Director has grossly erred in treating the income, from technical handling accruing to the appellant during the year under consideration, as being covered under article 7 while as in the assessment year 2007-08 the same had been taxed by the very same Assessing Officer under article 13 of the Double Taxation Avoidance Agreement as fees for technical service.

19. That the learned Additional Director of Income-tax in the assessment order has grossly erred in initiating penalty proceedings under section 271(1)(c).

20. That the learned Additional Director of Income-tax in the assessment order has grossly erred in initiating penalty proceedings under sections 271A and 271B.

21. That the learned Additional Commissioner has in the assessment order grossly erred in charging interest under section 234 of the Income-tax Act.

22. That the appellant may add, alter, and amend any of if so required.

11 The facts for both the assessment years 2004-05 and 2005-06 are identical, therefore, we are firstly taking up I. T. A. No. 5008/Delhi/2011. The assessee renders technical and engineering handling services to other air lines over and above its regular air transportation business. Engineering and technical handling services are rendered by the assessee through its engineers to other airlines. The Assessing Officer held that these services are not covered under the head air transport business and, therefore, the income of the assessee is not covered under article 8 of Indo-French Double Taxation Avoidance Agreement. The Assessing Officer also held that the activity is not a cool activity. The Assessing Officer further held that the term bill and joint business are only related to preservation of passenger and goods transport and by no means coverer separate business activities.

The assessee filed objections to the draft order on January 24, 2011. The Dispute Resolution Panel vide order dated August 2, 2011 passed direction under section 144C(5) of the Income-tax Act, 1961 thereby disposing of the objections of the assessee. Vide assumption order dated October 4, 2011. The Assessing Officer rejected the claim of the assessee that profit from technical handling services is covered by article 8. The Assessing Officer held that since the assessee has a permanent establishment in India profits of the assessee are taxable in India. The Assessing Officer further held that fees for technical services are effectively connected with the permanent establishment as the services are being rendered by personal located in India, provisions of article 7 of the Double Taxation Avoidance Agreement are applicable and thus incurring of expenses is computed on estimated basis as was done in 2007-08 and 2008-09 at 60 per cent. of gross receipts of Rs. 21,48,427 from other airlines on account of maintenance and technical services which amounts to Rs. 12,089,56 for the assessment year 2004-05 and Rs. 34,63,105 for the assessment year 2005-06.

During the course of arguments, the assessee argued the assessment **12**
year 2006-07 firstly which is dealt on the merits hereinabove paras and thereafter argued the assessment years 2004-05 and 2005-06. The learned authorised representative has not pressed ground No. 2 for the assessment years 2004-05 and 2005-06 in both these appeals. Therefore, ground No. 2 in both the appeals for the assessment years 2004-05 and 2005-06 are dismissed.

The learned authorised representative submitted that the assumption of **13**
jurisdiction by the Assessing Officer who resorted to passing the impugned orders by initiating proceedings under section 148 of the Act is bad in law and without jurisdiction on the ground that the reasons recorded were not cogent. On the merits, the learned authorised representative contended that profits earned by way of receipts from technical handling services during the assessment years 2004-05 and 2005-06 are duly covered by article 8(2) of the Indo-French Double Taxation Avoidance Agreement as was the case before the hon'ble Delhi High Court in the case of *DIT* v. *KLM Royal Dutch Airlines* [2017] 392 ITR 218 (Delhi), as article 8(2) is identically worded as article 8(3) and 8(4) of the Indo-Netherlands and Indo-German Treaty respectively. The learned authorised representative further submitted that the Indo-France Double Taxation Avoidance Agreement have not gone any amendment or change and thus the same deserves to be treated at par as article 8(1) of the Double Taxation Avoidance Agreement.

The learned Departmental representative as regards the assumption of **14**
jurisdiction under section 148 of the Act submitted that admittedly no

return was filed by the assessee and thus, prima facie, the Assessing Officer has reason to believe that income has escaped. Thus, it makes no difference whether the income is later assessed as fees for technical services or under article 7 as business profits. As on the merits, the learned Departmental representative contended that the submissions which were placed before the assessment year 2006-07 may be taken under these years as well.

15 We have heard both the parties and perused the material available on record. After going through the reasons it can be seen that the Assessing Officer has prima facie reason to believe that there is escapement of income as no return was filed by the assessee which is admitted fact. Thus, initiating proceedings under section 148 of the Act are just and proper. Thus, ground Nos. 3 and 4 in both the appeals are dismissed. On the merits, we have already decided the issue of applicability of article 8 of the Double Taxation Avoidance Agreement in the assessment year 2006-07. Thus, ground Nos. 5 to 21 in both the appeals are allowed. Hence, I. T. A. Nos. 5008 and 5009/Delhi/2011 for the assessment years 2004-05 and 2005-06 is partly allowed.

16 In the result, I. T. A. Nos. 5008 and 5009/Delhi/2011 for the assessment years 2004-05 and 2005-06 filed by the assessee are partly allowed and I.T.A. Nos. 1786 and 2212/Delhi/2012 for the assessment year 2006-07 filed the assessee is allowed and the appeal filed by the Revenue is dismissed.

17 Order pronounced on this 22nd day of May, 2020.

[2020] 82 ITR (Trib) 324 (Indore)

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

ASSISTANT COMMISSIONER OF INCOME-TAX

v.

DEEPAK SONI

KUL BHARAT *(Judicial Member)* and
MANISH BORAD *(Accountant Member)*

June 1, 2020.

SS ▶ ITA 1961, ss 68, 69C
AY ▶ 2012-13
HF ▶ Assessee

UNEXPLAINED EXPENDITURE—TRADING OF GOLD—ADDITION BASED ON INCORRECT ITEM MOVEMENT ANALYSIS SHEET PREPARED BY ACCOUNTANT—

FAILURE BY ASSESSING OFFICER TO MAKE ADEQUATE INVESTIGATION AND REJECT BOOKS OF ACCOUNT—UNINTENTIONAL MISTAKE CORRECTED DURING REMAND PROCEEDINGS AND DULY ACCEPTED BY ASSESSING OFFICER—COMMISSIONER (APPEALS) JUSTIFIED IN DELETING ADDITION—INCOME-TAX ACT, 1961, S. 69C.

CASH CREDITS—ASSESSEE FURNISHING REQUISITE DOCUMENTARY EVIDENCE TO PROVE IDENTITY, GENUINENESS AND CREDITWORTHINESS OF CASH CREDITORS—TRANSACTIONS CARRIED OUT THROUGH BANKING CHANNELS—ONUS ON DEPARTMENT TO DISPROVE EVIDENCE FILED BY ASSESSEE—FAILURE BY ASSESSING OFFICER TO BRING ANY MATERIAL ON RECORD TO RAISE SUSPICION ABOUT GENUINENESS OF LOAN TRANSACTIONS—COMMISSIONER (APPEALS) JUSTIFIED IN DELETING ADDITION FOR UNEXPLAINED CASH CREDIT—INCOME-TAX ACT, 1961, S. 68.

The assessee was an individual carrying on business of trading of gold and silver bar. For the assessment year 2012-13, the Assessing Officer added a sum of Rs. 2.19 crores on account of unexplained expenditure on the purchase of gold bullion under section 69C of the Income-tax Act, 1961 and a sum of Rs. 65.42 lakhs on account of unexplained loan creditors under section 68 of the Act. The Commissioner (Appeals) deleted those additions. On appeal :

Held, *dismissing the appeal, (i) that the books of account were regularly audited under section 44AB of the Act. The Assessing Officer had not rejected those books of account. The audited financial statements and the return showing particulars of the quantity and value-wise details of opening stock, purchase and sales and closing stock of gold bullion for the financial year 2011-12 stood undisputed. If the Assessing Officer was serious about the anomaly detected in the item movement analysis sheet, he could have taken further action examining the total purchases during the year and compared the details of purchase and quantity of gold purchased during the year with the entries appearing in the item movement analysis sheet for the complete year. Available records showed that he confined his investigation to two particular dates and made the addition without resorting to any other investigation and rejecting books of account. The Assessing Officer had accepted the authentication of the audited financial statements. The annual quantitative details did not show negative stock. Complete quantitative details for the year had been examined by the auditor and purchase and sales bills were available for the examination of the Assessing Officer. However, the Assessing Officer had not conducted complete enquiry and rather had accepted the financial results including that of quantity of gold purchase and sales. Further, in the remand report submitted before the Commissioner (Appeals), the Assessing Officer*

had not pointed out any defect related to any incorrectness in quantity of goods purchased during the year nor any observation of negative stock. Thus, the addition made by the Assessing Officer was based on an incorrect item movement analysis sheet prepared by the accountant and looking to the overall records maintained by the assessee this mistake was insignificant. There was no infirmity in the finding of the Commissioner (Appeals) deleting the addition made on account of unexplained expenditure.

CIT *v.* PADAMCHAND RAMGOPAL [1970] 76 ITR 719 (SC) *and* UMACHARAN SHAW AND BROS *v.* CIT [1959] 37 ITR 271 (SC) *relied on.*

(ii) That the assessee had filed additional evidence under rule 46A of the Income-tax Rules, 1962 before the Commissioner (Appeals). The assessee to the best of his ability had furnished requisite documentary evidence to prove the identity, genuineness and creditworthiness of the 13 cash creditors from whom loans of Rs. 65.42 lakhs had been taken in the year. Out of the 13 cash creditors 10 had appeared before the Assessing Officer and explained the transactions and for the remaining three cash creditors the transactions were carried out through banking channels and confirmation account with permanent account numbers and addresses were filed and the loans had been repaid in the subsequent years. Further, the Assessing Officer had not carried out any further investigation nor pointed out any instance from the bank statement or other documents of these three cash creditors to raise suspicion about the genuineness of the loan transactions. The assessee filed ample evidence to discharge the burden cast upon him and the Assessing Officer failed to bring any material on record to show that the explanations filed by the assessee were unsatisfactory. Therefore, the addition under section 68 of the Act for unexplained cash creditors was not justified. The Commissioner (Appeals) had rightly deleted the addition for unexplained cash credit under section 68 of the Act.

CIT *v.* METACHEM INDUSTRIES [2000] 245 ITR 160 (MP) *and* CIT *v.* ORISSA CORPORATION P. LTD. [1986] 159 ITR 78 (SC) *relied on.*

Cases referred to :

Aseem Singh *v.* Asst. CIT [2012] 19 ITJ 52 (Trib.Indore) (para 18)

CIT *v.* Metachem Industries [2000] 245 ITR 160 (MP) (para 22)

CIT *v.* Orissa Corporation P. Ltd. [1986] 159 ITR 78 (SC) (paras 6, 23)

CIT *v.* Padamchand Ramgopal [1970] 76 ITR 719 (SC) (para 14)

Umacharan Shaw and Bros *v.* CIT [1959] 37 ITR 271 (SC) (para 14)

Umesh Electricals *v.* Asst. CIT [2011] 18 ITJ 635 (Trib.Agra) : [2011] 131 ITD 127 ; [2011] 141 TTJ (para 18)

I. T. A. No. 270/Indore/2018 (assessment year 2012-13).

Ashish Porwal, Senior Departmental representative, for the Department.

Kunal Agarwal and *Amit Choudhary*, Chartered Accountants, for the assessee.

ORDER

The order of the Bench was pronounced by

MANISH BORAD ***(Accountant Member)***.—The above captioned appeal 1
filed at the instance of the Revenue pertaining to the assessment year 2012-13 is directed against the orders of the learned Commissioner of Income-tax (Appeals) (in short, "Ld. CIT(A)"), Ujjain dated January 19, 2018 which is arising out of the order under section 143(3) of the Act dated March 31, 2015 framed by the Deputy Commissioner of Income-tax, Ratlam.

The Revenue has raised the following grounds of appeal : 2

"1. Whether on the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) was justified in deleting the addition of Rs. 2,19,13,800 made on account of unexplained expenditure in the purchase of gold bullion under section 69C of the Income-tax Act, 1961 ?

2. Whether on the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) was justified in deleting the addition of Rs. 65,42,060 made on account of unexplained loan creditors under section 68 of the Income-tax Act, 1961 ?

The appellant reserves his right to add, amend or alter the grounds of appeal on or before the date, the appeal is finally heard for disposal."

Brief facts of the case as culled out from the records are that the assessee 3
is an individual carrying on business of trading of gold and silver bar. e-return of income declaring income of Rs. 25,67,180 was filed on September 30, 2012 for the assessment year 2012-13. The case was selected for scrutiny through CASS. Statutory notices under section 142(1)/143(2) of the Act along with questionnaire were duly served upon the assessee. Assessment under section 143(3) of the Act was completed on March 31, 2015 at Rs. 3,10,23,040 making addition on account of unexplained expenditure under section 69C at Rs. 2,19,13,800 and unexplained loan creditors under section 68 at Rs. 65,42,060.

4 Aggrieved, the assessee preferred an appeal before the learned Commissioner of Income-tax (Appeals) and succeeded.

5 Now, the Revenue is in appeal against the finding of the learned Commissioner of Income-tax (Appeals) deleting the addition made by the learned Assessing Officer.

6 The learned counsel for the assessee along with supporting the finding of the learned Commissioner of Income-tax (Appeals) also referred to the written submissions placed before first appellate authority, judgments referred and relied therein and also referred to the following written submissions placed before us :

"Nature of addition :

Addition of Rs. 29,13,800 under section 69C on account of negative stock of gold bullion made on the basis of incorrect 'Item movement analysis report'.

Loan creditors under section 68 of Rs. 65,42,060 made under section 68 for the reason that the assessee could not submit confirmation of the loan creditors to prove the genuineness of the same.

The appeal against the above additions were allowed by the hon'ble Commissioner of Income-tax (Appeals) vide order dated January 19, 2018 as under—

1. Basis of deleting the addition made under section 69C of Rs. 2,19,13,800.

The above addition have been made under section 69C on the basis of stock item movement analysis statement which is drawn from the audited books of account but no defects have been found in such books of account bills (sale and purchases) and vouchers produced, not only during the assessment proceedings but also during the remand proceedings (see Commissioner of Income-tax (Appeals) order page Nos. 49 to 51 of the paper book).

No defects pointed by the learned Assessing Officer in his remand report dated October 31, 2017 while verifying the correct statement movement analysis statement with books of account, bills (sale and purchases) and vouchers. (see page Nos. 229 to 232 of the paper book).

The above addition made on the basis of incorrect data furnished by the accountant of the assessee.

The information relates to incorrect quantity movement.

There was no physical verification of stock done by the learned Assessing Officer. The assessee has produced all books of account

with all supporting vouchers and bills. The same has also been subject to tax audit under section 44AB of the Income-tax Act, 1961. All sales and purchases have been duly recorded and supported by bills.

2. Basis of deleting addition made under section 68 of Rs. 65,42,060.

During the appellate proceedings, the appellant furnished duly signed loan confirmations for all 30 parties as additional evidence. Further, the bank statement with respect to 13 creditors from whom fresh acceptance has been made during the year were also furnished. (see pages 33 to 134 of the paper book)

The learned Assessing Officer called such persons from whom fresh acceptance was made and took their statement on oath, however 3 persons could not appear but their confirmation, address, PAN and bank statement were made available to the learned Assessing Officer for verification.

The learned Assessing Officer in his remand report dated October 13, 2016 did not made any negative observation about identity, creditworthiness and genuineness of transactions with any creditors (See page Nos. 135 to 140 of the paper book).

The appellant duly discharged his burden laid on him under section 68 in line with the judicial pronouncements in Supreme Court held in case of *CIT* v. *Orissa Corporation P. Ltd.* [1986] 159 ITR 78 (SC). The hon'ble Income-tax Appellate Tribunal Indore Bench in case of *Girish Kumar Sharda* v. *Asst. CIT* (order dated October 28, 2013) and many others. (see page Nos. 204 to 227 of the paper book)

In view of the above order dated November 2, 2017 passed by the hon'ble Commissioner of Income-tax (Appeals) may be sustained."

7 Per contra the learned Departmental representative (DR) vehemently argued and supported the order of the learned Assessing Officer.

8 We have heard rival contentions and perused the records placed before us and carefully gone through the decision referred and relied by the learned counsel for the assessee.

9 *Apropos to ground No. 1* : We observe that during the course of assessment proceedings while examining the purchase and sales of gold, quantitative details were referred at two places, except the quantity details of rate and vendor were missing in the item movement analysis sheet dated April 15, 2011 and October 12, 2011 which were submitted before the Assessing Officer. On these two dates against the entry of transfers inward (production) for gold there stood stock journal entry of 1,000 gms and

7,500 gms. When the assessee was asked to explain the source of gold purchase, it was submitted that there occurred unintentional mistake committed by the accountant employee of the assessee in the preparation of item movement analysis sheet. It was also submitted that overall quantitative details, i. e., opening stock, purchase and sales and closing stock are duly supported by the documentary evidence and there was no negative stock at any point of time during the year. These submission were not sufficient to satisfy the Assessing Officer and he after applying the rate of gold, i. e., Rs. 2,113.80 per gram as on April 15, 2011 and Rs. 2,640 per gram as on October 12, 2011 completed that the alleged unexplained purchase at Rs. 2,19,13,800 and made addition under section 69C of the Act for the unexplained expenditure.

10 When the matter came up before the learned Commissioner of Income-tax (Appeals), the assessee again reiterated the submissions and the learned Commissioner of Income-tax (Appeals) after going through the audited financial statements, remand report by the Assessing Officer and other relevant details deleted the addition made under section 69C of the Act of Rs. 2,19,13,800 observing as follows :

> "5.1 *Ground Nos. l, 2, 3 and 4* — Through these grounds of appeal the appellant has challenged the addition of Rs. 21,91,380 under section 69C of the Income-tax Act. The Assessing Officer made the addition on the ground that the appellant has made excess sale in comparison to the purchases. The Assessing Officer arrived this conclusion on the basis of gold movement analysis has been furnished by the accountant during the course of assessment proceedings. The total inward and outward of stock has been examined and no shortage has been found during the year under consideration. The appellant during the course of appellate proceedings furnished the corrected stock movement statement. On verification of this statement no negative stock has been detected. The stock movement statement has been forwarded to the Assessing Officer for his comment. The Assessing Officer furnished the comment vide report dated October 29, 2017. The Assessing Officer has taken the statement of Shri Deepak Kumar Soni, appellant, Shri Parth Jhalani, chartered accountant and Shri Ravindra Chourasia, accountant. Shri Ravindra

Chourasia, accountant during the course of recording the statement while replying question No. 9 stated as under :

प्र.9. वित्त वर्ष 2011-12 (क.नि.व. 2012-13) के दौरान तैयार आईटम मुवमेंट एनालिसिस रिपोर्ट जो कि इस कार्यालय को कर निर्धारण के दौरान सौंपी गई थी, क्या वह रिपोर्ट आपके द्वारा तैयार की गई थी ।

उत्तर - मैं यह स्पष्ट करना चाहता हूँ कि मेरे द्वारा उपलब्ध कराया गया टैली का डाटा जो कि अपडेटेड नहीं था के आधार पर टैली सॉफ्टवेयर में उपलब्ध एमआईएस रिपोर्ट के ऑप्शन द्वारा उपरोक्त रिपोर्ट जनरेट हुई थी हालांकि यह अपूर्ण टैली का डाटा मेरे द्वारा गलती उपलब्ध करा दिया गया था जिस वजह से उपरोक्त रिपोर्ट में कई तरह की विसंगतियां अधिकारी द्वारा जानकारी में लाई गई थी । उपरोक्त रिपोर्ट की विसंगतियां मेरे द्वारा गलत जानकारी उपलब्ध कराने की वजह से हुई है और मैं यह स्पष्ट करना चाहता हूँ कि साल भर का डाटा समग्र रूप से देखने पर प्रारंभिक स्टॉक, अंतिम स्टॉक, खरीदी एवं बिक्री में किसी प्रकार का परिवर्तन नहीं है ।

Shri Ravindra Chourasia submitted that there was some mistake in the computer generated stock statement and the same has been taken by the Assessing Officer. The Assessing Officer is not justified in making the addition only on the basis that some wrong document has been filed during the course of assessment proceedings without supporting documentary evidence. The appellant was maintaining books of account. The books of account have been audited by the chartered accountant under section 44AB of the Income-tax Act. The Assessing Officer has not pointed out any defect in the books of account. Therefore, there is no reason in presuming that appellant has made the excess sale than purchase. All the purchases have been accounted in the books of account. The Assessing Officer failed to establish the unaccounted purchases made by the appellant. The chartered accountant who has audited the books of account submitted during the course of remand proceeding that no discrepancy with regard to the stock noticed. To deliver natural justice in the assessment proceedings, the real income is to be assessed. In view of the above facts and circumstances, there is no doubt appellant did not submit the correct stock movement analysis statement with the Assessing Officer in completion of assessment proceedings but the fact remains that in the delivery of justice the real income of appellant has to be assessed and that too after giving the opportunity of being heard to the appellant. To sum up the account. The Assessing Officer merely proceeded to make addition which is not permissible under law. The Assessing Officer has not pointed any defects in the

additional evidence in the form of, 'corrected stock movement analysis statement' submitted which was verified by the Assessing Officer not only with the books of account, sales and purchase invoices but statement of the assessee, his accountant and auditor were also taken. Even after verification and checking no defects have been pointed by the Assessing Officer. Therefore, the addition made by the Assessing Officer amounting to Rs. 2,19,13,800 is deleted. Therefore, the appeal on these grounds is allowed."

11 We have gone through the detailed finding of facts by the learned Commissioner of Income-tax (Appeals) and also gone through the available records. It is noteworthy that the books of account are regularly audited under section 44AB of the Act. The learned Assessing Officer had not rejected these books of account. As per the audited financial statements and the return of income filed the following particulars showing the quantity and value-wise details of opening stock, purchase and sales and closing stock of gold bullion for the financial year 2011-12 stands undisputed :

Statement showing quantity and value of gold bullion for the assessment year 2012-13

Sl. No.	*Particulars*	*Quantity (Grams)*	*Value (Rs.)*
A	Opening stock	1336.584	27,57,880.37
B	Purchases	1773892.430	447,32,14,102.27
C	Sale	1775066.483	448,28,55,485.33
D	Closing stock	162.531	4,07,844.57

12 The above referred details have been accepted by the learned Assessing Officer and no defect has been pointed out in the books of account, bills and vouchers, etc. The basis of the alleged addition of unexplained expenditure is item movement analysis sheet given during the course of assessment proceedings for two particulars dates. If the Assessing Officer was very much serious about the anomaly detected in the item movement analysis sheet, he was supposed to take further action by examining the total purchase during the year and should have vouched the details of purchase and quantity of gold purchased during the year with the entries appearing in the item movement analysis sheet for complete year. Available records shows that he confined his investigation only to the extent of item movement analysis sheet of two particular dates and made the addition without resorting to any other investigation and rejecting books of account. The learned Assessing Officer has accepted the authentication of audited financial statements. If there has been a short fall of stock-in-hand on particular

dates when the goods were sold, then they should have been on effect on the annual quantitative details but in the instant case the annual quantitative details do not sure any such situation of negative stock. Complete quantitative details for the year have been examined by the auditor and purchase and sales bills were available for the examination of the Assessing Officer.

13 In these facts and circumstances the assessee certainly deserves the benefit of doubt as the Assessing Officer has not conducted complete enquiry and rather has accepted the financial results including that of quantity of gold purchase and sales. It is also brought to our notice that during the appellate proceedings before the learned Commissioner of Income-tax (Appeals) remand report was called for from the Assessing Officer and during the remand proceedings the corrected stock movement analysis statement was placed for verification before the Assessing Officer along with books of account, sales and purchase bills and quantitative records and after verification of all these details the learned Assessing Officer had not pointed out any defect in the remand report related to any incorrectness in quantity of goods purchased during the year nor any observation of negative stock.

14 Thus, in our considered view, the addition made by the Assessing Officer seems to base on an incorrect item movement analysis sheet prepared by the accountant and looking to the overall records maintained by the assessee this mistake seems to be insignificant. The hon'ble apex court in the case of *CIT* v. *Padamchand Ramgopal* [1970] 76 ITR 719 (SC) held that "insignificant mistake cannot form basis for rejection of books of account." Similarly the hon'ble apex court in the case of *Umacharan Shaw and Bros* v. *CIT* [1959] 37 ITR 271 (SC) has observed that "there was no material on which the Income-tax Officer or the Appellate Tribunal could come to the conclusion that the firm was not genuine. There were many surmises and conjectures, and the conclusion was the result of suspicion which could not take the place of proof".

15 In the light of the above judgments and in the given facts and circumstances of the case, we are of the considered view that the learned Assessing Officer grossly erred in making addition for unexplained expenditure under section 69C of the Act based on the incorrect item movement analysis sheet which at the later stage during the remand proceedings were correctly filed by the assessee and duly accepted by the Assessing Officer. Thus, we find no infirmity in the finding of the learned Commissioner of Income-tax (Appeals) deleting the addition of Rs. 2,19,13,800 made by the learned Assessing Officer under section 69C of the Act on account of

unexplained expenditure. Thus, ground No. 1 of the Revenue's appeal stands dismissed.

16 *Apropos to ground No. 2* : Wherein the Revenue has challenged the action of the learned Commissioner of Income-tax (Appeals) deleting the addition of Rs. 65,42,060 made on account of unexplained loan creditors under section 68 of the Act we observe that while examining the unsecured loans totalling to Rs. 3,19,74,781, the learned Assessing Officer called for the details to explain the cash creditors. Some details were filed by the assessee, based on which accept for the cash creditors totalling to Rs. 65,42,060 for the remaining cash creditors. The learned Assessing Officer was satisfied with the explanation. He thus made addition under section 68 of the Act at Rs. 65,42,060.

17 During the proceedings before the learned Commissioner of Income-tax (Appeals), the assessee requested to file additional evidence under rule 46A of the Income-tax Rules, 1962 and permission was granted. The assessee filed the confirmation letter, computation of income, bank statements, PANs. These details were forwarded to the Assessing Officer. During the remand proceedings the learned Assessing Officer called all the 13 cash creditors to appear before him and explain the loan/credit given to the assessee. Out of 13 cash creditors, 10 cash creditors appeared in persona. Out of these 10 cash creditors six of them categorically accepted the amount given by them to the assessee during the year and also explained about the mismatch of certain entries. The remaining (4 out of 10 cash creditors) submitted that the loans given to the assessee are old and no fresh loan was given during the year.

18 Now, as far as the remaining three cash creditors who did not appear before the Assessing Officer they were Ashya Pratap Soni, Komal Bai Dhammani and Sandeep Gupta who gave loan of Rs. 1,12,450, Rs.1,12,450 and Rs. 3,20,295 during the year. Confirmation of account, bank statement and bank details were duly filed. It was also placed on record that the loans taken from Sandeep Gupta, Komal Bai Dhammani and Ashya Pratap Soni were fully repaid during the assessment years 2012-13, 2013-14 and 2014-15 respectively. Based on these details and the remand report the learned Commissioner of Income-tax (Appeals) deleted the addition under section 68 of the Act at Rs. 65,42,060 observing as under :

> "5.2 *Ground Nos. 5, 6, 7 and 8* : Through these grounds of appeal the appellant has challenged the addition of Rs. 65,42,060 under section 68 of the Income-tax Act. The Assessing Officer made the addition on the ground that the appellant failed to furnish the loan confirmation of 13 parties. The appellant during the course of appellate

proceedings furnished the loan confirmation in respect of all parties. The loan confirmation has been forwarded to the Assessing Officer for verification. The Assessing Officer called all the persons and has taken the statement. The appellant produced the 10 creditors before the Assessing Officer. The Assessing Officer examined all the 10 creditors who in turn accepted that they had given loan to the appellant. In respect of the three creditors who have not attended, the appellant furnished the PAN, address, particulars of payment and bank statement, TDS certificate etc. The appellant furnished the correct addresses of the loan parties and in response to the summons the roan parties filed the reply. By issuing the summon under section 131 of the Income-tax Act, the above parties becomes the witnesses of the Department. It is obligatory on the part of the Assessing Officer to force the attendance of the witnesses. The Assessing Officer has all power to force the attendance of the loan parties. Once the Assessing Officer has issued the summons and the same have been served, he cannot ask the appellant to produce the loan parties because the loan parties are the witnesses of the Department. The loan parties furnished the loan confirmation, copy of bank account and proof of filing of the return. By filing the above documents the appellant is able to establish the :

(i). Identity of the creditors—all the creditors are income-tax payers and filed the loan confirmations.

(ii). Genuineness of the transaction—the appellant has taken the loan through banking channel. The appellant is in the receipt of loan by cheque.

(iii). Creditworthiness of the creditors all the creditors is income-tax payers and filing the income-tax return. The persons not only given the loan to the appellant but to other parties also. From the above it is clear that the appellant has satisfied all the three conditions required for genuineness of the transaction. The same view has been upheld by the hon'ble Income-tax Appellate Tribunal in the following cases :

(i). *Umesh Electricals* v. *Asst. CIT* [2011] 18 ITJ 635 (Trib.Agra) ; [2011] 131 ITD 127 ; [2011] 141 TTJ 288 (Agra) : Establishment of identity and creditworthiness proved. The assessee produced the bank account of creditor in his bank account on the same day on which loan was given. The assessee furnished the cash flow statement of creditor. Based on inquiry, the Assessing Officer noted that creditor was engaged in providing accommodation entries. *Held* : In group

cases, it has been held that there was no evidence against the creditor to prove that he was providing accommodation entries. Further, mere deposit of money by the creditor on the same day, does not establish that the loan is not genuine. The assessee has proved the source of credit and also the source of source. Addition cannot be made.

(ii). *Aseem Singh* v. *Asst. CIT* [2012] 19 ITJ 52 (Trib.Indore)

Identity and creditworthiness proved—Assessee took loan of Rs.1,00,000 confirmation of creditor was filed—Lower authorities made addition under section 68 holding that amount was deposited in cash in the bank account of lender immediately prior to date of loan—HELD Assessee has established the identity—The party has confirmed the transaction—If the Assessing Officer doubted the transaction, the Assessing Officer should have called creditor under section 131—Addition cannot be made. Therefore, the addition made by the Assessing Officer amounting to Rs. 65,42,060 is deleted. Therefore, the appeal on these grounds is allowed."

19 From a perusal of the above details filed during the appellate proceeding which have been rightly appreciated by the learned Commissioner of Income-tax (Appeals) in the light of the judgment, we are of the considered view that the assessee to the best of his ability has furnished requisite documentary evidence to prove the identity, genuineness and creditworthiness of the 13 cash creditors from whom loan of Rs. 65,42,060 stood taken at the close of the year. It is also noteworthy that out of 13 cash creditors 10 have appeared before the learned Assessing Officer and explained the transactions and for the remaining three cash creditors even though necessary details were filed but they could not appear but the facts remains that transactions were carried out through banking channel confirmation account with PAN and address were filed and the loans have been repaid in subsequent year/years. Further, the Assessing Officer has not carried out any further investigation nor pointed out any instance from the bank statement or other documents of these three cash creditors to raise suspicion about the genuineness of the loan transactions.

20 We find that the Indore Bench of the Income-tax Appellate Tribunal in the case of *Girish Kumar Sharda* v. *Asst. CIT* order dated October 28, 2013 considering a similar issue has held that "as per the requirement of section 68 the sum credited in the books of account can be considered to be the income of the assessee in a case where the assessee does not offer any explanation or the explanation offered by him, in the opinion of the Assessing Officer is not satisfactory. The explanation of the assessee in the present case is that all these creditors are income-tax assessees and their

PANs have given along with their copy of bank account as well as preceding years. By filing these evidence, it can be said that the assessee had discharged the initial burden laid upon him under section 68. When the particulars regarding income-tax assessment and bank account, audited balance-sheet duly indicating advancing of loan to the assessee, have been filed then initial burden has to be held to be discharged and then the burden shifts on the Revenue to show that what is stated or explained by the assessee is not satisfactory. No material whatsoever, has been brought on record by the learned Assessing Officer to show that what was explained by the assessee, was not a correct state of affairs. If any sum is found credited in the accounts of the creditors then the creditors may be examined so as to explain the credit so far as the source of deposit in the account of the assessee is concerned. The assessee can be considered to have explained by bringing the material on record in the shape of confirmations, bank account and income-tax numbers of that person. Thus the assessee had filed ample evidence to discharge the burden cast upon him and the learned Assessing Officer has not brought any material on record to show that the explanation filed by the assessee, was in any manner, unsatisfactory consequent thereto the evidence filed by the assessee remain unrebutted."

21 In the light of the above decision we observe that if the assessee filed ample evidence to discharge the burden cast upon him and the Assessing Officer fails to bring any material on record to show that explanation filed by the assessee are unsatisfactory, then addition under section 68 of the Act for unexplained cash creditors is not justified.

22 The hon'ble jurisdictional High Court in the case of *CIT* v. *Metachem Industries* [2000] 245 ITR 160 (MP) ; [2001] 116 Taxman 572 (MP) held that "when cash credit is found in the assessee-firm's books and the assessee has established that amount has been invested by a particular person, responsibility of firm is over and there is no requirement on part of the assessee-firm to further show whether amount invested has been properly taxed in creditor's hands."

23 Further, in the case where the assessee discharge his duty satisfactorily given all required details the burden shifts on the Revenue to disprove the evidence filed by the assessee and if it is unable to do so then the assessee deserves relief. The hon'ble Supreme Court in the case *CIT* v. *Orissa Corporation P. Ltd.* [1986] 159 ITR 78 (SC) laid down the ratio had held that "when the particulars regarding income-tax assessment and bank account, audited balance-sheet duly indicating advancing of loan to the assessee have been filed then initial burden has to be held to be discharged and

then the burden shifts on the Revenue to show that what is stated or explained by the assessee is not satisfactory."

24 In the light of the above judgment, detailed finding of facts by the learned Commissioner of Income-tax (Appeals) and in the given facts and circumstances which, inter alia, includes the personal appearance of 10 cash creditors out of 13 cash creditors and in the remaining three cases also the loan taken has been repaid in the subsequent years and all the necessary documentary evidence stands filed, we are of the considered view that the learned Commissioner of Income-tax (Appeals) has rightly deleted the addition for unexplained cash credit under section 68 of the Act for Rs. 65,42,060. We thus, confirm the finding of the learned Commissioner of Income-tax (Appeals) and dismiss the Revenue's ground No. 2.

25 In the result, the appeal of the Revenue's stands dismissed.

26 The order pronounced in the open court on June 1, 2020.

[2020] 82 ITR (Trib) 338 (Delhi)

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

TERADATA OPERATIONS INC.

v.

DEPUTY COMMISSIONER OF INCOME-TAX

AMIT SHUKLA *(Judicial Member)* and
O. P. KANT *(Accountant Member)*

March 19, 2020.

AY ▶ 2014-15
HF ▶ Department

NON-RESIDENT—TAXABILITY IN INDIA—FEES FOR TECHNICAL SERVICES—EMPLOYEES OF NON-RESIDENT ASSESSEE DEPUTED TO MANAGE AFFAIRS OF ITS ASSOCIATED ENTERPRISE IN INDIA AND PROVIDE TECHNICAL KNOWLEDGE—THOUGH EMPLOYEES WORKING AT PREMISES OF ASSOCIATED ENTERPRISE FOR ALL PRACTICAL PURPOSES REMAINING EMPLOYEES OF ASSESSEE—EMPLOYEES CONTINUING TO MAKE SOCIAL SECURITY CONTRIBUTIONS IN THEIR COUNTRY AND THEIR SALARIES DISTRIBUTED TO THEIR BANK ACCOUNTS THERE—PERMANENT ESTABLISHMENT IN INDIA EXISTS—REVENUE RECEIVED BY ASSESSEE BY WAY OF REIMBURSEMENT CONSTITUTES FEES FOR INCLUDED SERVICES—INCOME-TAX ACT, 1961.

The assessee was a non-resident company and a part of the T group. It provided data warehousing services in the form of their proprietary package

called T solution. During the year 2014-15, it provided certain professional services and received royalty in respect of software licence to its associated enterprise in India, namely, TIPL. The assessee also received reimbursements in respect of the employees seconded to TIPL. The Assessing Officer observed that the agreement regarding secondment of the employees between the assessee and the Indian entity and assignment agreement between the assessee and the expatriate, existed but no employment agreement between the expatriate and the Indian company existed. The Assessing Officer observed that the seconded employees were actually employees of the assessee who had come to India to render services and conduct the home entities business in India. He held that the premises of the Indian entity, where the seconded employees were stationed, remained at the disposal of the assessee throughout the duration of the stay of those employees and accordingly, he concluded the existence of a fixed place permanent establishment. He held that the revenue received by the assessee by way of reimbursement was fees for included services. The Dispute Resolution Panel agreed with the finding of the Assessing Officer on the issue of fixed place permanent establishment and service permanent establishment, but issued directions on the issue of the attribution of the profit to the permanent establishment. On appeal :

Held, *(i) that the employees of the assessee had been deputed to manage the affairs of the Indian entity and provide technical knowledge. Though the employees worked at the premises of T India for all practical purposes they remained employees of the assessee. The employees continued to make their social security contributions in the U. S. A. and their salaries were also distributed to their bank accounts in the U. S. A. The finding of the authorities on the issue of existence of permanent establishment of the assessee in India in terms of the Double Taxation Avoidance Agreement between India and the U. S. A. was upheld.*

CENTRICA INDIA OFFSHORE P. LTD. *v.* CIT [2014] 364 ITR 336 (Delhi) *relied on.*

(ii) That the issue relating to relocation expenses was to be remanded to the Assessing Officer for deciding after verification of each and every item of expense of Rs. 4,10,60,108 with a direction to include only the items of the expenses pertaining to the seconded employees.

(iii) That the issue regarding non-consideration of the global profit of the assessee for applying mark-up on the cost base and adopting an ad hoc 25 per cent. as profit attributable to the permanent establishment was remanded to the Assessing Officer, who, after verification of the documents along with the audited statements filed by the assessee in support of its claim of the global

profits, was to decide the attribution of profits in accordance with article 7 of the Double Taxation Avoidance Agreement between India and the U. S. A.

(iv) That the issue of credit for tax deducted at source for amount of Rs.22,721 was to be verified by the Assessing Officer from the records of the assessee and of the Department. The assessee was directed to produce all the evidence in support before the Assessing Officer for verification and he would then after examination of the documents and evidence and data base of the Department, allow the credit for tax deducted at source in accordance with law.

Cases referred to :

AT and S India (P.) Ltd., *In re* [2006] 287 ITR 421 (AAR) (para 6)

Centrica India Offshore P. Ltd. *v.* CIT [2014] 364 ITR 336 (Delhi) (para 3)

DIT *v.* E-Funds IT Solution [2014] 364 ITR 256 (Delhi) (para 6)

DIT (I.T.) *v.* Morgan Stanley and Co. Inc. [2007] 292 ITR 416 (SC) (paras 3, 6)

I. T A. Nos. 7805/Delhi/2017 and 2580/Delhi/2018 (assessment year 2014-15).

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

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

ORDER

The order of the Bench was pronounced by

1 O. P. KANT ***(Accountant Member)***.—These two appeals have been filed by the assessee against the final assessment order dated October 18, 2017 passed by the learned Deputy Commissioner of Income-tax, Circle-3(1)(1), International Taxation, New Delhi, ('in short, 'the learned Assessing Officer') pursuant to the direction of the learned Dispute Resolution Panel ('DRP') for the assessment year 2014-15, and rectification order dated February 9, 2018 passed by the learned Assessing Officer for the same assessment year respectively. Both the appeals being connected with the same assessment year, have been heard together and disposed of by way of this consolidated order for convenience. The grounds in I. T. A. No. 7805/Delhi/2017 are reproduced as under :

> "These grounds of appeal represent the grievances of the appellant against the order dated October 18, 2017 passed by the learned Deputy Commissioner of the Income-tax, Circle-3(1)(1), New Delhi ('the learned Assessing Officer') under section 143(3) read with

section 144C(5) of the Income-tax Act, 1961 ('the Act') in pursuance of the directions issued by the learned Dispute resolution Panel-1, Delhi ('DRP') dated August 28, 2017.

1. That the assessment order passed under section 143(3) read with section 144C(5) of the Act by the learned Assessing Officer and the additions made by the learned Assessing Officer, are bad in law, unlawful and unjust.

2. That, in view of the facts and in the circumstances of the case and in law, the learned Assessing Officer has erred in determining the total income of the appellant at Rs. 3,07,34,310 as against the returned income of Rs. 72,84,230 which was offered to tax on gross basis as per article 12 of the Double Taxation Avoidance Agreement ("DTAA") by making an addition of Rs. 2,32,98,701 (assessed income Rs. 3,07,34,310 less Rs. 1,51,473 offered to tax by the appellant on account of inadvertent mistake in the return of income filed) on account of the secondment arrangement between the appellant and its Indian associated enterprise ("AE").

That, in view of the facts and in the circumstances of the case and in law :

2.1 The learned Assessing Officer/Dispute Resolution Panel erred in not passing a speaking order/directions.

2.2 The learned Assessing Officer/Dispute Resolution Panel erred in holding that the appellant constitutes a fixed place permanent establishment ("PE") in India as per article 5 of the India-USA Double Taxation Avoidance Agreement.

2.3 The learned Assessing Officer/Dispute Resolution Panel erred in holding that the appellant constitutes a service permanent establishment in India as per article 5 of the India-USA Double Taxation Avoidance Agreement.

2.4 The learned Assessing Officer/Dispute Resolution Panel erred in perceiving, interpreting and evaluating facts and law in deciding/ relied upon cases and in reasoning towards preferred outcome by totally ignoring/misinterpreting underlying facts as also the principles laid down in such decisions and applying the same to facts.

2.5 That, without prejudice, the learned Assessing Officer/Dispute Resolution Panel erred in holding and attributing profits to the alleged permanent establishment of the appellant by considering that the total reimbursement for 'relocation expenses' of Rs. 4,10,60,108 was received by the appellant only in relation to the secondment

arrangement and thus erred in not considering that it also includes reimbursement for other employees of its associated enterprise.

2.6 The learned Assessing Officer/Dispute Resolution Panel erred in not taking cognizance of the additional evidence providing segregation of the relocation expenses, filed and admitted by the appellant during the proceedings before the learned Dispute Resolution Panel.

2.7 That, without prejudice, the learned Assessing Officer/Dispute Resolution Panel erred in not allowing the cost of the seconded persons while attributing profits to the alleged permanent establishment in India.

2.8 That, without prejudice, the learned Assessing Officer/Dispute Resolution Panel erred in estimating an ad hoc 25 per cent. as profits attributable to the alleged permanent establishment. The learned Assessing Officer erred in ignoring the global profitability statements filed on October 27, 2017 as directed by the learned Dispute Resolution Panel.

3. That, on the facts and in law, the learned Assessing Officer has erred in initiating penalty under section 274 read with section 271 of the Act.

4. That on the facts and in law, the learned Assessing Officer has erred in charging interest under section 234B of the Act.

5. That on the facts and in law, the learned Assessing Officer has erred in not granting credit of tax deducted at source amounting to Rs. 22,721.

The above grounds of appeal are mutually exclusive and without prejudice to each other. The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.

The appellant prays for appropriate relief based on the said grounds of appeal and the facts and circumstances of the case."

2 Grounds raised in I. T. A. No. 2580/Delhi/2018 are reproduced as under :

"These grounds of appeal represent the grievances of the appellant against the order dated on February 9, 2018 passed by the learned Deputy Commissioner of Income-tax, Circle-3(1)(1), New Delhi ('the learned Assessing Officer') under section 154 of the Income-tax Act, 1961 ('the Act') ('impugned order') in pursuance of the rectification application dated January 11, 2018 filed by the appellant against the final assessment order dated October 18, 2017 passed under section 143(3) read with section 144C(13) of the Act.

1. That the order passed under section 154 read with section 143(3) of the Act by the learned Assessing Officer is illegal, bad in law, without jurisdiction and contrary to the facts of the case.

2. That in view of the facts and in the circumstances of the case and in law, the learned Assessing Officer has erred in ignoring the settled position of law that proceedings before the Dispute Resolution Panel ("DRP") are part of the assessment proceedings only and therefore, failed to appreciate that detail of relocation expenses filed before the learned Dispute Resolution Panel was part of the assessment records.

3. That in view of the facts and in the circumstances of the case and in law, the learned Assessing Officer has erred in holding that no segregation of relocation expenses was provided by the appellant during the assessment proceedings and accordingly, erroneously held that there is no mistake apparent from record in the assessment order.

4. That in view of the facts and in the circumstances of the case and in law, the learned Assessing Officer erred in not appreciating that this a mistake apparent on record and hence falls within the purview of section 154 of the Act.

5. That, without prejudice, in any case, no addition is called for in relocation expenses, hence the same is liable to be deleted.

The above grounds of appeal are mutually exclusive and without prejudice to each other. The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal."

Briefly stated the facts of the case are that the assessee is a company **3** incorporated in and tax resident of the United States of America (USA) and a part of "Teredata" group. The assessee was engaged in the business of providing "data warehousing services" in the form of their proprietary package called "Teredata solution". During the year, the assessee provided certain professional services and also received royalty in respect of software licence to its associated enterprise (AE) in India, namely, Teradata India Pvt. Ltd. (TIPL). For the year under consideration, the assessee filed a return of income on November 29, 2014 declaring a total income of Rs. 72,84,230. During the year, the assessee also received certain reimbursement in respect of the employees seconded to Teradata India Pvt. Ltd., which, inter alia, include the following :

1. Rs. 5,21,34,696 in respect of the cost of the seconded persons included on behalf of M/s. Teradata India Private Limited (TIPL) of in short "Teradata India".

2. Rs. 4,10,60,108 in respect of reimbursement of relocation expenses, i. e., visa expenses and other travel cost.

3.1 The return of income was selected for scrutiny the assessment and information in respect of the seconded person was filed before the Assessing Officer. Summary of the information in respect of the seconded persons filed is as under :

Name of person seconded	*Qualification of person seconded*	*Job profile*
Malla Reddy	MS Computer Science	Software development
Sunanda Reddy	MS Electrical Engineering	Software development
Bashyam Ramesh	MS Computer Science and BE Electrical and Electronic Engineering	Software development and guiding Teradata India team technically in developing Teradata technology and features
Raj Cherabuddi	MS Computer Science	Software Development and handling Teradata India teams working on wide variety of software development projects

3.2 In the draft assessment order dated December 22, 2016 issued by the learned Assessing Officer under section 144C(1) read with section 143(3) of the Act he proposed that the arrangement of the seconded employees constitute existence of permanent establishment (PE) in India and a sum of Rs. 2,32,98,701 (25 per cent. of Rs. 9,31,94,804) was attributed to the said permanent establishment. The amount of Rs. 9,31,94,804 was computed as under :

Particulars	*Amount (in Rs.)*
Towards payments made for insurance, retirement costs and social security contributions	5,21,34,696
Towards VISA charges and other travel costs paid by company for seconded persons	4,10,60,108
Total	9,31,94,804

3.3 Before the Assessing Officer, the assessee contended that :

(i) The employees are seconded to Teradata India under a secondment agreement under which those employees worked as employees of the Indian company.

(ii) The seconded employees worked under the control and supervision of "Teradata India".

(iii) The salary of the seconded employees was disbursed by the assessee in their home country (USA) for administrative convenience as

those seconded employees were situated in the USA and the "Teradata India" reimbursed to the assessee-company for the payments made in the USA on actual cost basis.

3.4 The Assessing Officer, however, did not accept the contention of the assessee. The learned Assessing Officer referred to the decision of the hon'ble Delhi High Court in the case of *Centrica India Offshore P. Ltd.* v. *CIT* [2014] 364 ITR 336 (Delhi) ; [2014] 44 taxmann.com 300. The Assessing Officer observed that in the instant case, the secondment agreement regarding secondment of the employees between the foreign company, (i. e., the assessee) and the Indian entity, (i. e., Teradata India) and the secondment/assignment agreement between the foreign company, (i. e., the assessee) and the expatriate, exist but no employment agreement between the expatriate and the Indian company, (i. e., Teradata India) existed. This fact was duly admitted by the assessee before the Assessing Officer. In the absence of any such employment agreement between the expatriate and the Teradata India, the Assessing Officer rejected the following arguments of the assessee that :

(i) The Teradata India has right to control and supervise expatriate employees.

(ii) The Teradata India has right to take discipline reaction against the expatriate employees.

(iii) The Teradata India has an obligation to pay salary to the expatriate employees.

(iv) All the standard terms of employment with Teradata India shall apply to the expatriate employees.

3.5 In paragraph 5.6 of the assessment order, the Assessing Officer has justified that the expatriate employees continue to be the employee of the assessee-company due to the following reasons :

> "(i) The employees continue to make social security contributions in the USA as the employees of the assessee-company and the salaries are disbursed to their bank accounts in the USA by the assessee-company. This also implies that the seconded employees continue on the payroll of the assessee-company. This fact has been submitted by the assessee and is also evident from clause 4.2 of the secondment agreement which provides that amongst other things, Teradata India shall also reimburse the assessee for social security contributions made in the USA.
>
> (ii) The employees continue to be under the assessee's employment and/or have lien on overseas employment with the assessee-company.

These are released only for a short period of time to provide services to Teradata India. This is evident from the relevant clause (objective clauses on the first page) of the secondment agreement which provides that 'And whereas the international assignee shall be released their work under the supervision of Teradata operations and shall be integrated as employees of Teradata India for a period of secondment with Teradata India'.

(iii) Where the expatriate employees continue to be the employees of the assessee-company and there is no employer-employee relationship between, it is difficult to accept that these employees work under the control and supervision of the Indian company. The said claim of the assessee remains completely unsubstantiated also on account of the fact that expatriate continues to enjoy lien with the foreign company and also his account on social benefit continues in the foreign country. If it is not so, no foreign expatriate would like to be seconded. Apparently, therefore, there is control exercised by the foreign company on the seconded employee even if he shown to have been economically working with the Indian company, i. e., Teradata India.

(iv) It is not without significance that the agreement is for the 'secondment' of the personnel. That the agreement envisages 'secondment' of the personnel from the home entity to the host entity is by itself indicative of the fact that effectively the expatriate employees were and continue to be the employees of the home entity. The dictionary meaning of the term 'secondment' provides that temporary detachment of a person from their regular organisation for temporary assignment elsewhere. This suggests an element of continuity of the relationship between the home entity and the expatriate deputed to render services in India. No employee who has served the employer (i. e., the home entity herein) and has earned valuable rights in the form of seniority, qualifying service counting towards pensionary/ severance benefits, and other social and economic benefits by virtue of long employment with an employer, would agree to lose those rights by abruptly leaving the employer and enter into fresh employment with a new employer, unless there is a clear understanding that he or she effectively continues to be the employee of the home entity for all practical purposes."

3.6 The Assessing Officer also highlighted various terms of assignment extension letter between Mr. Raj Cherabuddi, inter alia, fixed compensation provided subject to certain adjustment by the assessee ;

expatriate salary was based on home country (USA) policies and practices ; terms of employment after the end of the assignment will be governed by the policies of the home country ; expatriate shall abide and adhere to the assessee-company's policies and applicable laws regarding code of business conduct and ethics.

3.7 The Assessing Officer observed that the seconded employees were actually the employees of the assessee who had come to India to render services and conduct the home entities business in India.

3.8 In view of the observation, the learned Assessing Officer held that the premises of Teradata India, where the seconded employee were stationed, remained at the disposal of the assessee throughout the duration of the stay of those employees and accordingly, he concluded existence of fixed place permanent establishment as under :

> "7. The place made available by Teradata India was used as fixed place by them for the business activities of the home entity. It is settled law that the foreign entity need not be the owner of the premises from which the business activity are carried out. The place of business need only be at the disposal of the enterprise and it is not necessary that it should be for the exclusive via of the enterprise. The premises of Teradata India, where the seconded employees were stationed, remained at the disposal of the assessee throughout the duration of the stay of the transferred employees. Therefore, a fixed place permanent establishment of the assessee is constituted in India in the form of the premises from which these transferred employees operated."

3.9 The Assessing Officer also concluded that the seconded employees rendered services on behalf of the assessee in India, they also constituted the service permanent establishment in India in view of the decision of the hon'ble Supreme Court in the case of *DIT (I. T.)* v. *Morgan Stanley and Co. Inc.* [2007] 292 ITR 416 (SC).

3.10 The Assessing Officer held that the reimbursement in the hands of the assessee is a business income as those payments have been on account of services rendered by the assessee through its employees in India and, therefore, the profit generated on the amount of activities carried out by the employee in India is liable to tax in India as business income of foreign entity under article 7 of the Double Taxation Avoidance Agreement read with section 9(1) of the Act.

3.11 As regards the quantification of the income of the permanent establishment, the learned Assessing Officer taken the cost of salary and relatable expenses paid by "Teradata India" in respect of the employees

under reference and profit mark-up on such reimbursement at 25 percent. (in the absence of global profitability data and audited global accounts). The relevant part of the assessment order is reproduced as under :

> "10.3 The above amounts towards salary and relatable expenses has been directly/indirectly met by/paid by Teradata India in respect of employees working for the assessee-company, i. e., rendering services in India. The aforesaid amounts results in income to the assessee and shall be considered to be the cost related to employees working in India and, therefore relates to the service permanent establishment/fixed place permanent establishment of the assessee-company in India.
>
> 11. The determination of income and tax for a foreign company is a function of two factors, namely, profits embedded in the payments the attribution of income/profits to activities carried out through the permanent establishment in India. In the present case, the payments are on account of the services rendered in India. It is the understanding that the entire services rendered by the employees have been in India therefore the entire income generated from the services rendered by the employees shall be attributable to the permanent establishment being established. Further, it is prudent to consider that in an independent scenario, no service provider shall be providing services without any profit element or mark-up on cost. For determination of such income/profits, the cost recouped by Teradata India to the assessee for rendition of services amounting to INR 9,31,94,804 could be taken as the base. In the absence of global profitability data and audited global accounts, I have left with no option but to invoke the provisions of rule 10 of the Income-tax Rules, 1962 to determine the profit on the reimbursement amount. Keeping in view the nature of services and facts of the case a reasonable profit of 25 per cent. is estimated on the entire receipt of Rs. 9,31,94,840 which would be earned by any service provider in an independent scenario."

3.12 Alternatively, the Assessing Officer also held the revenue received by the assessee by way of reimbursement as fee for included services, placing reliance on the decision of the hon'ble Delhi High Court in the case of *Centrica India Offshore P. Ltd.* (supra).

3.13 The assessee raised an objection before the learned Dispute Resolution Panel. The learned Dispute Resolution Panel agreed with the finding of the Assessing Officer on the issue of fixed place permanent establishment and service permanent establishment, however, on the issue

of the attribution of the profit to the permanent establishment, issued direction as under :

"(xv) Since it has been held that the A has permanent establishment in India, profits needs to be attributed to such permanent establishment. The Assessing Officer has mentioned that global profit figures of the A were not available and therefore an attribution of 25 per cent. was made by applying rule 10 of the Income-tax Rules. It is observed that even during the proceedings before us, the A has not submitted the global profit figures or the audited account which could be used for the purpose of reasonable attribution as desired by the A itself. In view of the same, the Assessing Officer is directed to once again verify whether the global profitability of the A is readily available and use the same for attribution of profit. If not, the attribution as per rule 10 is upheld.

(xvi) Further, the A has mentioned that the relocation expenses of Rs. 4,10,60,108 include the expenses both for the seconded employees and the other employees of the associated enterprise. The Assessing Officer is directed to verify if any such segregation has been provided by the A during the assessment proceeding and to exclude the sum which represents reimbursement towards 'relocation expenses' in relation with the other employees of Teradata India Pvt. Ltd. while quantifying the profits attributable to the permanent establishment of the assessee in India."

3.14 In the impugned final assessment order, the Assessing Officer has claimed to have complied the direction of the learned Dispute Resolution Panel as under :

"18.1 The perusal of the assessment record shows that the assessee-company has not provided the information in respect of its global profitability. The same is not readily available for calculation of profit for attribution to the permanent establishment of the assessee in India. In these circumstances, the provision of rule 10 of the Income-tax Rules, 1962 to determine the profit on the reimbursement amount are hereby invoked.

19. During the proceedings before the hon'ble Dispute Resolution Panel, the assessee has claimed that the relocation expense of Rs. 4,10,60,108 include the expenses both for the seconded employees and the other employees of the associate enterprise. In paragraph (xvi), the hon'ble Dispute Resolution Panel has directed to verify, if any, such segregation has been provided by the assessee during the assessment proceedings and to exclude the sum which represents

reimbursement towards relocation expenses in relation with the other employees of TIPL while quantifying the profits attributable to the permanent establishment of the assessee in India.

19.1 The assessment record is perused and it is found that the assessee neither has claimed such segregation nor has filed any such details during the assessment proceedings. Hence, the same is not verifiable from the assessment record. In these circumstances, I am left with no option but to apply the provisions of rule 10 of the Income-tax Rules, 1962 and to attribute the profit at 25 per cent. of the profit estimated at 15 per cent. of gross receipts of Rs. 9,31,94,804, as calculated in the draft assessment order."

3.15 Aggrieved with the final assessment order, the assessee is before us by way of appeal having I. T. A. No. 7805/Delhi/2017.

4 According to the assessee, in the final assessment order, the Assessing Officer did not follow the direction of the learned Dispute Resolution Panel for segregating the relocation expenses of Rs. 4,10,60,108 towards seconded employee and other employees of Teredata India and therefore, it filed rectification application before the Assessing Officer, which was rejected by the learned Assessing Officer. Aggrieved with the rejection of the rectification, the assessee is before us by way of appeal in I. T. A. No. 2580/Delhi/2018.

I. T. A. No. 7805/Delhi/2017 (assessment year 2014-15)

5 First, we take up the appeal bearing I. T. A. No. 7805/Delhi/2017 for the assessment year 2014-15.

6 We have heard the rival submissions of the parties on the issue in dispute. The learned counsel of the assessee reiterated the submission made before the lower authorities and submitted that absence only of employment agreement between Teradata India and expatriate is not determinative of the employer-employee relationship and other factors like control and direction to employees are important. He submitted that the relevant clauses of the seconded agreement established beyond doubt the fact that the seconded persons were working under the employment of Teredata India and had no responsibility towards the assessee. Though the learned counsel objected to the existence of permanent establishment of the assessee in India but could controvert that issue in dispute in the instant case is covered by the decision in the case of *Centrica India Offshore P. Ltd.* (supra), and he focused his arguments on no profit attribution. He submitted that no profit element was involved in reimbursement of costs incurred by the assessee in relation to salary and other expenses of the seconded employees.

6.1 As far as the decision in the case of *Centrica India Offshore P. Ltd.* (supra) is concerned, we find that in that case *Centrica*, UK outsourced some of their back office support functions to third parties vendors in India. The Centrica UK set up "Centrica India" to act as an interface between the third party vendors in India and the overseas entities. The Centrica India provided services to overseas entities in terms of a service agreement under the cost-plus arrangement. The Centrica India, in order to comply with its obligations in the service agreement had asked Centrica UK and its other global affiliate to provide staff with knowledge and experience of various processes and practices. Pursuant to that request, a secondment agreement was entered into between Centrica India and overseas entities, under which some management employees of overseas entities were deputed to Centrica India for short-term assignments ranging from three to nineteen months. In the above circumstances, the hon'ble High Court confirmed the existence of permanent establishment of Centrica UK in India observing as under (page 367 of 364 ITR) :

> "To determine the existence of a service permanent establishment, CIOP argues that the court must look towards the substance of the employment relationship and not the form. This is correct. In the present case, the seconded employees are to be integrated into CIOP, for the agreed period and are subject to its supervision and control. The rules, regulations, policies and other practices of CIOP for its employees were applicable to these employees too. The seconded employees' duties and functions were dictated by the instructions and directions of the CIOP. He/she had to perform the duties assigned with due diligence in accordance with the applicable laws and regulations, standards and practices and control of CIOP. The overseas entities were not responsible for any errors or omissions of such seconded employees or for their work. CIOP bore all risks in relation to the work of the seconded employees, and reaped the benefit from the output. CIOP also bore the cost of monthly remuneration and reimbursement of cost to the seconded employees. However, crucially, these seconded employees retained their entitlement to participate in the overseas entities. retirement and social security plans and other benefits in terms of its applicable policies, and the salary was properly payable by the overseas entities, which claimed the money from CIOP. There was no purported employment relationship between CIOP and the secondees. None of the documents, including the attachment to the secondment agreements placed on record (between the secondees and CIOP) reveal that the latter can terminate the secondment

arrangement ; there is no entitlement or obligation, clearly spelt out, whereby CIOP has to bear the salary cost of these employees. The secondees cannot in fact sue the CIOP for default in payment of their salary—no obligation is spelt out vis-a-vis the petitioner. All direct costs of such seconded employees' basic salary and other compensation, cost of participation in overseas entities retirement and social security plans and other benefits in accordance with its applicable policies and other costs were ultimately paid by the overseas entity. Whilst CIOP was given the right to terminate the secondment, (in its agreement with the overseas entities) the services of the secondees vis-a-vis the overseas entities—the original and subsisting employment relationship—could not be terminated. Rather, that employment relationship remained independent, and beyond the control of CIOP.

The concept of a legal and economic employer, as considered by Vogel (relied upon by CIOP), is when 'a local employer wishing to employ foreign labour for one or more periods of less than 183 days recruits through an intermediary established abroad who purports to be the employer and hires the labour out to the employer.' In this case, the temporal element of the three-way employment relationship is crucial. The secondees were—originally—employees of the overseas entities. They were not hired by that entity as a false facade, whose productivity is to be ultimately traced to CIOP. Rather, the secondees were regular employees of the overseas entities. There is no dispute with this fact. They have only been seconded or transferred for a limited period of time to another organisation, CIOP, in order to utilise their technical expertise in the latter. The secondment agreement between CIOP and the overseas entity, and the agreement between CIOP and the employees, envisages an end to this exception, and a return to the usual state of affairs, when the secondees return to the overseas entities. The employment relationship between the secondee and the overseas organisation is at no point terminated, nor is CIOP given any authority to even modify that relationship. The attachment of the secondees to the overseas organisation is not fraudulent or even fleeting, but rather, permanent, especially in comparison to CIOP, which is admittedly only their temporary home. Today, CIOP attempts to cast that employment relationship as a tenuous link because for the duration of the secondment, CIOP pays the salary of these. Even here, the salary is ultimately paid through the overseas entity, which is not a mere conduit. Crucially, the social

security, emoluments, additional benefits, etc., provided by the overseas entity to the secondee, and more generally, its employees, still govern the secondee in its relationship with CIOP. It would be incongruous to wish away the employment relationship, as CIOP seeks to do today, in the face of such strong linkages. Whilst CIOP may have operational control over these persons in terms of the daily work, and may be responsible (in terms of the agreement) for their failures, these limited and sparse factors cannot displace the larger and established context of employment abroad.

In this context, the decision of the Supreme Court in *DIT (I.T.)* v. *Morgan Stanley and Co. Inc.* [2007] 292 ITR 416 (SC) offers support for the Authority's viewpoint, rather than the contrary stance. In that case, the court considered various forms of permanent establishments, agency, service, etc., each of which contemplate a different characteristic and link between the deputed employee/organisation and the parent. In the context with which we are presently concerned, the following observations are critical (page 428 of 292 ITR) :

'As regards the question of deputation, we are of the view that an employee of MSCO when deputed to MSAS does not become an employee of MSAS. A deputationist has a lien on his employment with MSCO. As long as the lien remains with the MSCO the said company retains control over the deputationist's terms and employment. . . It is important to note that where the activities of the multinational enterprise entails it being responsible for the work of deputationists and the employees continue to be on the payroll of "the multinational enterprise or they continue to have their lien on their jobs with the multinational enterprise, a service permanent establishment can emerge . . . A deputationist under such circumstances is expected to be experienced in banking and finance. On completion of his tenure he is repatriated to his parent job. He retains his lien when he comes to India. He lends his experience to MSAS in India as an employee of MSCO as he retains his lien and in that sense there is a service permanent establishment (MSAS) under article 5(2)(l). We find no infirmity in the ruling of the Authority for Advance Rulings on this aspect. In the above situation, MSCO is rendering services through its employees to MSAS. Therefore, the Department is right in its contention that under the above situation there exists a service permanent establishment in India (MSAS). Accordingly, the civil appeal filed by the Department stands partly allowed.'

In fact, even the Organisation for Economic Co-operation and Development Commentary on article 15 of the Model Convention, on which the learned counsel for CIOP has placed great reliance, interestingly notes that '[t]he situation is different if the employee works exclusively for the enterprise in the state of employment and was released for the period in question by the enterprise in his state of residence.' This was clearly, and critically, not done in this case.

This brings the court to the next issue, concerning reimbursement and the doctrine of diversion of income by overriding title. This court notices that a case with almost identical circumstances, in *AT and S India (P.) Ltd., In re* [2006] 287 ITR 421 (AAR) ; MANU/AR/0016/2006, also came up before the Authority for Advance Rulings. There, an agreement between AT and S India and its parent, AT and Austria was entered into, by which AT and S Austria undertook to assign or cause its subsidiaries to assign its qualified employees to the AT and S India. These individuals were to work for AT and S India and receive compensation substantially similar to what they would have received as employees of AT and S Austria. They were engaged by AT and S India on a full time basis. The question before the Authority for Advance Rulings was identical to this case (page 424 of 287 ITR) :

'Whether pursuant to the secondment agreement entered into by the applicant with AT and S Austria, the payment to be made by the applicant to AT and S Austria, towards reimbursement of salary cost incurred by AT and S Austria in respect of seconded personnel, would be subject to withholding tax under section 195 of the Income-tax Act, in view of the facts that (1) the payments are only in the nature of reimbursement of the actual expenditure incurred by AT and S Austria, (2) AT and S Austria is not engaged in the business of providing technical services in the ordinary course of its business, (3) AT and S Austria is not charging the applicant any separate fee for the secondment, and (4) the seconded personnel work under the direct control and supervision of the applicant ?'

In holding that the obligation under section 195 would be triggered, the Authority for Advance Rulings held as follows (page 429 ITR 287) :

'From the above analysis of both the agreements it is clear that pursuant to the obligation under the FCA, the AT and S Austria has offered the services of technical experts to the applicant on the latter's request and the terms and conditions for providing services of technical experts are contained in the secondment agreement which we

have referred to above in great details. Though the term "reimbursement" is used in the agreements, the nature of payments under the secondment agreement has to satisfy the characteristic of reimbursement and that the term "reimbursement" in the agreement will not be determinative of nature of payments. The term "reimbursement" is not a technical word or a word of art. In *Oxford English Dictionary*, to reimburse means—to repay a person who has spent or lost money—and accordingly 'reimbursement' means to make good the amount spent or lost. However, under the secondment agreement the applicant is required to compensate AT and S Austria for all costs directly or indirectly arisen from the secondment of personnel and that the compensation is not limited to salary, bonus, benefits, personal travel, etc., though salary, bonus, etc., and the amounts referred to in paragraph 4.2 of the secondment agreement form part of compensation. The premise of the question that the payments are only in the nature of reimbursement of actual expenditure incurred by AT and S Austria is not tenable for reasons more than one. First it is not supported by any evidence as no material (except the debit notes of salaries of the seconded personnel) is placed before us to show what actual expenditure was incurred by AT and S Austria and what is being claimed as reimbursement ; secondly, assuming for the sake of argument that the debit notes represent the quantum of compensation as the actual expenditure, it would make no difference as the same is payable to the AT and S Austria under the secondment agreement for services provided by it. It would, therefore, be not only unrealistic but also contrary to the terms of the agreement to treat payments under the said agreement as mere reimbursement of salaries of the seconded employees who are said to be the employees of the applicant.

To show that the real employer of such employees is the applicant and not the AT and S Austria, Mr. Chaitanya invited our attention to various employment agreements entered into between the applicant and the seconded employees and also the certificate of deduction of tax at source on their global salary. All the employment agreements are similarly worded. We have carefully gone through the employment agreement between the applicant and Mr. Markus Stoinkellner. The duration of the employment is from September 1, 2005 till August 30, 2008. In article 3 thereof salary of the employee is noted as the remuneration, perquisites and other entitlements as detailed in Appendix A. However, Appendix A does not specify any amount. All

that it says, is that the salary will be as fixed and agreed between the employee and the company from time to time and that such salary may be paid either in India or outside India but the total salary shall not exceed the salary fixed as above, but no fixed salary is mentioned in the employment agreement. Other perquisites and entitlements are : travel expenses, transport, boarding, lodging ; and annual leave of 30 days per year ; and home leave which the employee will be entitled to once. The applicant shall have to organise an economic class return flight tickets to go on home leave. The employment agreement also provides that the employee will be responsible for meeting all requirements under Indian tax laws including tax compliance and filing of returns and the applicant is authorised to deduct taxes from the compensation and benefits payable.'

The mere fact that CIOP, and the secondment agreement, phrases the payment made from CIOP to the overseas entity as 'reimbursement' cannot be determinative. Neither is the fact that the overseas does not charge a mark-up over and above the costs of maintaining the secondee relevant in itself since the absence to mark-up (subject to an independent transfer pricing exercise) cannot negate the nature of the transaction. It would lead to an absurd conclusion if, all else constant, the fact that no payment is demanded negates accrual of income to the overseas entity. Instead, the various factors concerning the determination of the real employment link continue to operate, and the consequent finding that provision of employees to CIOP was the provision of services to CIOP by the overseas entities triggers the Double Taxation Avoidance Agreements. The nomenclature or lesser-than-expected amount charged for such services cannot change the nature of the services. Indeed, once it is established, as in this case, that there was a provision of services, the payment made may indeed be payment for services—which may be deducted in accordance with law—or reimbursement for costs incurred. This, however, cannot be used to claim that the entire amount is in the nature of reimbursement, for which the tax liability is not triggered in the first place. This would mean that in any circumstance where services are provided between related parties, the demand of only as much money as has been spent in providing the service would remove the tax liability altogether. This is clearly an incorrect reasoning that conflates liability to tax with subsequent deductions that may be claimed.

So far as the decision in *DIT* v. *E-Funds IT Solution* [2014] 364 ITR 256 (Delhi) goes, the judgment notes the distinction between stewardship activities of employees and deputationists, which had been highlighted in *Morgan Stanley*. The Division Bench in *e-Funds* highlighted that the nature of activity undertaken by the employee is determinative of whether it constitutes a service. In the present case, the overseas entities outsource their back office support functions like debt collections/consumers billings/monthly jobs to third party vendors in India. The seconded employees in the present case, oversea quality control of the work of such vendors. This work cannot be characterised as mere stewardship. What could have been left to CIOP to do is in fact being done through the seconded employees, whose expertise and training lends quality and content to the Indian entity. Therefore, it is held that the real employer of these seconded employees continues to be the overseas entity concerned."

6.2 In the instant case also, the employees of the assessee has been deputed to manage the affairs of the Indian entity and provide technical knowledge. The employees though worked at the premises of Teradata India but for all practical purposes the remained employees of the assessee-company. The employees continued to make their social security contributions in the USA and their salaries were also distributed to their bank accounts in the USA. In the case of *Centrica* (supra) there was an agreement between the Indian entity and expatriate, but in this case, even there was no such agreement also. In view of the above facts, respectfully following the finding of the hon'ble High Court, we uphold the finding of the lower authorities on the issue of existence of permanent establishment of the assessee in India in terms of the Double Taxation Avoidance Agreement. Ground No. 2.1 to 2.4 of the appeal accordingly dismissed.

Regarding the profit attribution, the learned counsel has made several **7** arguments/submissions in support of ground No. raised from 2.5 to 2.8 of the appeal.

7.1 The first submission which has been made is that the relocation expenses of Rs. 4,10,60,108 does not only relate to the secondment arrangement and were also paid for the other employees of TIPL. The Assessing Officer is of the view that the entire amount was incurred towards VISA charges and other travel cost of the seconded employees, which paid by the assessee-company and reimbursed to it by "Teradata India". According to the assessee, out of the total relocation expenses, expenses of Rs. 3,70,77,547 related to the employees other than the seconded employees. This issue was raised by the assessee before the

learned Dispute Resolution Panel and the learned Dispute Resolution Panel directed to verify the claim of the assessee, however, in the final assessment order, the learned Assessing Officer considered the same amount for cost base on the ground that no such details were provided by the assessee in the assessment proceedings. In our opinion, this is issue of the verification and if on verification certain expenses are not found pertaining to the seconded employees, the same need to be excluded for taking cost base for profit attribution. Accordingly, we restore this issue to the file of the learned Assessing Officer for deciding after verification of each and every item of expense of Rs. 4,10,60,108 and include only the item of the expenses pertaining to the seconded employees. Ground No. 2.5 and 2.6 of the appeal are accordingly allowed for statistical purposes.

8 The next submission of the assessee is regarding not considering the global profit of the assessee for applying mark-up on the cost base and adopting an ad hoc 25 per cent. as profit attributable to the permanent establishment. The contention of the assessee that the learned Dispute Resolution Panel specifically directed the Assessing Officer for verifying the global profit of the assessee, however, the learned Assessing Officer did not consider the submissions of the assessee.

8.1 We are of the opinion that this is issue of verification by the Assessing Officer accordingly. We restore this issue to the Assessing Officer for deciding after verification of the documents along with the audited statements filed by the assessee in support of its claim of the global profit and decide the attribution of profit in accordance with article 7 of the India-USA Double Taxation Avoidance Agreement. Ground No. 2.8 of the appeal is accordingly allowed for statistical purposes.

9 The next submission of the learned counsel is that the salary of Rs. 4,78,63,383 by TIPL to the seconded employees in India has been accepted as the cost of the business of TIPL, as hence salary payment made to the seconded employees by the assessee on behalf of TIPL should also be considered as cost of business of TIPL and should not be considered for attributing to the alleged permanent establishment.

9.1 This contention of the assessee is not acceptable because in the instant case, the revenue earned by the permanent establishment for providing services to the Indian entity is under consideration for profit attribution and the cost or expenditure incurred by the Indian entity is not an issue in dispute.

9.2 Further, the assessee proposed that salary costs paid to the seconded person is to be allowed as per article 7 of the Double Taxation Avoidance Agreement while making attribution to the alleged permanent

establishment in India. The submission of the assessee are reproduced as under :

"3.1.1 Article 7 of the Double Taxation Avoidance Agreement governs the taxability of business income of an US resident in India, which provides for deduction of any expenses which are incurred for the business of permanent establishment.

3.1.2 In the instant case this cost is the amount expended towards the salary and other benefit paid to the seconded persons. It is also submitted that as the reimbursements were on a case to cost basis, no profit element would be left and therefore there would be no taxable income in India.

3.1.3 In the instant case, attribution of profits to the alleged permanent establishment in India under the provisions of the Double Taxation Avoidance Agreement would stand as under :

Particulars	*Amount (INR)*
Reimbursements received from TIPL for the seconded persons	5,21,34,696
Less : Salary cost paid by the appellant (as reimbursements are on cost-to-cost basis)	5,21,34,696
Taxable income	Nil"

9.3 From the above submission, what we find that the assessee is proposing that out of the reimbursement amount received from "Teradata India", first the cost base should be deducted and then mark-up should be charged on the remaining amount, which will be nil in this case. We do not agree with this proposition of the assessee. The assessee has rendered services to Teradata India through the permanent establishment and therefore the income which accrued to the permanent establishment is the market value of the services which has been provided by the seconded employees reduced by the cost of the services. The market value of the services to the permanent establishment can also be deduced from the sale value or revenue fetched by Teradata India on those services reduced by the average profit margin of Teradata India. The Assessing Officer is required to attribute profit to the permanent establishment in accordance with article 7 of the Indo-USA Double Taxation Avoidance Agreement. Article 7(2) prescribe that profit attributable to the permanent establishment may be estimated on a reasonable basis, but the estimate adopted, however, should be in accordance with principle laid down in article 7 of the treaty. The deduction of expenses are also to be allowed as per article 7(3) of the Treaty. The Assessing Officer has considered mark-up at the rate of 25 percent on the cost base of the seconded employees in the absence of details of global

profit of the assessee. In our opinion, this action of the Assessing Officer was not totally arbitrary or in violation of the rules of estimation, though we have already restored the issue of the estimation of the profit to the file of the Assessing Officer in accordance with article 7 of the India and USA Double Taxation Avoidance Agreement.

9.4 The learned counsel also made an alternative argument that Teradata India was remunerated at the arm's length price under transfer pricing principles and no further attribution to the alleged permanent establishment of the assessee is warranted. We also do not agree with this proposition because, nothing is brought on record to show whether the services of the seconded employee has been utilised towards international transactions of the Indian entity or has been utilised in domestic market. Even the services has been utilised by the associated enterprises and remunerated at the arm's length price to "Teradata India", will not make any impact, as in the instant case the income taxable in the hands of the permanent establishment is under consideration and nothing has been brought on record that the arm's length price of the service transaction between permanent establishment of the assessee and the Indian entity has been determined. What is relevant here is that income has to be taxed in the hands of the correct person and in the instant case income from rendering services by the permanent establishment has to be taxed in the hands of the permanent establishment and remunerating Teradata India by other associated enterprises at the arm's length price is not relevant. Accordingly, we reject this alternative argument of the assessee.

10 Ground No. 3 of the appeal is premature at this stage and the dismissed as infructuous.

11 Ground No. 4 is consequential and, therefore, accordingly dismissed as infructuous.

12 In ground No. 5, the assessee has sought credit of tax deducted at source for amount of Rs. 22,721. This is the issue of verification by the Assessing Officer from the records of the assessee as well as from the record of the Department and, therefore, accordingly, we restore this issue to the file of the learned Assessing Officer with the direction to the assessee to produce all the evidence in support before the Assessing Officer for verification and he will then after examination of the documents/evidence and data base of the Department, allow the credit of tax deducted at source in accordance with law.

13 The assessee has also raised additional ground Nos. 6 and 7 as under :

> "6. That, in view of the facts and circumstances of the case and in law, the learned Assessing Officer has erred in ignoring the settled

position of law that proceedings before the Dispute Resolution Panel ('DRP') are part of the assessment proceedings only and therefore, failed to appreciate that detail of relocation expenses filed before the learned Dispute Resolution Panel was part of the assessment records.

7. That, without prejudice to other grounds of appeal, the learned Assessing Officer/Dispute Resolution Panel erred in ignoring the fact that for the subject secondment arrangement, TIPL was remunerated by the associated enterprises at an arm's length price under the transfer pricing principles and accordingly, no further attribution to the alleged permanent establishment of the appellant is warranted."

14 Both these grounds have already been adjudicated while dealing with ground No. 2.5 to 2.8 of the appeal and accordingly, we are not required to adjudicate again on these grounds. The grounds are accordingly dismissed.

I. T. A. No. 2580/Delhi/2018 (assessment year 2014-15)

15 In Appeal No. 2580/Delhi/2018, the assessee is aggrieved with the rejection of the rectification application of the assessee. In the rectification application the assessee requested for complying with the direction of the learned Dispute Resolution Panel on the issue of relocation expenses. As this issue has already been restored by us to the file of the Assessing Officer while dealing with the grounds in I. T. A. No. 7805/Delhi/2017 and, therefore, the grounds raised in I. T. A. No. 2580/Delhi/2018 are rendered academic only and, therefore, we are not adjudicating upon the same. The appeal is accordingly dismissed as infructuous.

16 In the result, the appeal bearing I. T. A. No. 7805/Delhi/2017 is allowed partly for statistical purposes and the appeal bearing I. T. A. No. 2580/Delhi/2018 is dismissed.

Order pronounced in the open court on March 19, 2020.

[2020] 82 ITR (Trib) 362 (Indore)

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

SANGHVI FOODS P. LTD.

v.

INCOME-TAX OFFICER (I. T. AND T. P.)

KUL BHARAT *(Judicial Member)* and
MANISH BORAD *(Accountant Member)*

June 3, 2020.

SS ▸ ITA 1961, ss 9, 195
AY ▸ 2015-16, 2016-17
HF ▸ Department

DEDUCTION OF TAX AT SOURCE—INCOME DEEMED TO ACCRUE OR ARISE IN INDIA—NON-RESIDENT—ASSESSEE PURCHASING SPARE PARTS FOR OLD MACHINES AND FLOUR MILLING MACHINE FROM NON-RESIDENT SUPPLIER—NON-RESIDENT SUPPLIER CARRYING OUT TRANSACTION THROUGH ITS INDIAN SUBSIDIARY COMPANY—BUSINESS CONNECTION ESTABLISHED—ASSESSEE REQUIRED TO DEDUCT TAX AT SOURCE—INCOME-TAX ACT, 1961, SS. 9, 195.

The assessee was in the business of manufacture of wheat products, running a cold storage and windmills in its different units. It purchased spare parts for old machines and flour milling machines from a non-resident supplier for which payments were made during the financial years 2014-15 and 2015-16. According to the assessee, the purchase was of capital goods in the form of spare parts for old machines and flour milling machines. The purchases were made directly from non-resident suppliers. The purchase of capital goods was not subject to deduction of tax at source. The Assessing Officer after considering the submissions and called for information from a Bangalore based company, which was a wholly owned subsidiary of the non-resident supplier. The Assessing Officer on the basis of the information received from the Indian company concluded that the Indian company was working on behalf of the non-resident supplier and apart from selling goods in India it also provided marketing services to its holding company. The Assessing Officer examined the communications between the assessee and the Indian company and concluded that the non-resident supplier had a business connection in India through the Indian company and thus the profit element in the sales made to the Indian company was subject to the withholding tax under section 195 of the Income-tax Act, 1961 and accordingly applied 10 per cent. of the net profit rate on the amount remitted. He calculated the shortfall

in the tax deduction at source at 41.2 per cent. on the gross amount for the two payments made at Rs. 38,093 and Rs. 2,83,438 during March 2015 and August 2015 during the financial years 2014-15 and 2015-16. This was confirmed by the Commissioner (Appeals). On appeal :

Held, *that the role of the Indian company could not be ignored at any stage. Since the beginning when the assessee looked for suppliers of spare parts, the Indian company was very much in the scene of the transaction of purchase. Since the non-resident supplier had carried out the transaction of sale of goods to the assessee through its subsidiary company the business connection was established and therefore section 9 came into operation and thus the transaction needed to satisfy the requirement of section 195.*

CIT *v.* REMINGTON TYPEWRITER CO. (BOMBAY) LTD. [1928] 3 ITC 166 (Bombay) (para 12) *and* HIND ENERGY and COAL BENEFICATION (INDIA) LTD. *v.* ITO (I. T. & T. P.) [2019] 110 taxmann.com 72 (Indore) (para 6) *referred to.*

I. T. A. Nos. 743 and 744/Indore/2018 (assessment years 2015-16 and 2016-17).

S. N. Agrawal and *Pankaj Mogra*, Chartered Accountants, for the assessee.

K. G. Goyal, Senior Departmental representative, for the Department.

ORDER

The order of the Bench was pronounced by

MANISH BORAD ***(Accountant Member)***.—The above captioned appeals **1**
filed at the instance of the assessee pertaining to the assessment years 2015-16 and 2016-17 are directed against the orders of the learned Commissioner of Income-tax (Appeals)-13 (in short, "Ld. CIT"), Ahmedabad dated June 27, 2018 which is arising out of the order under section 201(1A) of the Income-tax Act, 1961 (in short, "the Act") dated March 28, 2017 framed by the Income-tax Officer (International Taxation), Bhopal.

The assessee has raised the following grounds of appeal : **2**

I. T. A. No. 743/Indore/2018 (assessment year 2015-16)

1. That on the facts and in the circumstances of the case the learned Commissioner of Income-tax (Appeals) erred in confirming the action of the Assessing Officer by treating the assessee-company as assessee in default in respect of non-deduction of tax at source under section 195 of the Income-tax Act of Rs. 2616 in respect of payment made to Buhler AG Switzerland of Rs. 38,093 during the year

under consideration and also interest charged by the Assessing Officer under section 201/201(1A) of the Income-tax Act of Rs. 654 without properly appreciating the facts of the case and submissions made before her even when the assessee was not liable to deduct deduction of tax at source on this payment.

2. The assessee reserve its right to add, alter, modify or amend the grounds of appeal as and when required.

I. T. A. No. 744/Indore/2018 (assessment year 2016-17)

1. That on the facts and in the circumstances of the case the learned Commissioner of Income-tax (Appeals) erred in confirming the action of the Assessing Officer by treating the assessee-company as assessee in default in respect of non-deduction of tax at source under section 195 of the Income-tax Act of Rs. 19,463 in respect of payment made to Buhler AG Swittzerland of Rs. 2,83,438 during the year under consideration and also interest charged by the Assessing Officer under section 201/201(1A) of the Income-tax Act of Rs. 3,892 without properly appreciating the facts of the case and submissions made before her even when the assessee was not liable to deduct deduction of tax at source on this payment.

2. The assessee reserve its right to add, alter, modify or amend the grounds of appeal as and when required.

3. As the issues raised in these two appeals are common these were heard together and being disposed of for the sake of convenience and brevity.

3 Brief facts of the case as culled out from the records are that the assessee is a private limited company engaged in the business of manufacturing of wheat products, running of cold storage and running of wind mill under its different units. That during the years under appeal the company had purchased spare parts for old machines and flour milling machine from a non-resident supplier for which payments were made during the financial years 2014-15 and 2015-16. The year-wise details of the same is as under :

Sl. No.	*Particulars*	*Financial year*	*Amount paid*
1.	Payment to M/s. Buhler AG Switzerland	2014-15	38,093
2.	Payment to M/s. Buhler AG Switzerland	2015-16	2,83,438
	Total		3,21,531

That a show-cause notice was issued by the Income-tax Officer (International Taxation and Transfer Pricing) wherein it was asked from the assessee as to why the assessee be not treated as the assessee in default for

making the above payments to non-resident without deducting tax at source under section 195 of the Act.

In reply to the show-cause notice the assessee contended that the 4
alleged purchase is a capital goods in the form of spare parts for old machines and flour milling machine. Purchases have been made directly from the non-resident suppliers. It was also submitted that the purchase of capital goods is not subject to deduction of tax at source. The learned Assessing Officer after considering the submissions also called for information from a Bangalore based company, namely, Buhler India Pvt. Ltd. (in short, "BIPL") which is a wholly owned subsidiary of Buhler AG Holding, Switzerland. The learned Assessing Officer on the basis of the information received from Buhler India Pvt. Ltd., Bangalore came to a conclusion that the Bangalore based company is working on behalf of the Buhler AG, Switzerland and apart from selling goods in India also provides marketing services to its holding company, namely, Buhler AG, Switzerland. The learned Assessing Officer examined the communication between the assessee and Buhler India Pvt. Ltd. He came to a conclusion that Buhler AG, Switzerland is having its "business connection" in India through its subsidiary/group company, namely, Buhler India Pvt. Ltd. and thus the profit element in the sales made to the Indian company is subject to the withholding tax under section 195 of the Act and accordingly applied 10 per cent. of the net profit rate on the amount remitted. Default of deduction of tax at source at 41.2 per cent. is calculated on the gross amount for the two payments made at Rs. 38,093 and Rs. 2,83,438 during March 2015 and August 2015 during the financial years 2014-15 and 2015-16 respectively in the following manner :

Financial year 2014-15

Name of recipient	*Total amount remitted in Rs.*	*Amount of profit 10% of amount remitted*	*Gross up amount as per section 195A of the Act*	*Default of TDS at 41.2% include cess*	*Date of remittance*	*Interest thereon u/s. 201(1A)*
Buhler Switzerland	38,093	3,809	6,349	2,616	March 2015	654

Financial year 2015-16

Name of recipient	*Total amount remitted in Rs.*	*Amount of profit 10% of amount remitted*	*Gross up amount as per section 195A of the Act*	*Default of TDS at 41.2% include. cess*	*Date of remittance*	*Interest thereon u/s. 201(1A)*
Buhler Switzerland	2,83,438	28,344	47,240	19,463	August 2015	3,892

5 Aggrieved the assessee preferred appeals before the learned Commissioner of Income-tax (Appeals) but failed to succeed and now the assessee is in appeal before the Tribunal on the common issues raised in both the years.

6 The learned counsel for the assessee referred to the following written submissions which are reproduced below :

1. The brief facts of the case are that the assessee is a private limited company engaged in the business of manufacturing of wheat products, running of cold storage and running of wind mill under its different units.

2. That during the year under appeals the company had purchased spare parts for old machines and flour milling machine from a non-resident supplier for which payments were made by it in the financial years 2014-15 and 2015-16. The year-wise details of the same is as under :

Sl. No.	*Particulars*	*Financial year*	*Amount paid*
1.	Payment to M/s. Buhler AG Switzerland	2014-15	38,093
2.	Payment to M/s. Buhler AG Switzerland	2015-16	2,83,438
	Total		3,21,531

3.1 That a show-cause notice was issued by the Income-tax Officer (International Taxation and the Transfer Pricing) wherein it was asked from the assessee as to why the assessee be not treated as assessee in default for making the above payments to the non-resident without deduction of tax at source under section 195 of the Act.

3.2. In the show-cause notice it was also mentioned that payments to non-resident parties for purchase of various items (flour milling machines and its spare parts) were made and the said transactions were made through Indian parties which were agents/brokers in India of these non-resident, namely, Buhler AG, Switzerland.

3.3 That in para 3 of the said show-cause notice the Income-tax Officer mentioned that since the assessee has placed order through agent/broker as mentioned above in the table. These agents/brokers are working for the non-residents in india as their business connection and hence the amount paid to these parties are in the nature of business income chargeable to tax in India and deduction of tax at source is applicable as per section 195 of the Income-tax Act.

3.4 It was explained to the Income-tax Officer (Transfer Pricing and International Taxation) that the assessee-company basically purchased the spare parts for old machines and flour milling machine from the above non-resident parties. Thus, it has made payment towards purchase of capital goods. That for purchase of the said items the company has floated enquiries to various foreign suppliers and obtains technical specification and rates of the same from them. Subsequently it has placed the purchase order to the respective party who meet out the quality specification which is also competitive in terms of price.

3.5 It was also explained to the learned Income-tax Officer (International Taxation and Transfer Pricing) that the assessee has placed order to the non-resident supplier directly for purchase of spare parts since and since there is no liability of deduction of tax at source under section 195 on purchase of capital goods from the foreign supplier of goods hence there was no liability towards withholding tax under section 195 on the said payment made to the non-residents

4. The learned Income-tax Officer has not appreciated the facts placed before him and has passed an order under section 201(1)/201(1A) of the Act on March 28, 2017 wherein he was of the view that payment made by the assessee-company to M/s. Buhler AG, Switzerland towards purchase of spare parts for old machines and flour milling machine is governed by the provisions of section 9(1) of the Act and on which no withholding tax under section 195 of the Act was deducted. Hence, he has considered the assessee as assessee in default and created the demand in his case.

Sl. No.	*Particulars*	*Amount paid*	*Gross up amount*	*Default of TDS*	*Interest u/s. 201(1A)*
1.	Payment to M/s. Buhler AG Switzerland	38,093	6,349	2,616	654
2.	Payment to M/s. Buhler AG Switzerland	2,83,438	47,240	19,463	3,892
	Total			22,079	4,546

5. That on a perusal of the purchase order and invoices your honours will appreciate that the assessee-company has basically purchased spare parts for old machines and flour milling machines from the above non-resident parties. That to purchase the said items the company floats enquiries to various foreign suppliers and obtains technical specification and rates of the same from them. Subsequently it placed the purchase order to the respective party who meet out the quality specification which is also competitive in terms of price. It is also notable that payment to the said party was towards purchase of capital goods being spare parts for old machines and flour milling machine.

6. The learned Income-tax Officer prior to treating the assessee-company as an assessee in default referred to the provisions of sections 195 and section 5 of the Act. For the sake of convenience, the provisions of all these sections are reproduced hereunder :

"195. (1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC or section 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head 'Salaries') shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :

Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode :

Provided further that no such deduction shall be made in respect of any dividends referred to in section 115-O.

Explanation 1.—For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called 'Interest payable account' or 'Suspense account' or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

Explanation 2.—For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make

deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—

(1) a residence or place of business or business connection in India ; or

(ii) any other presence in any manner whatsoever in India . . .

Section 5 in the Income-tax Act, 1961

5.(1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which—

(a) is received or is deemed to be received in India in such year by or on behalf of such person ; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year ; or

(c) accrues or arises to him outside India during such year :

Provided that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6) of section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India.

(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which—

(a) is received or is deemed to be received in India in such year by or on behalf of such person ; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

Explanation 1.—Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance-sheet prepared in India.

Explanation 2.—For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India."

7.1 That on a close reading of section 195 of the Income-tax Act any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) (or section 194LD) or any other sum chargeable under the provision of this Act

7.2 The assessee-company is liable to deduct withholding tax only when the amount as paid by it is liable to tax in India as clearly mentioned under the provision of section 195 of the Act. The amount as paid by the assessee-company to M/s. Buhler AG Switzerland was liable to tax or not, we have refer the provision of section 5 of the Income-tax Act.

7.3.1 That as per sub-section (2) of section 5 of the Income-tax Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source of derived which—

(a) is received or is deemed to be received in India in such year by or on behalf of such person ; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year, accrues or arises or is deemed to accrue or arise to him in India during such year.

7.3.2 That on a perusal of the bills along with the correspondence made by the assessee with the said supplier you will find that payment to the non-resident supplier was towards purchase of capital goods being spare parts for old machines and flour milling machine. The assessee has placed order to the non-resident supplier directly.

8.1 It was also mentioned that the said transactions were made though Indian parties which were agents brokers in India of those non-resident. The detail of the same as mentioned by the learned Assessing Officer is as under :

Sl. No.	*Name of recipient*	*Name of agent/broker through which order is placed*
1.	Buhler AG Switzerland	Buhler India Pvt. Ltd., Bangalore

8.2 In this respect the assessee has already clarified to the learned Income-tax Officer that the assessee-company has purchased spare parts for old machines and flour milling machine from the above non-resident party.

8.3 That to purchase the said items the company floats enquiries to various foreign suppliers and obtains technical specification and rates of the same from them. Subsequently, it places the purchase order to

the respective party who meet out the quality specification which is also competitive in terms of price.

8.4 That the payment to the said party was towards purchase of capital goods being spare parts for old machines and flour milling machine and the assessee has placed order to the non-resident supplier directly.

8.5 That as per *Explanation* 2 to section 9(1)(a) M/s. Buhler India Pvt. Ltd. has not acted as an agent for its non-resident principal company M/s. Buhler AG Switzerland. The assessee-company has purchased the material on principal to principal basis. Thus, no liability of deduction of tax at source under section 195 is attracted on the said payment made to non-residents. In reply to the notice issued by the Income-tax Officer deduction of tax at source under section 133(6) to the said party, it was categorically mentioned that customers enquiry received by it is forwarded to Buhler AG (Principal) and quotation from Buhler AG (Principal) to the prospective customers. The Indian counterpart has no authority to conclude the contract on its own and, therefore, the Buhler AG has no business connection in India so as to consider income deemed or accrue arise in India as per the provisions of section 9(1) of the Act.

9. Copy of the audited balance-sheet, annual return in Form No. MGT-7 as filed by M/s. Buhler India Pvt. Ltd. for the year ending March 31, 2015 and March 31, 2016 under the Companies Act filing the particulars of holding, subsidiary, joint venture and associate companies of the said company are also enclosed for your kind reference. That on a perusal of the same you will find that Buhler AG Switzerland was not holding any shares in Buhler India Pvt. Ltd.

10. That the hon'ble Income-tax Appellate Tribunal, Indore Bench in its latest order in the case of *Hind Energy and Coal Benefication (India) Ltd.* v. *ITO (I. T. and T. P.)* reported in [2019] 110 taxmann.com 72 (Indore) in para 46.

In view of the above, your honour is very kindly requested to delete the entire amount of demand as raised by the learned Assessing Officer under the withholding tax under section 195 of the Act of Rs. 2,616 and Rs. 19,463 for the assessment years 2015-16 and 2016-17 respectively and also delete the interest charged under section 201/201(1A) of the Act of Rs. 654 and Rs. 3,892 for the assessment years 2015-16 and 2016-17 respectively.

7 Per contra the learned Departmental representative vehemently argued supporting the orders of the learned Commissioner of Income-tax (Appeals).

8 We have heard the rival contentions and perused the records placed before us and carefully gone through the decision referred and relied on by the assessee. The common grievance raised by the assessee in the instant two appeals for the assessment years 2015-16 and 2016-17 is against the finding of the learned Commissioner of Income-tax (Appeals) confirming the action of the learned Assessing Officer treating the assessee-company as an assessee in default for non-deduction of tax at source under section 195 of the Act at Rs. 2,616 and Rs. 19,463 on the payment for purchase of spare parts to the non-resident company, namely, Buhler AG, Switzerland at Rs. 38,093 and Rs. 2,83,438 during the financial years 2014-15 and 2015-16.

9 We observe that the assessee-company is engaged in the business of manufacturing of wheat products. It intended to purchase spare parts for its old flour mill machines. The assessee after making necessary enquiry finally purchased goods from M/s. Buhler AG, Switzerland vide invoice dated March 24, 2015 and August 11, 2015. In order to make payments to the supplier, Form 15CA/15CB of the Income-tax Rules was not filed on the ground that no such forms needs to be filed online and need not be provided to bank in the case of purchase of capital goods/spare parts of machineries.

10 When the matter was taken by the learned Assessing Officer, necessary details were called and it was revealed that M/s. Buhler AG, Switzerland is having the group company's office in Bangalore working in the name of Buhler India Pvt. Ltd. (in short, "BIPL") wherein 99.99 per cent. equity share is held with M/s. Buhler AG, Switzerland. The learned Assessing Officer also came across the correspondences through e-mail between the assessee-company and Buhler India Pvt. Ltd., Bangalore showing that the orders for supply of spare parts were finalised between these two companies based in India and finally the orders were placed to M/s. Buhler AG, Switzerland who had issued the invoice. On the basis of these information the learned Assessing Officer was of the view that as per the provisions of section 9(1) of the Act since the non-resident company is having a "business connection" in India through Buhler India Pvt. Ltd. through the communication attributable to these transaction for spare parts is subject to withholding tax under section 195 of the Act.

11 When the matter came before the learned Commissioner of Income-tax (Appeals) who after considering the reply of the assessee which summarised that transactions has been directly carried out with the non-resident

company which has issued the invoice/supply the goods and payment have been made directly to it. It was also submitted that purchase of capital goods from non-resident is not subject to tax withholding.

We further find that the learned Commissioner of Income-tax (Appeals) **12** elaborately discussed the facts and related sections of the Income-tax Act and came to the conclusion that Buhler India Pvt. Ltd. is working on behalf of Buhler AG, Switzerland and thus confirmed the action of the learned Assessing Officer observing as follows :

> "8. I have carefully considered the facts of the case, order passed by the Assessing Officer and the written submissions placed by the appellant. In the present appeal, the basic question that needs to be decided is whether Buhler AG Switzerland has a business connection/ permanent establishment in India. Through its subsidiary company/ group company Buhler (India) Pvt. Ltd., Bangalore. It is noted that vide submission dated August 11, 2016 before the Assessing Officer, the appellant had denied having knowledge of any business connection place of business of Buhler AG Switzerland in India. To verify the veracity of the above statement the Assessing Officer called for copy of invoices, purchase orders and copy of mail correspondences between the appellant and Buhler AG Switzerland. The appellant had initially refused to be aware of presence of BAGS's office I-branch or subsidiary in India. However, on a perusal of e-mail correspondences between the appellant and Buhler India Pvt. Ltd., Bangalore (is noted that the appellant it) primarily dealing with Indian counterpart subsidiary/group company-Buhler (India) Pvt. Ltd., Bangalore. At page No. 5 of the Assessing Officer's order, the Assessing Officer has reproduced extracts of the said mail correspondences carried by the appellant-company with Buhler India Pvt. Ltd. Extract of the said mail correspondences, i. e., produced hereinunder :
>
> '. . . The assessee to Buhler India Bangalore—As per your Quotation No. 20123456284/002 we are sending herewith a purchase order of spare parts of Sanghvi Foods Pvt. Ltd.
>
> Buhler India Bangalore to the assessee—Please find herewith attached revised quotation for the part required by you, kindly go through the same and send your confirmation for our further process looking forward for your valuable order. Thanks and regards. Buhler India Pvt. Ltd., Bangalore.

Assessee to Buhler : India Bangalore—We require below, items :

Material		*Quantity*
.....	(Details provided)	.....

Buhler India Bangalore to the assessee—Please find herewith attached quotation for the part required by you kindly go through the same and send your confirmation ; for our further process, looking forward for your valuable order. Thanks and regards. . .'

8.1 There is apparent contradiction in the claim made by the appellant and the facts of the case. On one side, the appellant is contending that it is not aware that the non-resident BAGS has any Indian counterpart and on another side the appellant itself has carried continuous mail correspondences with the Indian subsidiary Buhler India Pvt. Ltd. of the non-resident. BAGS. Further, in entire submission placed before this office there is no rebuttal to the observations raised by the learned Assessing Officer on the said mail correspondences. On a perusal of the first mail correspondence, it is very much apparent that the appellant company is placing order with RTPL only on reference to the quotation received horn Buhler India Pvt. Ltd. On a perusal of the second mail correspondence, it clearly transpires that Buhler India Pvt. Ltd. is authorised to negotiate, raise quotation, revise quotation and also confirm an order. On a perusal of the third mail correspondence it is very apparent that the appellant company sought a combined quotation only from Buhler India Pvt. Ltd. and also confirmed the purchase order only through it. Fourth mail correspondence also clearly spells that Buhler India Pvt. Ltd. has the authority to send quotations and taking orders from the appellant. This reveals (mail correspondences) that in the entire transaction, SIPL was in active participation till finalisation of the order. Series of events show that after substantial tasks carried by SIFL, BAGS have raised only final invoicing. In the light of the above factual position, the contention of the appellant that it was not aware of place of business in India of BAGS is contradictory to the facts submitted by itself during the course of assessment proceedings. At this juncture it would be relevant to note that substantial functions pertaining to sales, marketing have been carried out by Buhler India Pvt. Ltd. for and on behalf of its associated enterprise, namely, BAGS, to put in the same How chart it may be noted that the marked portion of the

contract is being carried out by Buhler India Pvt. Ltd. for and on behalf of BAGS in India.

Received indent from plant for requirement[1]
✍
Check Inventory and final the requirement[1]
✍
Send enquiry to vendor by e-mail[1]
✍
Received quotation from vendor[1]
✍
We negotiate price[1]
✍
Send to P.O for confirmation[1]
✍
We have received confirmation order[1]
✍
Transfer the amount by bank as per T&C of P.O.[1]
✍
Vendor confirm the payment[1]
✍
Vendor send the schedule of dispatch of goods like by air/sea and other detail[1]
✍
We have given contract for clearance of goods to CHA[1]
✍
CHA clear goods from custom for completing all legal compliance[1]
✍
CHA send goods to our factory premises[1]

1. Mail communications between the appellant-company and Buhler (India) Pvt. Ltd. clearly indicates that the appellant-company was in conversation with Buhler (India) Pvt. Ltd. till finalisation and confirmation of order.

8.2 Further, the learned Assessing Officer has issued notice under section 133(6) of the Income-tax Act, 1961 to Buhler (India) Pvt. Ltd. to which reply has been received from Buhler India Pvt. Ltd., extract of which is available at page 5 of the assessment order. To summarise, Buhler India Pvt. Ltd. has stated that its role is confined to identity customers, liaison with customers on requirement and product

specification and handling their inquiries, and thereafter forwarding enquiries to its associated enterprises, i. e., Buhler AG. However, on a perusal of the facts as well the correspondences between the appellant and Buhler (India) Pvt. Ltd., I am not inclined to agree with the reply received by the Assessing Officer pursuant to the notice under section 133(6). It clearly emanates that Buhler (India) Pvt. Ltd. is actually providing very vital services till the confirmation of order and it is not merely restricted to marketing of the product.

8.3 In the light of the above facts it now needs to be analysed whether Buhler India Pvt. Ltd. constitutes business connection/permanent establishment in India for BAGS as per the provisions of the Income-tax Act/Double Taxation Avoidance Agreement. It is a settled position in law that the tax treaty overrides the provision of the Act in so far as they are beneficial to the appellant.

8.4 It is also a settled position pursuant to section 5(4) that the benefit of the Double Taxation Avoidance Agreement would be available only if the tax residency certificate J Form 10 is filed by the appellant. Considering this the appellant was asked both by the Assessing Officer as well as the undersigned to file tax residency certificate. However, the appellant has submitted that there was no requirement to file tax residency certificate or Form 10 as the income of BAGS was not taxable in India. However, this stand of the appellant again gets fortified from the documents provided by the appellant itself and now available on record. During the course of appellate proceeding the appellant has failed to furnish a tax residency certificate or Form 10 and therefore reference to the provisions of the Double Taxation Avoidance Agreement is not required to be made.

8.5 Therefore, the basic question that now needs to be decided is whether under the provisions of the Income-tax Act, 1961, BAGS has a business connection in India through its subsidiary company/group company Buhler India Pvt. Ltd.

Therefore, it would be apt to refer to the provisions of the Income-tax Act which are reproduced hereunder :

"5. *Scope of total income*.—. . . .(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which—

(a) is received or is deemed to be received in India in such year by or on behalf of such person ; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

9. *Income deemed to accrue or arise in India*.—(1) The following incomes shall be deemed to accrue or arise in India—

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India. . .

Explanation 2.—For the removal doubts, it is hereby declared that 'business connection' shall include any business activity carried out through a person who, acting on behalf of the non-resident,—

(a) has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods or merchandise for the non-resident ; or

(b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident ; or

(c) habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident :

Provided that such business connection shall not include any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having an independent status is acting in the ordinary course of his business :

Provided further that where such broker, general commission agent or any other agent works mainly or wholly on behalf of a non-resident (hereafter in this proviso referred to as the principal non-resident) or on behalf of such non-resident and other non-residents which are controlled by the principal non-resident or have a controlling interest in the principal non-resident or are subject to the same common control as the principal non-resident, he shall not be deemed to be a broker, general commission agent or can agent of an independent status."

Section 5(1) read with section 9(1) determines the taxability in the case of non-resident. The Indian Income-tax Act provides for levy of

income-tax on the income of foreign companies and non-residents, but only to the extent of their income source from India. As per section 5(2) of the Act a foreign company-non-resident person is liable to tax for income deemed to accrue or arise to in India. Section 9(1) specifies certain types of income that are deemed to accrue or arise in India. Section 9(1)(i) provides for all income accruing or arising, whether directly or indirectly, through or from any business connection in India. Clause (a) to *Explanation 2* to section 9(1)(i) further defines business connection to be any business activity carried out through a person who, acting on behalf of non-resident, has habitually exercised in India, an authority to conclude contracts on behalf of the non-resident.

8.6 In the present case, details provided by the appellant itself shows that it has carried out transactions through Buhler India Pvt. Ltd. (though prima facie denied by it). The appellant has transacted with Buhler India Pvt. Ltd. continuously for the said transactions of purchase of machine parts. Buhler India Pvt. Ltd. is carrying out functions like orders, raising quotations, revising quotations, finalising terms, confirming the purchase order, etc., Buhler India Pvt. Ltd. was fully involved during the transaction and played an important role while undertaking discussions, negotiations, offering quotation, accepting purchase orders, liaison work and finalising the deal, etc. In totality, Buhler India is in lead to get deal concluded for BAGS. These functions performed by Buhler India Pvt. Ltd. for BAGS sufficiently go to prove that it is acting on behalf of BAGS and concludes contracts on behalf of it. It is not mere business sourcing agent but it is taking onerous task till the finalisation of business transaction which leads to a close business connection in India.

Further, vide reply to section 133(6) Buhler India Pvt. Ltd. also confirms that it regularly assists BAGS and other group of companies in India and evidence on records go to show that it actually does much more than the services as conveyed. Considering the above factual position, I find no reason to interfere with the findings of the Assessing Officer. In my considered view, therefore, the BAGS indeed has a business connection in India by way of its Indian subsidiary Buhler India Pvt. Ltd. which is acting for furtherance of the business interests of the BAGS in India remaining closely connected.

Further, the fact whether the parent company gets any kind of business from the Indian subsidiary would also be relevant in determining whether there exists a business connection in India. In this

context, there is a judgment in the case of *CIT* v. *Remington Typewriter Co. (Bombay) Ltd.* [1928] 3 ITC 166 (Bom), which is summarised below : An American company formed a subsidiary company in Bombay for carrying on in Bombay the American company's business of selling its products. Although no contractual obligation existed with the Bombay company, the flow of business between the two companies was secured by the fact that the ultimate and complete control of the Bombay company was vested in the American company which owned all its shares. *Held*, a Bombay company existed between the American company and the Bombay company and that the estimated profit must be deemed to have accrued to the American company in India.

When an enterprise of a contracting State carries on business in another contracting State, it needs to be examined whether a permanent establishment is hidden behind a subsidiary/dependent agent, i. e., if the agent in addition to its own business also carries on the business of the non-resident company. Substance of a transaction is more important than the mere legal form of the transaction. The Organisation for Economic Co-operation and Development commentary on the identification of the elements of a permanent establishment gave relevance to the substance rather than to the mere legal form of the transactions.

Without prejudice BAGS can also be considered to have a permanent establishment in India under clause (c) to *Explanation 2* to section 9(1)(i) since Buhler India Pvt. Ltd. is taking and finalising orders in India, mainly and or wholly for the non-resident-BAGS,

9. The alternative contention of the appellant is that, even if the said material was purchased from Indian company—Buhler India Pvt. Ltd., the appellant was not liable to deduct deduction of tax at source. This alternative plea of the appellant is academic. It needs to be noted here that once business connection is established in India for any non-resident, it has to pay taxes in India for profits or gains secured from business in India. In order to safeguard India's right to tax the said income the provisions of withholding tax have been placed so that the buyer itself withholds tax and pay it to the Income-tax Department. The contention that if the material would have been bought from Indian entity would not attract deduction of tax at source under section 195, as the Indian entities file their return of income in India is otiose. On the above detailed discussion, I find that Buhler (India) Pvt. Ltd., Bangalore constitutes business connection/

permanent establishment in India for Buhler AG Switzerland. I find merit in the findings of the learned Assessing Officer and hence reject the appellant's ground of appeal.

10. As a result, the appeal of the appellant is dismissed."

13 Though the finding of the learned Commissioner of Income-tax (Appeals) and the investigation of the learned Assessing Officer clearly shows that the role of Buhler India Pvt. Ltd. cannot be ignored at any stage. Since the beginning when the assessee-company searched for suppliers of the spare parts, Buhler India Pvt. Ltd. was very much in the scene of the transaction of purchase. This fact is further strengthened with the reply submitted by Buhler India Pvt. Ltd. under section 133(6) of the Act on February 15, 2017 through e-mail to the Assessing Officer and the same reads as follows :

"We refer to your letter dated January 12, 2017 which was received by us on January 17, 2017 calling for information with respect to proceedings under section 201(1)/201(1A) of the Act in the case of Sanghvi Foods Pvt. Ltd., Indore TAN BPLS01258F for the financial years 2014-15 and 2015-16.

In this regard we humbly submitted that Buhler India is primarily engaged in the business of manufacture and trade in food processing machineries (particularly rice and flour milling machines) and its spare and components. Company also provides repair and maintenance services engineering services, etc. It also provides marketing supporting services to some of the group companies including Buhler AG Switzerland.

Provision of marketing support services to Buhler AG Switzerland, inter alia, covers the following activity :

(a) Identifying customers interested in the products.

(b) Liaison with customers on their requirement and product specification as well as handling customer enquiries relating to the product.

(c) Forwarding customer enquiries to Buhler AG and quotation from Buhler AG to the prospective customers."

14 The above reply of Buhler India Pvt. Ltd. leaves no confusion that Buhler India Pvt. Ltd. being subsidiary/group company of Buhler AG, Switzerland is having regular business activity in India and apart from the trading business it also regularly providing marketing services to Buhler AG, Switzerland. Whether the activity carried out by Buhler India Pvt. Ltd. falls under the definition of "business connection" provided in *Explanation 2* to

section 9(1) of the Act which deals with the "Income accrued and derived in India" needs to be examined.

We find that the definition of "business connection" is provided in **15**
Explanation 2 to section 9(1) of the Act. Section 9 of the Act deals with "Incomes deemed to accrue or arise in India". Section 5 of the Act deals with the "scope of total income" and section 195 of the Act deals with the "deduction of tax at source on other sum" paid has already been mentioned in the finding of the learned Commissioner of Income-tax (Appeals). The most important words in the instant case is the "business connection" which is defined in *Explanation 2* to section 9(1) and the same includes the following business activities carried out through a person who is acting on behalf of non-resident :

(a) has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods of merchandise for the non-resident ; or

(b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident ; or

(c) habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents, controlling, controlled by, or subject to the same common control, as that non-resident.

The activities carried out by M/s. Buhler India Pvt. Ltd. for Buhler AG, Switzerland squarely falls in activity (a), (b) and (c). Since "business connection" of Buhler AG, Switzerland in India and "M/s. Buhler India Pvt. Ltd., Bangalore" is established beyond doubt, the income portion in the transaction between the Buhler AG, Switzerland and the assessee is subject to tax and the same has been rightly carried out by the learned Assessing Officer.

As regards the decision referred and relied by the learned counsel for the **16**
assessee of the Income-tax Appellate Tribunal, Indore Bench in the case of *Hind Energy and Coal Benefication (India) Ltd.* (supra) the same is not applicable in the instant case since the facts are different. In the case of *Hind Energy and Coal Benefication (India) Ltd.* where the activity of receiving order was carried though an Indian agent who along with the non-resident company in question provided services to many other companies also and thus was not "wholly" working for the non-resident company. The fact is also different since in the case of the agent through which the transaction was carried in the case of *Hind Energy and Coal Benefication (India) Ltd.* was not a subsidiary/group company of non-resident

company whereas in the instant case the activity of supply of goods/providing quotation/confirming orders have been carried through the Indian subsidiary, i. e., Buhler India Pvt. Ltd. Therefore, the decision of *Hind Energy and Coal Benefication (India) Ltd.* (supra) is not applicable in the instant case.

17 Therefore, in the given facts and circumstances of the case and a series of facts brought on record, we are of the view that since the non-resident supplier Buhler AG, Switzerland has carried out the transaction of sale of goods to the assessee-company through its subsidiary/group company Buhler India Pvt. Ltd., Bangalore "business connection" is established and therefore section 9 of the Act dealing with "income deemed to accrue or arise in India" comes into operation and thus the transaction needs to pass through section 195 of the Act. We, therefore, find no inconsistency in the finding of the learned Commissioner of Income-tax (Appeals) and the same is confirmed. In the result the common issue raised in ground No. 1 of Appeal Nos. I. T. A. Nos. 743/Indore/2018 and 744/Indore/2018 stands dismissed. The other grounds are general in nature which needs no adjudication.

18 In the result both the appeals of the assessee stands dismissed.

19 The order pronounced in the open court on June 3, 2020.

[2020] 82 ITR (Trib) 382 (Kolkata)

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

KUSUMLATA SONTHALIA

v.

PRINCIPAL COMMISSIONER OF INCOME-TAX

S. S. GODARA *(Judicial Member)* and
DR. A. L. SAINI *(Accountant Member)*

June 17, 2020.

SS ▶ ITA 1961, ss 143(3), 153A, 263
AY ▶ 2010-11
HF ▶ Assessee

REVISION—POWERS OF COMMISSIONER—SEARCH AND SEIZURE—ORIGINAL ASSESSMENT COMPLETED PRIOR TO DATE OF SEARCH—NO INCRIMINATING DOCUMENTS FOUND DURING SEARCH—STATUTE DOES NOT CONFER ANY POWER TO DISTURB FINDINGS ON COMPLETED ASSESSMENT—REVISION

OF ORDER PASSED PURSUANT TO SEARCH NOT SUSTAINABLE—INCOME-TAX ACT, 1961, SS. 143(3), 153A, 263.

REVISION—ERRONEOUS AND PREJUDICIAL TO INTERESTS OF REVENUE—ASSESSING OFFICER TAKING VIEW PERMISSIBLE IN LAW—ASSESSMENT NOT PREJUDICIAL TO INTERESTS OF REVENUE—REVISION NOT SUSTAINABLE—INCOME-TAX ACT, 1961, S. 263.

The original assessment in the case of the assessee for the assessment year 2010-11 was completed. A search and seizure operation was conducted on the assessee's premises on March 5, 2015 and assessment order was passed under section 153A/143(3) of the Income-tax Act, 1961. The assessee had sold two offices and shares which resulted in long-term capital gains and claimed exemption under sections 54 and 54F of the Act on account of purchase of a flat at G. Since the purchase was made within one year before the date of sale of the original asset and house property, the Assessing Officer allowed the deduction. But the Principal Commissioner in revision disallowed the claim on the ground that this was a case of construction of a flat and not purchase and the assessee had constructed a house prior to the date of transfer/sale of old house property. On appeal :

Held, *(i) that during the original assessment the issue relating to exemption had been examined by the Assessing Officer and the assessment was completed much prior to the search and seizure. Therefore the assessment for the assessment year 2010-11 did not abate and the Assessing Officer could not disturb the findings given in the original assessment. Unless there was any incriminating material found during the course of search relatable to such concluded year, the statute does not confer any power on the Assessing Officer to disturb the findings given and the income determined, as finality had already been reached thereon, and the proceeding was not pending on the date of search. Therefore, the assessee was entitled to exemption.*

CIT *v.* KABUL CHAWLA [2016] 380 ITR 573 (Delhi) *relied on.*

(ii) That the Assessing Officer had adopted one of the courses permissible in law and even if it had resulted in loss to the Revenue, the decision of the Assessing Officer could not be treated as erroneous and prejudicial to the interests of the Revenue and the assumption of jurisdiction exercising revisional jurisdiction by the Principal Commissioner was invalid.

MALABAR INDUSTRIAL CO. LTD *v.* CIT [2000] 243 ITR 83 (SC) *applied.*

The period during which lock down was in force for Covid-19 pandemic was to be excluded for the purpose of the 90-day time limit for pronouncement of orders by the Appellate Tribunal.

DEPUTY CIT *v.* JSW LTD. [2020] 79 ITR (Trib) 585 (Mum) *relied on.*

Cases referred to :

CIT *v.* Bharti Misra [2014] 41 taxmann.com 50 (Delhi) (para 7)
CIT *v.* Brinda Kumari (Smt.) [2002] 253 ITR 343 (Delhi) (para 8)
CIT *v.* Hilla J. B. Wadia (Mrs.) [1995] 216 ITR 376 (Bom) (para 8)
CIT (Dy.) *v.* JSW Ltd. [2020] 79 ITR (Trib) 585 (Mum) (para 14)
CIT *v.* Kabul Chawla [2016] 380 ITR 573 (Del) (para 11)
CIT *v.* Kuldeep Singh [2014] 49 taxmann.com 167 (Delhi) (para 8)
CIT *v.* Max India Ltd. [2007] 295 ITR 282 (SC) (para 7)
CIT (Asst.) *v.* Sugar Nitin Parikh *v.* Department of Income-tax (I. T. A. No. 6399/Mum/2011 dated June 3, 2015) (para 7)
CIT (Asst.) *v.* Sunder Kaur Sujan Singh Gadh (Smt.) [2005] 3 SOT 206 (Mumbai) (para 8)
Farida A. Dungerpurwala *v.* ITO [2014] 35 ITR (Trib) 205 (Mumbai) (para 7)
Jyoti Arun Kothari *v.* ITO (TS-737-ITAT-2014 (Mum) (para 8)
Kishore H. Galaiya *v.* ITO [2012] 24 taxmann.com 11 (Mumbai) (para 8)
Malabar Industrial Co. Ltd. *v.* CIT [2000] 243 ITR 83 (SC) (paras 8, 9, 12)
Nityanand Santhalia *v.* Pr. CIT (I. T. A. No. 1164/Kol/2018 dated December 31, 2019)
Ramita Mahendra Mehta *v.* ITO (I. T. A. No. 4535/Mum/2014 dated September 13, 2017) (para 7)

I. T. A. No. 1151/Kolkata/2018 (assessment year 2010-11).

None appeared for the assessee.

Radhey Shyam, Commissioner of Income-tax-Departmental representative, for the Department.

ORDER

The order of the Bench was pronounced by

1 DR. A. L. SAINI ***(Accountant Member)***.—The captioned appeal filed by the assessee, pertaining to the assessment year 2010-11 is directed against the order passed by the Principal Commissioner of Income-tax, Central-1, Kolkata, under section 263 of the Income-tax Act, 1961 (in short the "Act") dated January 15, 2018.

2 At the time of hearing none appeared on behalf of the assessee in spite of issuance of notice for hearing more than one occasion and the learned Departmental representative (DR), was present for the Revenue. In the

absence of any appearance by the assessee, the appeal is being disposed of ex parte qua the assessee, after hearing the learned Departmental representative for the Revenue on the merits in terms of rule 24 of the Income-tax (Appellate Tribunal) Rules, 1963.

The grounds of appeal raised by the assessee are as follows : 3

"1. That in the facts and in the circumstances of the case, the learned Principal Commissioner of Income-tax, Central-1, Kolkata has erred in passing order under section 263 of the Act and initiating proceedings under section 263 of the Act and subsequently setting aside the order passed by the Deputy Commissioner of Income-tax, Central Circle(4), Kolkata under section 153A/143(3) of the Act for examining the allowability of deduction under section 54F of the Act, when there was no scope for making any disallowance by the Assessing Officer in the order passed by him under section 153A/143(3) of the Act since no incriminating documents whatsoever was found during search operations under section 132 of the Act on the appellant. The action taken by the learned Principal Commissioner of Income-tax, Central-1, Kolkata is void ab initio and accordingly order under section 263 of the Act is liable to be quashed.

2. Without prejudice to the above, that in the facts and in the circumstances of the case, the learned Principal Commissioner of Income-tax, Central-1, Kolkata has erred in passing order under section 263 of the Act and subsequently setting aside the order passed by the Deputy Commissioner of Income-tax, Central Circle-(4), Kolkata under section 153A/143(3) of the Act for examining the allowability of deduction under section 54F of the Act when the issue of allowability of deduction under section 54F was already examined by the learned Assessing Officer while passing order under section 153A/143(3) of the Act.

3. That in the facts and circumstances of the case, the order passed by the learned Assessing Officer under section 153A/143(3) of the Act was not erroneous.

4. That in the facts and in the circumstances of the case, the learned Principal Commissioner of Income-tax, Central-1, Kolkata erred in coming to a prima facie conclusion that the appellant is not eligible to claim deduction under section 54F of the Act. The action of the learned Principal Commissioner of Income-tax, Central-1, Kolkata in coming to such conclusion was not justified in the facts of the case.

5. That the appellant craves leave to add, alter, and delete all or any grounds of appeal at the time of hearing."

4 Brief facts qua the issue are that in the case of the assessee, a search and seizure operation was conducted on March 5, 2015. Subsequent to search, assessment order in case of the assessee has been passed for the assessment year 2010-11 under section 153A/143(3) of the Income-tax Act, 1961 (hereinafter referred as the "Act") vide order dated December 30, 2016 by the Deputy Commissioner of Income-tax, Central Circle-1(4), Kolkata hereinafter referred as the Assessing Officer determining the assessed income at Rs. 12,52,580 as against the returned income of Rs. 12,23,460. In this assessment order, only one addition of Rs. 29,116 has been made on account of disallowance made under section 14A of the Act. Later on, the learned Principal Commissioner of Income-tax (PCIT) exercised his jurisdiction under section 263 of the Act. The learned Principal Commissioner of Income-tax, on examination of the assessment order along with the assessment record, noticed that the assessee sold two offices at Dhanbad (relating to his share) and also sold shares of Shree Ram Electrostat Pvt. Ltd. which resulted in long-term capital gain (LTCG) of Rs. 10,18,394 on sale of two offices and Rs. 37,10,000 on sale of shares. Total long-term capital gain earned by the assessee is computed at Rs. 47,28,394 (Rs. 10,18,394 + Rs. 37,10,000). Against this long-term capital gain earned by the assessee, she claimed exemption under sections 54 and 54F of the Act on account of purchase of flat at Sahara Grace, Gurgaon. As per the submission of the assessee made on December 2, 2016 during the course of assessment proceeding, the offices at Dhanbad was sold on July 31, 2009 and shares were sold on February 4, 2010 and investment for purchase of flat at Gurgaon was claimed to have been made vide sale deed dated March 9, 2009.

5 The learned Principal Commissioner of Income-tax noticed that the assessee had presented before the Assessing Officer that purchase of the new flat was made within one year before the date of sale of original asset and house property, therefore, the Assessing Officer allowed deduction under section 54F and section 54 of the Act, respectively.

6 However, the learned Principal Commissioner of Income-tax, on further examination of record, noticed that the assessee had taken home loan from ICICI Home Finance Ltd. in May, 2004 to book a flat to be constructed by Sahara Grace at Gurgaon and paid instalments from the financial year 2003-04 onwards till March, 2010. Thus, it is clear that the assessee booked the flat which was going to be constructed by the builder, i. e., Sahara Grace in the financial year 2003-04. Therefore, the claim of the assessee

made before the Assessing Officer for purchase of flat has been found to be a case of construction of flat and not purchase as per the judicial decisions overwhelmingly held in this regard, viz., in the case of *Farida A. Dungerpurwala* v. *ITO* [2014] 35 ITR (Trib) 205 (Mumbai) and *Addl. CIT* v. *Sagar Nitin Parikh* (Mumbai-Trib, vide I. T. A No. 6399/Mum/2011, dated June 3, 2017, it has been held that the booking of a flat which is going to be constructed by a builder has to be considered as a case of "construction of flat" and deduction under sections 54F and 54 is available only if the assessee constructs a new house within three years after the date of transfer of original assets or house property. Even as per Circular No. 471 dated October 15, 1986 ([1986] 162 ITR (St.) 41) and further modified vide Circular No. 672, dated December 16, 1993 (1994] 205 ITR (St.) 47) such allotment house under construction is to be treated as case of construction. In the assessee's case, the construction of new house has commenced about six year before the sale of a house property and certain shares and even the sale agreement for the new flat and possession of a new flat was taken before the date of sale of the old house property and shares on which long-term capital gain was computed. Therefore, the learned Principal Commissioner of Income-tax held that the assessee in the present case had not been found to be eligible for deduction under sections 54 and 54F of the Act because the assessee had been found to have constructed a house prior to the date of transfer/sale of old house property and shares.

Thus, the learned Principal Commissioner of Income-tax noted that the Assessing Officer had wrongly allowed deduction under sections 54 and 54F of the Act without examining the full facts of the case, whether acquiring of new house property by the assessee is construction of flats or purchase of flats (which prima facie on the basis of details available on record has been found to be construction) and accordingly, all the conditions of sections 54 and 54F of the Act have not been fulfilled. Therefore, the assessment order passed by the Assessing Officer under section 153A/143(3) of the Act dated December 30, 2016 is erroneous in so far as it is prejudicial to the interests of the Revenue, hence the assessment order needs to be revised as per the provisions of section 263 of the Act.

As the order passed by the Assessing Officer was erroneous in so far as it **7**
is prejudicial to the interests of the Revenue, therefore, the learned Principal Commissioner of Income-tax had issued a show-cause notice dated December 22, 2017 asking the assessee to explain as to why the order under section 153A/143(3) dated December 30, 2016 should not be revised. In response, the assessee submitted the written submission before the learned Principal Commissioner of Income-tax which is reproduced below :

Notice dated December 21, 2017 (No. Notice No. CIT(C)-1/Kol/Notice u/s. 263/2017-18/7053) under section 263 of the Income-tax Act

A. Admitted facts :

Particulars	*Date*
Date of agreement for purchase of new residential flat	May, 2004
Date of possession of flat	March 9, 2009
Date of transfer of original assets (On which exemption under section 54/54F claimed	March 8, 2010 February 4, 2010 and July 31, 2009

B. *Issues raised*_

Purchase of new residential house is on May, 2004 and hence not eligible for exemption under section 54/54F of the Act.

Judgments relied on in the notice under section 263 of the Act.

(a) *Farida A. Dungerpurwala* v. *ITO* (ITAT-Mumbai) I. T. A No. 5169/Mum/2010

- Date of transfer of original assets October 10, 2005
- Date of agreement for purchase of flat February 4, 2010
- Date of possession of flat December 4, 2004

(b) *Asst. CIT* v. *Sugar Nitin Parikh* (ITAT-Mumbai) I. T. A No. 6399/Mum/2011)

- Date of transfer of original assets March 27, 2008
- Date of agreement for purchase of flat December 1, 2004
- Date of possession of flat June 30, 2007

(c) *Our submissions*

(a) In the following judgments, it has been held that the date of possession is deemed to be date of purchase :

1. *Ramlta Mahendra Mehta* v. *ITO* I. T. A No. 4535/Mum/2014 (assessment year 2010-11)

- Date of transfer of original assets September 11, 2009
- Date of agreement for purchase of flat August 18, 2007
- Date of possession of flat March, 2009

Note : Date of possession was held as date of purchase

2. *CIT* v. *Beena K. Jain* [1996] 217 ITR 363 (Bom) ; 75 Taxman 145 (Bombay)

- Date of transfer of original assets July 23, 1987
- Date of agreement for purchase of flat September 4, 1985

• Date of possession of flat July 30, 1988

Note : Date of possession was held as date of purchase

3. *Bestimal K Jain* v. *ITO* I. T. A No. 2896/Mum/2014

• Date of transfer of original assets February 24, 2010

• Date of agreement for purchase of flat December 28, 2007

• Date of possession of flat September 11, 2009

Note : Date of possession was held as date of purchase

4. CIT v. *Bharti Misra* [2014] 41 taxmann.com 50 (Delhi)

(b) The issue of eligibility under section 54/54F has been examined by the Assessing Officer while passing the assessment order (refer pages 10-17 of the paper book). Hence, there is no scope to pass order under section 263 where the Assessing Officer has taken one possible view. We should like to rely on the following judgments :

1. *CIT* v. *Max India Ltd.* [2007] 295 ITR 282 (SC)

2. *Malabar Industrial Co. Ltd* v. *CIT* [2000] 243 ITR 83 (SC)

However, the learned Principal Commissioner of Income-tax rejected **8** the contention of the assessee and held as follows :

"5.2 I have considered the above arguments of the learned authorised representative. His entire arguments are based on acquisition of a new house by way of "purchase" for which courts have held that the date of possession is deemed to be date of purchase. As per the provisions of sections 54 and 54F, for being eligible to claim deduction under these two sections,

(i) the new house should have been purchased by the assessee within a period of one year before or two years after the date on which transfer took place (of old house property or original asset or as the case may be)

(ii) the new house should have been constructed within a period of three years after the date on which transfer took place (of old house property or original asset as the case may be).

Considering the above two conditions provided in the provisions of sections 54 and 54F, the first thing the Assessing Officer should have decided is whether booking of a new flat made with Sahara Grace, Gurgaon in the financial year 2003-04 was for construction or for purchase of flat already constructed. In this regard, no written query raised by the Assessing Officer is found on record. The submission of the assessee dated December 22, 2016 filed during assessment proceeding on which the learned authorised representative has

relied upon to put his argument that the issue of eligibility under section 54/54F has been examined by the Assessing Officer while passing the assessment order, is reproduced as under :

'Details of long-term capital gain along with supporting documents are enclosed herewith and marked as per annexure C. The sale of shares of Shree Ram Electrocast Private Limited was made on February 27, 2010 and the payment was received on March 8, 2010. Copy of the journal and bank statement are enclosed herewith and marked as per annexure D.

The assessee has claimed under section 54F of the Act on long-term capital gains on sale of shares and offices as per details, consequent to entering into agreement with Sahara India Commercial Corporation Limited for purchase of flat at Gurgoan in terms of agreement dated March 9, 2009. Supporting documents for flat at Gurgoan is enclosed herewith and marked as per annexure E. Supporting calculations for exemption under section 54F of the Act are enclosed herewith and marked as per annexure F.'

5.3 From the above submission, it is clear that the issue whether the booking of flat made by the assessee with Sahara Grace, Gurgaon in the financial year 2003-04 was for construction of flat or was for purchase of ready built house, had never been under his consideration. He had already accepted such new flat as being purchased on the basis of earlier submission dated December 2, 2016 made by the assessee before him and only wanted to know the date of purchase of the new flat to ascertain only that whether a new flat was purchased within a period of one year prior to the date of transfer of old house property or shares. In this regard, the assessee in her submission clarified as the date of purchase being March 9, 2009 on the basis of registered purchase deed being dated March 9, 2009 that is within one year of the date of transfer of the old house property and shares and accordingly, the claim of deduction under sections 54 and 54F has been justified.

5.4 Considering the above facts as available in the assessment record, I find that the contention of the learned authorised representative that the issue of eligibility under section 54/54F was examined by the Assessing Officer is only with respect to examination of 'date of purchase' taking into account the date of possession of flat and not examining the issue whether booking of flat is for 'construction' or for 'buying ready built house'.

The real issue involved in this case is that the new house under consideration was booked in May, 2004 after taking home loan from ICICI Home Finance Limited and paid instalments from the financial year 2003-04 onwards till March 2010. Construction of flats started in the financial year 2003-04 after booking and possession of flat is given on March 9, 2009 after construction is completed. Acquiring of any flat in the manner as it was acquired by the assessee discussed above has been clarified by the Central Board of Direct Tax in Circular No. 672 dated December 16, 1993. In this Circular, it has been clarified that acquisition of flat through allotment by DDA was to be treated as construction of flat would apply to co-operative societies and other institutions. The most, important point of consideration is whether purchase of flat from the private builders would fall in the categories of "other institutions" as has been held by various courts in the following judgments as cited and relied upon by the assessee as under :

(i) *Kishore H. Galaiya* v. *ITO* [2012] 24 taxmann.com 11 (Mumbai) ;

(ii) *Asst. CIT* v. *Smt. Sunder Kaur Sujan Singh Gadh* [2005] 3 SOT 206 (Mumbai)

(iii) *Sri Ved Prakash Rakhra* v. *Asst. CIT* ;

(iv) *Mrs. Jyoti Arun Kothari* v. *ITO* (TS-737-ITAT-2014(Mum) ;

(v) *CIT* v. *Smt. Brinda Kumari* [2002] 253 ITR 343 (Delhi) ; [2001] 114 Taxman 266 (Delhi) ;

(vi) *CIT* v. *Kuldeep Singh* [2014] 49 taxmann.com 167 (Delhi) ; and

(vii) *Farida A. Dungerpurwala* v. *ITO* [2014] 35 ITR (Trib) 205 (Mumbai) ; [2014] 52 taxmann.com 527 (Mum-Tribunal).

In the above cases, the competent courts have held that the flats constructed by the private developers are also covered by Circular Nos. 471 and 672 and, therefore, entitled for deduction under section 54. The moot question is whether the agreement with the builder to purchase a flat which is going to be constructed, is the case of purchase or construction. In this regard, the hon'ble Bombay Court in the case of *CIT* v. *Hilla J. B. Wadia* [1995] 216 ITR 376 (Bom) held that it is a case of construction. Further, on identical question, i. e., whether the booking of flat with the builder is to be considered as a case of purchase or construction was considered by the Mumbai Bench of the Tribunal in the case of *Addl. CIT* v. *Sardar Kaur Sujan* Singh and it was held to be a case of construction.

5.7 After discussing the legal position as held in various judgments of courts with regard to the nature of acquiring a house/flat from a builder after its booking with builder at the time of starting of construction and then paying the cost of construction in instalments, if facts of the present case is examined, it is prima facie found that it is the case of "construction" and not "purchase" because the assessee booked the flat in May, 2004 with Sahara Grace, Gurgaon (builder) when it started constructing flats. The flat was booked after taking home loan from ICICI Home Finance Ltd. Thereafter, payments were made to the builder in instalments to meet the cost of construction and finally, possession of flat was handed over on March 9, 2009. The original asset being house and shares were sold on July 21, 2009 and February 4, 2010 and February 27, 2010, respectively and long-term capital gain earned on their sale has been computed. Both assets are sold after taking possession of constructed flat while as per the provisions of sections 54 and 54F, deduction under these two sections are allowable only when the new house is constructed within a period of three years from the date of sale of original asset. Therefore, prima facie, it is clear that the assessee is not eligible for deduction either under section 54 or 54F. However, in the interest of natural justice, the assessee should be given an opportunity to show that her case of acquisition of new house is not of "construction" but of "purchase" to justify her claim for deduction under sections 54 and 54F. The Assessing Officer should then, after examining the entire facts of the case and taking into consideration the explanation of the assessee, determine whether the assessee acquired the new flat by way of "construction" or by way of "purchase" after taking into account the judgments and the Central Board of Direct Taxes Circular Nos. 471 dated October 15, 1986 and 672, dated December 16, 1993 discussed in the previous paras of this order and accordingly, decide about allowing or disallowing the deduction under sections 54 and 54F of the Act keeping in view of my findings discussed in this order also. Thereafter, a fresh assessment order is to be passed by the Assessing Officer in speaking manner discussing entire facts and circumstances of the case along with the explanation of the assessee and his decision on allowing or disallowing the deduction under section 54 or 54F.

6. In view of my above decision, the assessment order passed under section 153A/143(3), dated December 30, 2016 for the assessment year 2010-11 is set aside and restored to the file of the Assessing Officer to the extent of examining the allowability of deduction

under sections 54 and 54F keeping in view the directions given by me in the previous para and then pass a fresh assessment order. Other additions made in the original assessment order dated December 30, 2016 shall remain intact."

We have heard the learned Departmental representative for the Revenue and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case law relied upon, and perused the fact of the case including the findings of the learned Principal Commissioner of Income-tax and other materials available on record. First of all we have to see whether the requisite jurisdiction necessary to assume revisional jurisdiction is there existing before the Principal Commissioner of Income-tax to exercise his power. For that, we have to examine as to whether in the first place the order of the Assessing Officer found fault by the Principal Commissioner of Income-tax is erroneous as well as prejudicial to the interests of the Revenue. For that, let us take the guidance of judicial precedence laid down by the hon'ble apex court in *Malabar Industries Ltd.* v. *CIT* [2000] 243 ITR 83 (SC) wherein their Lordships have held that twin conditions needs to be satisfied before exercising revisional jurisdiction under section 263 of the Act by the Commissioner of Income-tax. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interests of the Revenue. In the following circumstances, the order of the Assessing Officer can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact ; or (ii) incorrect application of law ; or (iii) the Assessing Officer's order is in violation of the principles of natural justice ; or (iv) if the order is passed by the Assessing Officer without application of mind ; (v) if the Assessing Officer has not investigated the issue before him ; then the order passed by the Assessing Officer can be termed as erroneous order. Coming the next to the second limb, which is required to be examined as to whether the actions of the Assessing Officer can be termed as prejudicial to the interests of the Revenue. When this aspect is examined one has to understand what is prejudicial to the interests of the Revenue. The hon'ble Supreme Court in the case of *Malabar Industries* (supra) held that this phrase, i. e., "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Their Lordships held that it has to be remembered that every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the Revenue, or where two views

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are possible and the Assessing Officer has taken one view with which the Commissioner of Income-tax does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue "unless the view taken by the Assessing Officer is unsustainable in law".

10 Taking note of the aforesaid dictum of law laid down by the hon'ble apex court, let us examine whether the assessment order passed by the Assessing Officer under section 153A/143(3) of the Act dated December 30, 2016 is erroneous in so far as it is prejudicial to the interests of the Revenue. We note that during the revision proceedings under section 263 of the Act the assessee submitted written submissions before the learned Principal Commissioner of Income-tax (vide para 4 of the learned Principal Commissioner of Income-tax's order at page 4) stating that "issue of eligibility of exemption under section 54/54F has been examined by the Assessing Officer while passing assessment order (refer pages 10-17 of paper book)". Therefore, it is abundantly clear that during the original assessment the issue relating to exemption under section 54/54F of the Act have been examined by the Assessing Officer. It is important to note that in the assessee's case the search and seizure action has been conducted on March 5, 2015 whereas the assessment year under consideration is the assessment year 2010-11, which is not an abated assessment. We note that no incriminating materials relating to the exemption under section 54/54F of the Act was found during the course of search.

11 It would be necessary here to address the preliminary issue of whether the addition could be framed under section 153A of the Act in respect of a concluded proceeding without the existence of any incriminating materials found in the course of search. The scheme of the Act provides for abatement of pending proceedings as on the date of search. It is not in dispute that the assessment for the assessment year 2010-11 was originally completed and thereafter a search and seizure action was conducted on March 5, 2015, therefore, the assessment year 2010-11 is an unabated assessment. Hence, unless there is any incriminating material found during the course of search relatable to such concluded year, the statute does not confer any power on the learned Assessing Officer to disturb the findings given thereon and income determined thereon, as finality had already been reached thereon, and such proceeding was not pending on the date of search to get itself abated. For that we rely on the judgment of the hon'ble Delhi High Court in the case of *CIT* v. *Kabul Chawla* [2016] 380 ITR 573 (Delhi) held as under (page 589) :

"On a conspectus of section 153A(1) of the Act read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under :

(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 the six assessment year 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 learned Assessing Officers as a fresh exercise.

(iii) The learned Assessing Officer will exercise normal assessment powers in respect of the six years previous to the relevant assessment year in which the search takes place. The learned 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 learned 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 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 complete assessment proceedings.

(vi) In so far as 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 learned Assessing Officer.

(vii) Completed assessments can be interfered with by the learned 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.

The present appeals concern assessment years 2002-03, 2005-06 and 2006-07, on the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed."

Therefore, in the assessee's case original assessment was completed much prior to search and seizure therefore the assessment year under consideration, that is, the assessment year 2010-11 is unabated and in unabated proceedings, the Assessing Officer cannot disturb the findings given thereon in the original assessment unless there is incriminating material unearthed by the search team since in the assessee's case under consideration there is no incriminating material therefore the order passed by the Assessing Officer is neither erroneous nor prejudicial to the interests of the Revenue.

12 We note that on the identical facts, in the case of one of the assessees covered under the said search and seizure action, this Tribunal has quashed the order of the learned Principal Commissioner of Income-tax under section 263 of the Act, vide I. T. A No. 1164/Kol/2018, in the case of *Nityanand Sonthalia v. Pr. CIT*, for the assessment year 2010-11, the findings of the Tribunal is given below :

"2. It transpires during the course of hearing that the Principal Commissioner of Income-tax has assumed his revision jurisdiction whilst setting aside the assessment in question dated December 25, 2016 as under :

'5. As per the details available on record, the assessee had sold a flat at Dhanbad on December 18, 2009 and land and building at Dahiya on December 24, 2009 earning long-term capital gain (LTCG) of Rs. 125,72,502 and Rs. 23,11,098, respectively, totalling to Rs. 28,63,600. Against such long-term capital gain earned by the assessee, he has claimed deduction under sections 54 and 54F, on account of purchase of right in a flat at Uniworld City Horizons by Bengal Unitech in New Town, Kolkata being built by Bengal Unitech on June 10, 2010 from Shri Ram Multicom Pvt. Ltd. by paying

Rs. 40,00,000. There is no detail available on the record to show that as to when the flat was acquired by the assessee from Bengal Unitech. Just by purchasing of any right in the flat under construction, it cannot be said that the assessee has acquired any flat by way of purchase or construction. Therefore, the Assessing Officer has wrongly allowed deduction under sections 54 and 54F, only on the basis of purchase of right in a flat under construction. From examination of record of the assessment year 2014-15, it has been found that this right has been sold by the assessee in September, 2013. Therefore, I found that prima facie deduction under sections 54 and 54F, was wrongly allowed by the Assessing Officer without examining the detail of nature of acquisition made by the assessee of a flat from Bengal Unitech. Considering the above facts and circumstances of the case, as discussed above and taking into account the fact that no submission has been made by the assessee against my notice under section 263, I set aside the assessment order passed by the Assessing Officer under section 143(3)/153A, dated December 30, 2016 and restore it to the file of the Assessing Officer to the extent of examining the issue relating to allowing deduction to the assessee under sections 54 and 54F after examining the nature of right purchased by the assessee in a flat under construction at Uniworld City Horizon in New Town Kolkata being built whether it is within the time period given in the provisions of sections 54 and 54F or not and whether the said flat was sold by the assessee after the time limit of three year or not, after taking the possession of the flat and accordingly determine, the eligibility of the assessee to allow deduction under sections 54 and 54F of the Act and then pass a fresh assessment order in this regard by computing the correct amount of taxable long-term capital gains in the hands of the assessee. Other additions made by the Assessing Officer in the original assessment order shall remain intact.

6. In the result, the assessment order dated December 30, 2016 is set aside to the extent of examination of deduction under sections 54 and 54F and passing of a fresh assessment order as directed above.'

3. We now advert to the basic relevant facts. There is hardly any dispute that we are in the assessment year 2009-10. The Department had carried out search in question dated August 5, 2014 in M/s. Kushal Group, Kolkata. The same culminated in initiation of section 153A proceedings vide notice dated March 20, 2015. The assessee filed his return on May 15, 2015 stating income of Rs. 18,62,070. The Assessing Officer then completed the regular assessment accepting

the above return of income. Suffice to say, it is the said assessment which has been subjected to revision proceedings in the Principal Commissioner of Income-tax's order under challenge on the ground that the Assessing Officer has wrongly accepted the assessee's sections 54 and 54F deduction claim (supra).

4. Both the learned representatives reiterated their respective pleadings against and in support of the Principal Commissioner of Income-tax's assumption of revision jurisdiction. The hon'ble apex court's landmark decision in *Malabar Industries Co.* v. *CIT* [2000] 243 ITR 83 (SC) holds that before an assessment is sought to be revised in proceedings under section 263 of the Act the same has to be erroneous as well as cause prejudice to interests of the Revenue ; simultaneously. And also an assessment cannot be termed as erroneous causing prejudice to interests of the Revenue in case the Assessing Officer adopts one of the possible views. Reverting back to the impugned regular assessment, we notice that the Assessing Officer had claimed yet another regular assessment on November 30, 2010 invoking section 153A/143(3) proceedings whilst assessing the total income of Rs. 18,62,400 only. That being the case, it is sufficiently clear that the impugned second assessment dated December 25, 2016 pertained to the search dated August 5, 2014 only qua the alleged incriminating material found/seized. It emerges from the case records that the assessee had claimed the impugned sections 54 and 54F deduction relief at the first instance in the former assessment. This issue nowhere formed a subject matter of deduction in the latter assessment therefore. We conclude in these facts that since the Assessing Officer could not have even taken up the assessee's above deduction claim during latter assessment, the Principal Commissioner of Income-tax has erred in law and on facts in terming the same as erroneous causing prejudice to interests of the Revenue. We therefore restore the Assessing Officer's regular assessment dated December 25/30, 2016 and reverse the Principal Commissioner of Income-tax's revision directions under challenge."

13 We also note that the Assessing Officer has adopted one of the courses permissible in law and even if it has resulted in loss to the Revenue, the said decision of the Assessing Officer cannot be treated as erroneous and prejudicial to the interests of the Revenue as held by the hon'ble Supreme Court in *Malabar Industries Ltd.* v. *CIT* (supra). Since the order of the Assessing Officer cannot be held to be erroneous as well as prejudicial to the interests of the Revenue, in the facts and circumstances narrated above,

the usurpation of jurisdiction exercising revisional jurisdiction by the Principal Commissioner of Income-tax is "null" in the eyes of law and, therefore, we are inclined to quash the very assumption of jurisdiction to invoke the revisional jurisdiction under section 263 by the Principal Commissioner of Income-tax.

Before parting, it is noted that the order is being pronounced after 90 days of hearing. However, taking note of the extraordinary situation in the light of the Covid-19 pandemic and lockdown, the period of lockdown days need to be excluded. For coming to such a conclusion, we rely upon the decision of the co-ordinate Bench of the Mumbai Tribunal in the case of *Dy. CIT* v. *JSW Ltd.* in I. T. A No. 6264/Mum/2018 and I. T. A No. 6103/Mum/2018 for the assessment year 2013-14 order dated May 14, 2020 [2020] 79 ITR (Trib) 585 (Mum). **14**

In the result, the appeal of the assessee is allowed. **15**

Order pronounced in the court on June 17, 2020

[2020] 82 ITR (Trib) 399 (Delhi)

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

ASSISTANT COMMISSIONER OF INCOME-TAX

v.

SOUL SPACE PROJECTS LTD.

(and vice versa)

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

June 3, 2020.

SS ▸ ITA 1961, s 142(2A), (2C)
AY ▸ 2007-08, 2008-09
HF ▸ Department

ASSESSMENT—LIMITATION—SPECIAL AUDIT—EXTENSION OF TIME FOR COMPLETION OF ASSESSMENT—ASSESSING OFFICER ALONE COMPETENT TO GRANT—EXTENSION GIVEN BY COMMISSIONER—BEYOND POWERS VESTED BY STATUTE—ASSESSMENT COMPLETED AFTER DUE DATE NOT VALID—INCOME-TAX ACT, 1961, S. 142(2A), (2C).

Consequent to a search and seizure operation was carried out on the assessee and notice under section 153A of the Income-tax Act, 1961 was issued. During the assessment proceedings, the Assessing Officer arrived at the opinion, that having regard to the nature and complexity of the accounts of

the assessee and in the interests of the Revenue, it was necessary to get the accounts audited by an accountant, as provided under section 142(2A) of time for completion of the assessment. On appeal :

Held, *that a power which has been given to a specified authority has to be discharged only by him. Substitution of that officer by any other officer, albeit of higher rank, cannot validate the action. The extension would have been valid only if it had been given by the Assessing Officer after due application of mind and after examining the existence of circumstances as provided in the proviso below section 142(2C) since it had to be given only by the competent authority. In this case, the extension had not been given by the Assessing Officer but by the Commissioner and the Assessing Officer had only conveyed the approval. Therefore, the extension given by the Commissioner was beyond the powers vested by the statute and accordingly the assessment completed after the due date was void ab initio.*

Cases referred to :

Anirudhsinhji Karansinhji Jadeja *v.* State of Gujarat [1995] 5 SCC 302 (para 11)

CIT *v.* Anjum M. H. Ghaswala [2001] 252 ITR 1 (SC) (para 11)

CIT *v.* Kelvinator of India Ltd. [2002] 256 ITR 1 (Delhi) [FB] (para 11)

CIT *v.* Soyuz Industrial Resources Ltd. [2015] 232 Taxman 414 (Delhi) (para 11)

CIT *v.* SPL's Siddhartha Ltd. [2012] 345 ITR 223 (Delhi) (para 11)

CIT *v.* Vector Shipping Services (P.) Ltd. [2013] 357 ITR 642 (All) (paras 4, 5)

Commissioner of Police *v.* Gordhandas Bhanji [1952] AIR 1952 SC 16 (para 11)

Ghanshyam K. Khabrani *v.* Asst. CIT [2012] 346 ITR 443 (Bom) (para 11)

ITO *v.* Vilsons Particle Board Industries Ltd. [2017] 55 ITR (Trb) 114 (Pune) (para 11)

Nalini Mahajan (Dr.) *v.* DIT (Investigation) [2002] 257 ITR 123 (Delhi) (para 11)

Rajesh Kumar *v.* Dy. CIT [2006] 287 ITR 91 (SC) (para 11)

Sahara India (Firm) *v.* CIT [2008] 300 ITR 403 (SC) (para 11)

State of U. P. *v.* Maharaja Dharamander Prasad Singh [1989] 2 SCC 505 (para 11)

The Purtabpore Co. Ltd. *v.* Cane Commissioner of Bihar [1969] 1 SCC 308 (para 11)

Yum Restaurants Asia Pte. Ltd. *v.* Dy. DIT (No. 1) [2017] 397 ITR 639 (Delhi) (para 11)

I. T. A. Nos. 193 and 1849/Delhi/2015 and C. O. Nos. 271 and 284/Delhi/2015 (assessment years 2007-08, 2008-09).

Rohit Jain, Advocate, for the assessee.

H. K. Choudhary, Commissioner of Income-tax-Departmental representative, for the Department.

ORDER

The order of the Bench was pronounced by

DR. B. R. R. KUMAR ***(Accountant Member)***.—The present appeals and cross-objections have been filed by the Revenue and the assessee against the orders of the learned Commissioner of Income-tax (Appeals)-III, New Delhi dated October 14, 2014 for the assessment year 2007-08 and the order of the learned Commissioner of Income-tax (Appeals)-29, New Delhi dated January 21, 2015 for the assessment year 2008-09. 1

In I. T. A. No. 193/Delhi/2015, the following grounds have been raised by the Revenue : 2

"1. The learned Commissioner of Income-tax (Appeals) has erred in law as well as on the facts in deleting the addition of Rs. 43,341 out of the total addition of Rs. 47,601 made on account of disallowance under section 40A(3) of the Income-tax Act.

2. The learned Commissioner of Income-tax (Appeals) has erred in law as well as on the facts in deleting the addition of Rs. 43,46,874 (including the disallowance of Rs. 13,67,240 in respect of which the Commissioner of Income-tax (Appeals) has also directed the Assessing Officer to decide the assessee) made on this issue after giving a reasonable opportunity of hearing on account of account disallowance under section 40(a)(ia) of the Income-tax Act.

3. The learned Commissioner of Income-tax (Appeals) has erred in law as well as on the facts in deleting the addition of Rs. 7,24,395 made on account of disallowance under section 40(a)(ia) of the Income-tax Act.

4. The learned Commissioner of Income-tax (Appeals) has erred in facts in deleting the addition of Rs. 30,64,438 made disallowance under section 14A read with rule 8D.

5. The learned Commissioner of Income-tax (Appeals) has erred in law as well as on the facts in deleting the addition of Rs. 1,27,13,360 made on account of disallowance of brokerage expenses.

6. The learned Commissioner of Income-tax (Appeals) has erred in law as well as on the facts in deleting the addition of Rs. 1,71,979 made on account of disallowance of expenses under section 40A(2)(b) of the Income-tax Act.

7. The learned Commissioner of Income-tax (Appeals) has erred in law as well as on the facts in deleting the addition of Rs. 2,20,060 made on account of disallowance of depreciation.

8. The learned Commissioner of Income-tax (Appeals) has erred in law as well as on the facts in deleting the addition of Rs. 96,45,844 made on account of the Bikaner project."

3 In I. T. A. No. 1849/Delhi/2015, the following grounds have been raised by the Revenue :

"1. The learned Commissioner of Income-tax (Appeals) has erred in law as well as on the facts in deleting the addition of Rs. 3,53,169 out of the total addition of Rs. 4,94,161 made on account of disallowance under section 40A(3) of the Income-tax Act.

2. The learned Commissioner of Income-tax (Appeals) has erred in law as well as on the facts in deleting the addition of Rs. 38,65,870 out of the total addition of Rs. 48,73,752 made on account of disallowance of the prior period expenditure.

3. The learned Commissioner of Income-tax (Appeals) has erred in law as well as on the facts in deleting the addition of Rs. 55,73,597 out of the total addition of Rs. 1,46,77,246 made on account of disallowance under section 40(a)(ia) of the Income-tax Act.

4. The learned Commissioner of Income-tax (Appeals) has also erred in law as well as on the facts in deleting the addition of Rs. 83,98,877 out of the total addition of Rs. 1,46,77,246 made on account of disallowance under section 40(a)(ia) of the Income-tax Act.

5. The learned Commissioner of Income-tax (Appeals) has erred in law as well as on the facts in deleting the addition of Rs. 3,49,82,627 made on account of profit from the Bikaner project.

6. The learned Commissioner of Income-tax (Appeals) has also erred in law as well as on the facts in deleting the addition of Rs. 72,17,751 made on account of profit from the Mohali project.

7. The learned Commissioner of Income-tax (Appeals) has erred in law as well as on the facts in deleting the addition of Rs. 4,48,156 made on account of depreciation disallowance.

8. The learned Commissioner of Income-tax (Appeals) has erred in law as well as on the facts in deleting the addition of Rs. 43,03,908 made on account of disallowance of proportionate interest expenses.

9. The learned Commissioner of Income-tax (Appeals) has erred in law as well as on the facts in deleting the addition of Rs. 2,05,750 made on account of disallowance of brokerage expenses.

10. The learned Commissioner of Income-tax (Appeals) has erred in law as well as on the facts in deleting the addition of Rs. 2,86,594 made on account of disallowance of expenses under section 40A(2)(b) of the Income-tax Act."

In C. O. No. 271/Delhi/2015, the assessee has raised the following grounds : **4**

"1. That the additions/disallowance made by the Assessing Officer by passing the assessment order under section 153A read with section 143(3) are illegal, bad in law and without jurisdiction.

2. That on the facts and in the circumstances of the case, the Commissioner of Income-tax (Appeals) erred in not quashing the order dated August 10, 2010 passed by the Assessing Officer under section 153A as barred by limitation since the same had been passed beyond the time-limit specified under section 153B(1) of the Income-tax Act, 1961 ('the Act') inasmuch as :

(a) the audit conducted by the special auditor under section 142(2A) of the Act was not required because the Assessing Officer did not point out any complexity in the books of account of the appellant before issuing any such directions ; and

(b) in any case, the extended time period allowed to the special auditor for furnishing audit report could not be excluded in terms of clause (ii) of *Explanation* under section 153B since such extension having been granted by the Commissioner of Income-tax, instead of the Assessing Officer as required under section 142(2C) of the Act was invalid in law.

3. That the Commissioner of Income-tax (Appeals) erred on the facts and in the circumstances of the case in not appreciating that various disallowances/additions made by the Assessing Officer (separately challenged infra) were beyond jurisdiction and scope of assessment under section 153A of the Act since the same were not based on any incriminating materials/documents found in the course of search.

Without prejudice

Re : Disallowance under section 40A(3) of the Act

4. That the Commissioner of Income-tax (Appeals) erred on the facts and in law in upholding disallowance of Rs. 4,260, 20 per cent. of Rs. 21,300 being expense paid in cash by the appellant due to business exigencies and holding the same to have been paid in contravention of the provisions of section 40A(3) of the Act.

Re : Disallowance under section 40(a)(ia)

5. That the Commissioner of Income-tax (Appeals) erred on the facts and in law in directing the Assessing Officer to verify and allow the expense of Rs. 13,67,240 disallowed under section 40(a)(ia) of the Act without appreciating that all the necessary documents/information relevant for examination were already placed on record by the appellant before the Commissioner of Income-tax (Appeals).

5.1 That without prejudice, in view of the decision of various authorities, the provisions of section 40(a)(ia) are not applicable on such expenditure which were not payable (not outstanding) as on the last day of the financial year, therefore, to this extent, the learned Commissioner of Income-tax (Appeals) erred in not excluding such expenditure outside the purview of section 40(a)(ia). Reliance is placed upon *CIT* v. *Vector Shipping Services (P.) Ltd.* [2013] 357 ITR 642 (All) (SLP of the Department has been dismissed by the hon'ble apex court vide order dated July 2, 2014.

5.2 That without prejudice, out of the total expenditure Rs. 9,65,53,346, only Rs. 46,96,235 have been claimed as deduction and the balance have been transferred to work-in-progress, therefore not claimed as a deduction, thus only 4.86 per cent. of the total expenditure are claimed as deduction. Consequently at the most, only 4.86 per cent. of such expenditure which ultimately stands hold being incurred in violation of section 40(a)(ia) can be disallowed.

Re : Addition of assumed, presumed and deemed assessable profits from the Bikaner project.

6. That the Commissioner of Income-tax (Appeals) erred on the facts and in law in not accepting the method of accounting and accounting policies adopted by the appellant in respect of the Bikaner project accounting for recognising the revenue and cost thereof.

6.1 That the Commissioner of Income-tax (Appeals) erred on the facts and in law in upholding without any basis and justification for presuming the sale value of the Bikaner land as Rs. 201.61 per square

foot (estimated) against the actual sale value for the plot to plot evidenced by proper, authentic and legal documents, wherein no defect/ deficiencies/in correctness have been found.

7. *Re : Disallowance under section 14A/rule 8D*

That the Commissioner of Income-tax (Appeals) erred on the facts and in law in upholding the addition of Rs. 2,93,635 under the provisions of section 14A/rule 8D of the Act.

Re : Interest under section 234A/234B of the Act

8. That the Assessing Officer erred on the facts and in law in charging/ computing interest under sections 234A and 234B of the Act."

In C. O. No. 284/Delhi/2015, the assessee has raised the following grounds : 5

"1. That the additions/disallowance made by the Assessing Officer by passing the assessment order under section 143(3) are illegal, bad in law and without jurisdiction.

2. That on the facts and in the circumstances of the case, the Commissioner of Income-tax (Appeals) erred in not quashing the order dated August 10, 2010 passed by the Assessing Officer under section 153A as barred by limitation since the same had been passed beyond time limit specified under section 153B(1) of the Income-tax Act, 1961 ('the Act') inasmuch as :

(a) the audit conducted by the special auditor under section 142(2A) of the Act was not required because the Assessing Officer did not point out any complexity in the books of account of the appellant before issuing any such directions ; and

(b) in any case, the extended time period allowed to the special auditor for furnishing audit report could not be excluded in terms of clause (ii) of *Explanation* under section 153B since such extension having been granted by the Commissioner of Income-tax instead of the Assessing Officer as required under section 142(2C) of the Act was invalid in law.

Without prejudice

Re : Disallowance under section 40A(3) of the Act

3. That the Commissioner of Income-tax (Appeals) erred on the facts and in law in upholding the disallowance of Rs. 1,40,992, 100 per cent. of Rs. 1,40,992 being expense paid in cash by the appellant holding the same to have been paid in contravention of the provisions of section 40A(3) of the Act.

Re : Addition of prior period expenses

4. That the Commissioner of Income-tax (Appeals) erred on the facts and in law in upholding the addition of Rs. 10,07,882 made on account of disallowance of prior period expenditure.

4.1 That without prejudice, in view of the explanation filed, none of the expenditure are in the nature of prior period expenses, therefore, cannot be added on that ground.

Re : Disallowance under section 40(a)(ia)

5. That the Commissioner of Income-tax (Appeals) erred on the facts and in law in directing the Assessing Officer to verify and allow the expense of Rs. 4,95,396 disallowed under section 40(a)(ia) of the Act without appreciating that all the necessary documents/information relevant for examination were already placed on record by the appellant before the Commissioner of Income-tax (Appeals).

5.1 That without prejudice, in view of the decision of various authorities, the provisions of section 40(a)(ia) are not applicable on such expenditure which were not payable (not outstanding) as on the last day of the financial year, therefore, to this extent, the learned Commissioner of Income-tax (Appeals) erred in not excluding such expenditure outside the purview of section 40(a)(ia). Reliance is placed upon *CIT* v. *Vector Shipping Services (P.) Ltd.* [2013] 357 ITR 642 (All) (SLP of the Department has been dismissed by the hon'ble apex court vide order dated July 2, 2014.

5.2 That without prejudice, out of the total expenditure Rs. 40,78,60,092, only Rs. 15,97,52,489 have been claimed as deduction and the balance have been transferred to work-in-progress, therefore not claimed as a deduction, thus only 39.16 per cent. of the total expenditure are claimed as deduction. Consequently at the most, only 39.16 per cent. of such expenditure which ultimately stands hold being incurred in violation of section 40(a)(ia) can be disallowed.

Re : Addition of assumed, presumed and deemed assessable profits from the Bikaner and Mohali projects.

6. That the Commissioner of Income-tax (Appeals) erred on the facts and in law in not accepting the method of accounting and accounting policies adopted by the appellant in respect of the Bikaner and Mohali projects accounting for recognising the revenue and cost thereof.

6.1 That the Commissioner of Income-tax (Appeals) erred on the facts and in law in upholding without any basis and justification for

presuming the sale value of the Bikaner land as Rs. 201.61 per square foot (estimated) against the actual sale value for the plot to plot evidenced by proper, authentic and legal documents, wherein no defect/ deficiencies/in correctness have been found.

Re : Interest under section 234B of the Act

7. That the Assessing Officer erred on the facts and in law in charging/computing interest under section 234B of the Act."

6 At the outset, the assessee has raised a legal ground during the hearing that the extension of time given by the Commissioner of Income-tax, Central-II in getting the books audited under section 142(2A) of the Income-tax Act, 1961 was illegal thus vitiating the proceedings thereof.

7 The detailed facts of case as taken up from records and submission are as under :

7.1 A search and seizure operation was carried on the assessee on February 19, 2008 and consequently, notice under section 153A was issued. During the assessment proceedings, the Assessing Officer arrived to an opinion, that having regard to the nature and complexity of the accounts of the assessee and in the interests of the Revenue, it was necessary to get the accounts audited by an accountant, as provided in section 142(2A).

7.2 Prior to arriving at this conclusion, the Assessing Officer issued a detailed letter dated November 27, 2009 requiring the assessee to show cause as to why the accounts should not be got audited under section 142(2A) by an accountant. The assessee raised objections to the aforesaid show-cause notice and the Assessing Officer vide his office letter dated December 8, 2009 rejected the assessee's objections and later on, with the approval of the Commissioner of Income-tax, Central-II ordered for special audit in accordance with the provisions of section 142(2A). During the course of special audit, the special auditors requested for grant of additional time to submit its report on the ground that the assessee was not co-operating with them and there was a delay on the part of the assessee to furnish details and information required for conducting special audit. The request was acceded to and special audit report was received by the Assessing Officer from the special auditors in his office on June 11, 2010.

8 The relevant important points are :

• The special audit under section 142(2A) was directed vide the Commissioner of Income-tax Central-II, New Delhi, letter dated December 5, 2009.

• It was to be completed within 120 days, i. e., up to April 14, 2010.

• The special auditor found unable to complete the job within the allowed time.

• The special auditor vide letter dated March 25, 2010 requested for extension of time.

• This request was forwarded by the Assessing Officer to the Commissioner of Income-tax Central-II, New Delhi.

• Vide his letter dated April 13, 2010 granted the extension for a further period of 60 days, i. e., up to June 13, 2010.

• The special audit report (SAR) has been furnished to the Assessing Officer on June 11, 2010.

9 The issue before us is to examine whether the action of the learned Commissioner of Income-tax, Central-II for granting extension for the further period is legally valid are not.

10 The learned authorised representative referred to the provision below section 142(2C) and argued that it is the Assessing Officer who can grant the extension of period for completion of audit but not the Commissioner of Income-tax, Central-II. He referred to the provisions of the Act which are as under before resting his detailed arguments :

> "Provided that the Assessing Officer may, (suo motu, or on an application) made in this behalf by the assessee and for any good and sufficient reason, extend the said period by such further period or periods as he thinks fit ; so, however, that the aggregate of the period originally fixed and the period or periods so extended shall not, in any case, exceed one hundred and eighty days from the date on which the direction under sub-section (2A) is received by the assessee."

11 Against the arguments, the learned Commissioner of Income-tax Departmental representative, made submissions and argued the case at length. For the sake of convenience and completeness, the submissions of the learned Commissioner of Income-tax Departmental representative in the written form consisting of differentiation of the case law quoted by the authorised representative, case law supported by the Revenue, letter dated February 11, 2020 of the Assistant Commissioner of Income-tax Central Circle-15 with regard to the events, letter dated April 13, 2010 of the Deputy Commissioner of Income-tax, Central Circle-17 are reproduced as under :

> "*Sub* : Written submission in the above case-reg.
>
> All these appeals are filed by the Department and the assessee has filed cross-objection.

The assessee has raised a legal ground through cross-objection that the extension of time getting the books audited under section 142(2A) of the Act was granted by the Commissioner of Income-tax (Central) whereas the extension of time for audit under section 142(2A) was to be given by the Assessing Officer as per the first proviso below section 142(2C).

A. The learned authorised representative relied on the following decision in support of the argument that approval from the higher incompetent authority is improper :

1. *CIT* v. *SPL's Siddhartha Ltd.* [2012] 345 ITR 223 (Delhi)

2. *Ghanshyam K. Khabrani* v. *Asst. CIT* [2012] 346 ITR 443 (Bom)

3. *CIT* v. *Soyuz Industrial Resources Ltd.* [2015] 232 Taxman 414 (Delhi)

4.*Yum Restaurants Asia Pte. Ltd.* v. *Dy. DIT (No. 1)* [2017] 397 ITR 639 (Delhi)

Submission

All these decisions are on the subject of reopening of assessment under section 147 and the authority who should be satisfied on the reasons recorded by the Assessing Officer. Therefore, these decisions are in respect of satisfaction for initiation of reassessment proceedings. None of the decisions are related for extension of time period of audit of books of account, where the initiatives of assessment proceedings are not challenged. Therefore, these cases are distinguishable on the facts of the case.

B. The learned authorised representative relied on the following decisions on the argument that power vested in an authority by statute to be exercised strictly by such authority.

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

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

7. *Dr. Nalini Mahajan* v. *DIT (Investigation)* [2002] 257 ITR 123 (Delhi)

My Submission on these case law are as under :

(a) *Anjuman M. H. Ghaswala* : This case related to power of the Settlement Commission v. CBDT for waiver of interest under sections 234A, 234B and 234C of the Income-tax Act.

(b) *Kelvinator of India Ltd.* : Issue of change of opinion for the reason to believe escapement of income.

(c) *Dr. Nalini Mahajan* : These issue was exercising power to issue authorisation under section 132 by additional direction.

In all these cases, the jurisdiction was challenged on the basis of either initiation of assessment or search authorisation or level of interest which is distinguishable on the facts of the case, which is only extension of time period for audit under section 142(2A).

C. The learned authorised representative argued that exercise of the statutory power of an authority at the discretion of another authority vitiates the proceedings.

11. *The Purtabpore Co. Ltd.* v. *Cane Commissioner of Bihar* [1969] (1) SCC 308

12. *Commissioner of Police* v. *Gordhandas Bhanji* AIR 1952 SC 16

13. *Anirudhsinhji Karansinhji Jadeja* v. *State of Gujarat* [1995] 5 SCC 302

14. *State of U. P.* v. *Maharaja Dharamander Prasad Singh* [1989] 2 SCC 505

My submission are as under

(a) *Purtabpore Co. Ltd.* [1969] (1) SCC 308

The issue was for quasi-judicial power of commission v. Chief Minister. The facts in the present case are entirely different.

(b) *Gordhandas Bhanji* AIR 1952 SC 16

The issue was the power of commission vis-a-vis the interference of the Government. These facts are clearly distinguished in the present case.

(c) *Anirudh Sinhji Jadeja* [1995] 5 SCC 302

The issue was the power of DSP for prior approval for recording information about commission of offence under the Terrorist and Disruptive Activities (Prevention) Act, 1987. The facts are clearly distinguishable.

(d) *Maharaja Dharamander Prasad Singh* [1989] 2 SCC 505

The issue was related to permission for development of land by private part under the U. P. Urban Planning Development Act, 1973. These facts are not applicable in the present case.

D. The learned authorised representative finally relied on the decision of the hon'ble Income-tax Appellate Tribunal, Pune Bench in the case of *ITO* v. *Vilsons Particle Board Industries Ltd.* [2017] 55 ITR (Trb) 114 (Pune) ; [2017] 88 taxmann.com 889 (Pune) which has been approved by the hon'ble Bombay High Court is relying on *Sahara*

India (Firm) v. *CIT* [2008] 300 ITR 403 (SC) the decision of the hon'ble Supreme Court.

Submission

Issue in the case of *Vilsons Particle Board Industries Ltd.* [2017] 55 ITR (Trb) 114 (Pune) was before sending the proposal of approval to the Commissioner of Income-tax, the Assessing Officer should give opportunity of being heard to the assessee compulsorily. The hon'ble Income-tax Appellate Tribunal after relying on the decision of the hon'ble Supreme Court in the case of *Sahara India* [2008] 300 ITR 403 (SC) and *Rajesh Kumar* v. *Dy. CIT* [2006] 287 ITR 91 (SC) in paras 40 and 41 of the order held that without opportunity given by the Assessing Officer if proposal for audit was sent to the Commissioner of Income-tax, then the special audit is invalid and the assessment was held to be time barred as the period of extension of time for special audit was not available.

In the present case, there is no issue of opportunity not given by the Assessing Officer before sending the proposal for getting special audit before the Commissioner of Income-tax. In fact the assessee has not challenged the initial approval under section 142(2A). Therefore, the requirement of section 142(2A) of providing opportunity to the assessee by the Assessing Officer has been satisfied.

The issue is of extension of time period for submission of audit report as per the proviso below section 142(2C) of the Income-tax Act which is not covered by the decision of the hon'ble Income-tax Appellate Tribunal, Pune in the case of *Particle Board Industries Ltd.* [2017] 55 ITR (Trb) 114 (Pune) The relevant *Explanation* is reproduced as under :

"Provided that the Assessing Officer may, suo motu or on an application made in this behalf by the assessee and for any good and sufficient reason, extend the said period by such further period or periods as he thinks fit ; so, however, that the aggregate of the period originally fixed and the period or periods so extended shall not, in any case, exceed one hundred and eighty days from the date on which the direction under sub-section (2A) is received by the assessee."

The requirement of application of the proviso can be summarised as under :

1. The Assessing Officer can extend the time period for audit under section 142(2A) either suo motu or an application made by the assessee.

2. The Assessing Officer has for good and sufficient reason can extend the period for audit.

In the present case the facts are as under :

1. The Assessing Officer has received the request from the special auditor for extension of time to complete the audit under section 142(2A) which was on account of delay on the part of the assessee.

2. The Assessing Officer was satisfied on the reason submitted by the special auditor and recommended for extension to the Commissioner of Income-tax as there were other cases having inter-group transaction for special audit and extension was granted by the Commissioner of Income-tax (C)-II, New Delhi.

3. CIT(C)-II, New Delhi has conveyed the extension.

These facts can be seen from the letter of the Assessing Officer dated February 11, 2020 (enclosed)

A perusal of the above facts reveals that the issue of providing opportunity to the assessee for the extension of time period is not the requirement of law.

The only condition is the satisfaction of the Assessing Officer for extending the time. The Assessing Officer in the present case has applied his mind and found the case suitable for extension as can be seen from the letter of the Assessing Officer dated February 11, 2020. Therefore, the conditions for extending the time period under the above proviso is met expect the grant of extension by the Commissioner of Income-tax for administrative reason on account of special audit pending in other group cases.

Therefore, it is submitted that since on substantial basis the requirement of the proviso has been met, just on account of only administrative approval of the Commissioner of Income-tax for sanctioning the extension should not vitiate the extension of time for special audit.

Without prejudice to the above submission it may be mentioned that the Commissioner of Income-tax is the approving authority for special audit under section 142(2A) and therefore his involvement for extension of time as per the proviso is inherent."

12 The information received by the Revenue during the arguments with regard to the granting of permission in connection with the extension of the period for audit is as under :

"Office of the
Asstt. Commissioner of Income-tax
Central Circle-15, New Delhi
Room No. 245, ARA Centre, E-2, Jhandewalan Extn.,
New Delhi - 110055.

F. No. ACIT/CC-15/2019-20/1605

Dated : 11.02.2020

To

The Commissioner of Income-tax (DR),
G-Bench, ITAT, 7th Floor,
Lok Nayak Bhawan, Khan Market, New Delhi.

Sir,

Subject : Second appeal in the case of *Asst. CIT* v. *Soul Space Projects Ltd.*, I. T. A. No.193/Delhi/2015 for the assessment year 2007-08, 1849/Delhi/2015 for the assessment year 2008-09 and 4352/Delhi/2015 for the assessment year 2009-10—matter reg.

Ref : F. No. CIT/DR/ITAT/G-Bench/2019-20/195 dated 27-1-2020.

Kindly refer to the above noted subject.

2. On a perusal of assessment and special audit records in the case of Soul Space Projects Ltd, it is found that M/s. Dinesh Mehta and Co., special auditor appointed in the case of Soul Space Projects Ltd. has filed an application on April 8, 2010 related to extension of time for furnishing the special audit report. Accordingly, the then Assessing Officer has forwarded a letter to the learned Commissioner of Income-tax, Central-II, New Delhi on April 8, 2010 regarding the extension of special audit in this case and stated as under :

'2. M/s. Dinesh Mehta and Co. has filed a request vide letter dated March 25, 2010 for granting extension of time for a further period of two months for submission of the aforesaid report because there is a delay on the part of the assessee to furnish details and information required by the auditors as per the annexure appended by the auditors with the aforesaid letter (copy of letter with enclosures is enclosed for ready reference).

3. In this connection, it is also informed that the auditors M/s. Sanjay Satpal and Associates appointed for special audit in the case of the flagship company for the group, i. e., M/s. B. L. Kashyap and Sons

Ltd. has also requested for extension of time for further 2 months for the similar reasons. The application filed by M/s. Sanjay Satpal and Associates has already been forwarded to your goodself on April 7, 2010 for favourable consideration. Since M/s. Soul Space Projects Ltd. has a large numbers of intergroup transactions with M/s. B. L. Kashyap and Sons Ltd. it is necessary that both the auditors should work in close co-operation with each other and should exchange one other's finding before reaching any conclusion. Hence, it is recommended that the extension of time may also be granted to M/s. Dinesh Mehta and Co. if extension of time is granted by your goodself to M/s. Sanjay Satpal and Associates.'

3. Further, the learned Commissioner of Income-tax, Central-11, New Delhi, vide letter No. CIT/(C)-II/10-11/24 dated April 12, 2010 has conveyed the extension of 60 days for the purpose of furnishing the audit report and directed "No further extension will be allowed and the auditors may be asked to adhere to the extended time-limit for the purpose". Accordingly, the Assessing Officer vide letter F. No. DCIT-CC-17/Special Audit/2010-11/40, dated April 13, 2010 has informed that the extension of further 60 days granted to the special auditors M/s. Dinesh Mehta and Co., Chartered Accountants, for furnishing the audit report under section 142(2A) in the case and also requested to the assessee to provide the requisite information immediately under information to the undersigned so the special audit may be completed in a smooth manner.

4. On a perusal of the relevant records, it is ascertained that the Assessing Officer has applied his mind in the letter dated April 8, 2010 therein he has given the reasons for extension for furnish the special audit report. Consequently, the learned Commissioner of Income-tax has considered the facts (application of mind of the Assessing Officer) and directed the Assessing Officer to convey the extension of 60 days for the purpose of furnishing the special audit under section 142(2A). Therefore, it is clear that the extension of period under section 142(2C) was granted by the Assessing Officer after applying his mind, not by the learned Commissioner of Income-tax, Central-II and the learned Commissioner of Income-tax, Central-II has only directed to the Assessing Officer to convey the extension of period to the special auditors. The above referred letters are also enclosed herewith for ready reference."

The order of the Deputy Commissioner of Income-tax, Central Circle-17, which is an important document to determine whether the provisions of section 142(2C) are followed or not. **13**

"F. No. DCIT-CC-17/Special Audit/2010-11/40

Office of the
Deputy Commissioner of Income-tax
Central Circle -17,
Room No. 353, ARA Centre,
Jhandewalan Extension, New Delhi
Phone No. 23593441
Date : 13-04-2010

To,

The Principal Officer,
M/s Soul Space Projects Ltd.
A-21/B-1 Extn., Mohan Co-operative Industrial Area,
Mathura Road, New Delhi.

Sub : In the matter of M/s. Soul Space Projects Ltd.—Assessment years 2006-07 to 2008-09—Special audit under section 142(2A) of the Income-tax Act, 1961—Regarding

Sir,

Please refer to the above.

In this connection you are hereby informed that the Commissioner of Income-tax (Central)-II, New Delhi vide his office letter F. No. CIT/(C)-11/10-11/24 dated April 12, 2010 has granted extension of 60 days to the special auditors M/s. Dinesh Mehta and Co., Chartered Accountants, for furnishing the audit report under section 142(2A) in your case.

Please acknowledge the receipt of this letter.

Sd,
Yours faithfully,
(B. L. Sharma)
Deputy Commissioner of Income-tax,
Central Circle-17, New Delhi".

Heard the arguments of both the parties and perused the material available on record. **14**

The case law quoted by the learned authorised representative as rebutted by the learned Departmental representative have been closely perused **15**

while the learned Departmental representative argued that the relevance of the case law with regard to the sections for which the case law emanated, the learned authorised representative stressed on the ratio of the case law as to the statutory discretion of the powers of the various authorities. The learned Departmental representative's contention was that the "administrative approval" of the Commissioner of Income-tax for sanctioning extension of the period should not vitiate the conduct of special audit. It was argued that the letter of the Commissioner of Income-tax, Central-II should be construed only as an administrative direction whereas the real extension has been granted by the Deputy Commissioner of Income-tax, Central Circle-17 vide letter dated April 13, 2010. It was also argued that while the approval of the Commissioner of Income-tax, is required for ordering fresh audit under section 142(2A), no such approval for extension it is not required. It is the administrative permission sought by the Deputy Commissioner of Income-tax for the Commissioner of Income-tax, hence the action cannot be said to be illegal. The undisputed facts are :

1. The Assessing Officer has received the request from the special auditor for extension of time to complete audit under section 142(2A) which was on account of delay on the part of the assessee.

2. The Assessing Officer was satisfied on the reason submitted by the special auditor and recommended for extension to the Commissioner of Income-tax as there were other cases having inter-group transaction for special audit and extension was granted by the Commissioner of Income-tax (C)-II, New Delhi.

3. The Commissioner of Income-tax (C)-II, New Delhi has conveyed the extension.

4. The Assessing Officer conveyed the granting of extension of 60 days by the Commissioner of Income-tax Central-II to the assessee.

16 Section 142(2A) provides that the directions for special audit shall be given by the Assessing Officer, with the previous approval of the Chief Commissioner or the Commissioner. In this case, there is no dispute that these directions have been given. Thus, the Legislature clearly intended that initial direction shall be with the approval and after examination of the subject matter by the higher after the prior approval of the Commissioner of Income-tax, Central - II, New Delhi. Thereafter, the proviso below section 142(2C) provides for the procedure for giving extension for completing the special audit task. It clearly provides that the Assessing Officer shall extend the said time period if the conditions as mentioned in the said proviso stands satisfied. Thus, while initial direction is to be given with the approval of the Chief Commissioner of Income-tax/Commissioner of

Income-tax, however, for extension, it is only the Assessing Officer who has to take a decision for extension. It is to be specifically pointed out that in section 142(2A) law mandates the prior approval of Chief Commissioner of Income-tax/Commissioner of Income-tax while in the proviso below section 142(2C), while to grant extension, the sole power is vested with the Assessing Officer. The statute under section 142(2A) provides for special audit with the previous approval of the Commissioner of Income-tax is intended with an objective that the subject matter stands examined by the higher and more experienced officers so that it may not bring unnecessary work and equity to the assessee. Once the issue under section 142(2A) stands examined by the higher authorities, thereafter, for the issue of extension under section 142(2C), there is no need for the higher authorities to be involved and the law provided the circumstances, on existence of which, this decision has been left over to be taken by the concerned Assessing Officer.

17 In the present case, the extension has been given by the Commissioner of Income-tax and not by the Assessing Officer, vide letter dated April 13, 2010 as under :

> "In this connection you are hereby informed that the Commissioner of Income-tax (Central)-II, New Delhi vide his office letter F. No. CIT/(C)-II/10-11/24 dated April 12, 2010 has granted extension of 60 days to the special auditors M/s. Sanjay Satpal and Associates, Chartered Accountants, for furnishing the audit report under section 142(2A) in your case."

18 We have carefully gone through the entire events and the verbatim of the letters. We also tried to dwell whether the intention of the Assessing Officer is to "extend the period" or conveying the "approval of the Commissioner". While it may be an administrative phenomenon to intimate, inform the Commissioner of Income-tax about the fact of the special audit party appointed seeking extension but statutorily that power is vested with the Assessing Officer. On going through the established judgment, it cannot be disputed that the statutory powers vested with one specified authority cannot be exercised by another authority unless and until the statute provides for the same. And we find that the extension has not been given by the Assessing Officer.

19 The powers and the jurisdiction of the various authorities to implement the Income-tax Act stands clearly defined in the statute. For example, the power to approve the accounts audited under section 142(2A) lies with the Commissioner of Income-tax/Principal Commissioner of Income-tax/ Chief Commissioner of Income-tax or Principal Chief Commissioner of

Income-tax. The powers under section 144A are to be exercised by the Joint Commissioner or the Additional Commissioner. The powers under section 251 are specific to the Commissioner (Appeals). Similarly, the powers under sections 263 and 264 are to be exercised by the Principal Commissioner of Income-tax/Commissioner of Income-tax. Further, in exercise of the powers conferred under clause (a) of sub-section (2) of section 119 of the Income-tax Act, 1961, the Central Board of Direct Taxes, may direct that the Chief Commissioner of Income-tax and the Director-General of Income-tax may reduce or waive interest charged under section 234A or section 234B. Further to mention, while levy of the penalty under section 271AAB is the power of the Assessing Officer, the provisions under section 274(2) mandates that the prior approval of the Joint Commissioner of Income-tax is required before levy of such penalty. Thus, we find that the statute has accorded implementation of the various provisions to the specified authorities which cannot be interchanged.

20 A power which has been given to a specified authority has to be discharged only by him. Substitution of that officer/authority by any other officer, may be of higher rank, cannot validate the said order/action. The extension could have been valid only if it had been given by the Assessing Officer after due application of mind and after examining the existence of circumstances as provided in the proviso below section 142(2C) since it has to be given only by the competent authority. In this case, the extension has not been given by the Assessing Officer but by the Commissioner of Income-tax, Central-II and the Assessing Officer has only conveyed the approval, therefore, we hold that the extension given by the Commissioner of Income-tax, Central-II is beyond the powers vested as per the statute and accordingly the assessment completed after the due date is held to be void ab initio.

21 Since the order has been held to be invalid ab initio, any adjudication on the other grounds would only be academic in nature and hence not resorted to.

22 Before parting, we would like to keep on record our appreciations to the learned Commissioner of Income-tax Departmental representative, Sh. H. K. Choudhary and the authorised representative, Sh. Rohit Jain for their radiant arguments.

23 In the result, the appeals of the Revenue are dismissed and the cross objections of the assessee are allowed.

24 Order pronounced in the open court on June 3, 2020.

[2020] 82 ITR (Trib) 419 (Mumbai)

[Before the Income-tax Appellate Tribunal — Mumbai "A" Bench]

INCOME-TAX OFFICER

v.

ABDUL KAYUM AHMED MOHD. TAMBOLI

Mahavir Singh *(Vice-President)* and
Manoj Kumar Aggarwal *(Accountant Member)*

July 6, 2020.

SS ▸ ITA 1961, s 2(47)(v)
AY ▸ 2009-10
HF ▸ Assessee

Business income—Civil contractor—Transfer of development rights—Income earned from project assessed as business income—No transfer involved since development rights not capital assets—Definition of transfer cannot be applied—Part income accrued to assessee on execution of project agreement—Balance consideration conditional upon assessee performing certain obligations under agreement—Payments received in subsequent years already offered to tax—Estimating income at 10 per cent. of gross receipts justified—No disallowance under section 40A(3)—Income-tax Act, 1961, s. 2(47)(v).

The assessee's case for the assessment year 2009-10 was reopened on the ground that the proprietorship concern of the assessee had transferred certain development rights to S for a consideration of Rs. 336 lakhs, out of which an amount of Rs. 100.80 lakhs was received during the financial year 2008-09. Since the assessee had handed over the possession of property, the Assessing Officer treated the transaction as a transfer under section 53A of the Transfer of Property Act, 1882 and charged the resultant gains to tax as business profits. Since the assessee followed the mercantile system of accounting, the entire amount received on sale of development rights was taxable in the year of signing of the development agreement and handing over of possession of the land. Hence, he brought the entire amount of Rs. 336 lakhs to tax. An expenditure of Rs. 42 lakhs was paid through bearer cheques and therefore the expenditure would not qualify as deduction under section 40A(3) of the Income-tax Act, 1961. Finally, the amount of Rs. 336 lakhs was treated as business income against which the expenditure of Rs. 58.80 lakhs was allowed to the assessee and the balance amount of Rs. 277.20 lakhs was determined as business income. The Commissioner (Appeals) held that the

provisions of section 2(47)(v) defining the term "transfer" were not be applicable since the income was assessed as business income. Only part payment accrued to the assessee during the year 2009-10 whereas the balance receipts were conditional receipts which were payable only in the event of the assessee performing various work, obtain requisite permissions, etc. The payments were subject to the fulfilment of certain contractual performance by the assessee. The payment was received in various trenches over the next five years and the amount had already been offered to tax in those years after deducting related expenditure. On appeal :

Held, *that the assessee was engaged as a civil contractor and the income earned from the project was assessed as business income. Therefore, the term "transfer" as defined in section 2(47)(v) not applicable since the transfer was applicable only in the case of capital assets held by the assessee. The development rights were held as business assets. In terms of the joint venture agreement only part of the income accrued to the assessee on execution of the project agreement. The balance consideration was conditional and was to accrue only in the event of the assessee performing certain obligations under the agreement. The payments received in the subsequent years had already been offered to tax. Therefore, estimating the income at 10 per cent. of gross receipts was justified. Once the income was estimated, no further disallowance under section 40A(3) would be warranted.*

Cases referred to :

Anil Rai *v.* State of Bihar [2002] 3 BCR 360 (SC) (para 5)

CIT *v.* Hemal Raju Shete (Mrs.) (I. T. A. No. 2348 of 2014 dated March 29, 2016) (para 3)

CIT (Dy.) *v.* JSW Ltd. [2020] 79 ITR (Trib) 585 (Mum) (para 5)

CIT *v.* Shoorji Vallabhdas and Co. [1962] 46 ITR 144 (SC) (para 3)

E. D. Sassoon and Co. Ltd. *v.* CIT [1954] 26 ITR 27 (SC) (para 3)

Morvi Industries Ltd. *v.* CIT [1971] 82 ITR 835 (SC) (para 3)

Otters Club *v.* DIT (E) [2017] 392 ITR 244 (Bom) (para 5)

Shivsagar Veg. Restaurant *v.* Asst. CIT [2009] 317 ITR 433 (Bom) (para 5)

I. T. A. No 5851/Mum/2018 (assessment years 2009-10).

Sushil Lakhani, authorised representative, for the assessee.

Michael Gerald, Departmental representative, for the Department.

ORDER

The order of the Bench was pronounced by

Manoj Kumar Aggarwal ***(Accountant Member)***.—The aforesaid appeal by the Revenue for the assessment year (in short referred to as, "the AY") 2009-10 contest the order of the learned Commissioner of Income-tax (Appeals)-34, Mumbai, (in short referred to as, "the CIT(A)"), Appeal No. CIT(A)-34/ITO-22(1)(1)/IT-335/16-17, dated July 12, 2018 on the following grounds : 1

> 1. Whether on the facts and in the circumstances of the case and in law the learned Commissioner of Income-tax (Appeals) is right in deleting the addition made by the Assessing Officer holding that the entire consideration is not taxable during the year whereas the assessee transferred his right of development during the year under consideration and possession has also been handed over and has received part consideration.
>
> 2. Whether on the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) is right in estimating the income at 10 per cent. without appreciating the disallowance made by the Assessing Officer as per the provisions of section 40A(3) of the Income-tax Act when the learned Commissioner of Income-tax (Appeals) himself has stated that the assessee is not eligible for showing income as per the provisions of section 44AD of the Income-tax Act.
>
> 3. The appellant prays that the order of the learned Commissioner of Income-tax (Appeals) on the above ground be reversed and that of the Assessing Officer be restored.

As evident, the primary subject matter of appeal is to determine the question of accrual of certain income.

2.1 We have carefully heard the rival submissions and perused relevant material on record including the documents placed in the paper book. Our adjudication on the subject matter of the appeal would be as given in the succeeding paragraphs. 2

2.2 Briefly stated, the assessee, being a resident individual, is stated to be engaged as civil contractor under the proprietorship concern, namely, M/s. Tamboli Developer. And the assessment was framed for the year under consideration under section 143(3) read with section 147 of the Act on December 30, 2016 wherein the income of the assessee was determined at Rs. 276.69 lakhs as against the returned income of Rs. 2.82 lakhs filed by

the assessee on June 9, 2010 which, prima facie, was processed under section 143(1).

2.3 Pursuant to the receipt of certain information from the Additional Director of Income-tax (I and CI)-Unit-1, Mumbai, the case was reopened under section 147 by issuance of notice under section 148 on March 30, 2016. The reasons for reopening the case were duly supplied to the assessee. The statutory notices under sections 143(2) and 142(1) were issued in due course. The reasons for reopening the case, as extracted in the assessment order, would reveal that it came to notice that M/s. Tamboli Developer, i. e., proprietorship concern of the assessee, had transferred certain development rights to M/s. Shivalik Ventures Pvt. Ltd. (M/s. Shivalik) vide agreement dated July 23, 2008 for a consideration of Rs. 336 lakhs, out of which an amount of Rs. 100.80 lakhs was stated to be received during the financial year 2008-09. It was observed that since the assessee transferred the development rights and handed over the possession of property, the aforesaid transfer qualified to be treated as transfer under section 53A of the Transfer of Property Act, 1882 and therefore, the resultant gains would be chargeable to tax as business profits. Since the assessee followed the mercantile system of accounting, the entire amount received/receivable on sale of development rights would be taxable in the year of signing of development agreement and handing over of possession of land. Upon verifying the return of income, it was seen that the said amount was not offered to tax as business income. In the above background, reassessment proceedings were initiated against the assessee.

2.4 The property in question was property bearing CTS No. 19(pt),Village Bandra (E), Near Golibar Kabrastan, Golibar, Santacruz(E), Mumbai admeasuring 1046.43 square metres. The development rights of the same were acquired by the assessee during the financial years 2004-05 and 2005-06, from the two co-operative societies, i. e., M/s. Evergreen SRA Co-op Society and M/s. Nilofar CHS Ltd. The said property was stated to be encroached upon and in use and occupation of slum. Due to technical difficulties, the assessee could not proceed with further redevelopment of the property and approached M/s. Shivalik for the same. The assessee and M/s. Shivalik formed a joint venture entity, namely, Shivalik Tamboli Venture for the redevelopment of the property. As per the terms of the joint venture agreement, M/s. Tamboli Developers handed over the development rights to M/s. Shivalik for Rs. 336 lakhs and received part payment of Rs. 100.80 lakhs against the same.

2.5 The assessee defended its stand by submitting that as per the terms of the agreement, the assessee was to perform his work on the basis of the

receipt of fund from M/s. Shivalik. Further, the funds were received from M/s. Shivalik which were spent for ground level activities and the balance amount was already offered for taxation.

2.6 In response to the notice under section 133(6), M/s. Shivalik confirmed that the assessee was to do ground level work activities like collecting consent, taking care of local elements and do all the activities with the slum dwellers so that letter of intent could be issued. For the same, the assessee was to bear all the expenses and the payment was to be made in trenches as per the assessee's activities. The sale consideration was stated to be revised from Rs. 336 lakhs to Rs. 422.40 lakhs, out of which the amount of Rs. 373.80 lakhs was already paid to the assessee.

2.7 During the course of the assessment proceedings, the assessee submitted a chart showing amount received from M/s. Shivalik and expenses incurred by the assessee for ground level work. The assessee reflected the expenditure of Rs. 83.65 lakhs against the receipt of Rs. 100.80 lakhs. The business receipts were shown at Rs. 35.09 lakhs and the assessee offered income of 8 per cent. against business receipts of Rs. 35.09 lakhs.

2.8 However, the learned Assessing Officer opined that the said accounting treatment was not in consonance with the mercantile system of accounting being followed by the assessee. The income accrued to the assessee out of transfer of development right would be Rs. 336 lakhs. As per the terms of the agreement, the assessee parted with the development rights and the possession of the land was also given. Therefore, the transfer was completed during the year and the taxability of business receipts would not be dependent upon the actual receipt thereof. Hence, the entire amount of Rs. 336 lakhs was to be brought to tax.

2.9 Upon a perusal of the expenditure, it was noted that an expenditure of Rs. 42 lakhs was paid through bearer cheques and therefore the same would not qualify as deduction under section 40A(3) of the Act.

2.10 Finally, the amount of Rs. 336 lakhs was treated as business income against which the expenditure of Rs. 58.80 lakhs was allowed to the assessee and the balance amount of Rs. 277.20 lakhs was determined as business income.

3.1 Aggrieved as aforesaid, the assessee assailed the assessment before **3**
the learned Commissioner of Income-tax (Appeals) vide the impugned order dated July 12, 2018 wherein the assessee drew attention to clause 17 of the joint venture agreement and submitted that as per the agreement, only an amount of Rs. 100.80 lakhs accrued to the assessee upon execution of the agreement. The balance consideration was conditional receipt upon fulfilment of certain conditions by the assessee as laid down in the

agreement and therefore, the assessee did not have any legally enforceable right under the agreement to receive the balance amount. Reliance was placed on Accounting Standard 9 issued by the Institute of Chartered Accountants of India with respect to revenue recognition. A plea was also raised that the stated receipts were capital receipts. Another argument was that the provisions of section 2(47)(v) regarding part performance of contract referred to under section 53A of the Transfer of Property Act, 1882 related to capital gains chargeable under section 45 of the Income-tax Act. However, the said development rights were business assets and even the learned Assessing Officer assessed the income as business income and therefore the definition of transfer as defined in section 2(47)(v), was not applicable.

3.2 Convinced with the assessee's submission, the learned Commissioner of Income-tax (Appeals) concluded the issue in the assessee's favour by observing as under :

"4.4. I have carefully considered the facts of the case, documents produced before me and submissions of the authorised representative. It is observed that the appellant had procured the Hsg. Soc. Ltd. and Evergreen SRA Co-op. Hsg. Soc. (proposed). It is an undisputed fact that the property was under serious encroachment and occupation of slums and was declared as censuedslum. As the appellant was not able to redevelop the property, thus he executed a joint venture development agreement with M/s. Shivalik Ventures Pvt. Ltd. to assign its rights to the transferee. On perusing clause No. 17 of the joint venture agreement, it is observed that the appellant was entitled to receive the joint venture consideration of Rs. 3,36,00,000 in various stages, as under :

(a) Rs. 1,00,80,000 was receivable on execution of the agreement to acquit, release, discharge the rights in favour of M/s. Shivalik Ventures Pvt. Ltd. ;

(b) Rs. 1,66,00,000 was receivable on obtaining a revised letter of intent (LOI) and intimation of approval (IOA) ;

(c) Rs. 67,20,000 was receivable upon all the slum dwellers vacating the property and shifting to alternate temporary accommodation. On perusing clause No. 6 of the joint venture agreement, it is observed that the appellant was responsible to perform the various activities and work assigned thereon, being ;

(a) To procure the revised letter of intent (LOI) and intimation of approval (IOA) from the Slum Rehabilitation Authority ;

(b) Procure resolution from M/s. Nilofer Co-operative Housing Society agreeing to consent the redevelopment of property and shift to permanent rehabilitation tenement ;

(c) To procure resignation and NOC from the previous architects ;

(d) To shift all slum dwellers to temporary alternate and handover on vacating the properties and handover the same to M/s. Shivalik Ventures Pvt. Ltd. for redevelopment ;

(e) To shift all slum dwellers from temporary alternate accommodation to permanent accommodation constructed.

As per clause No. 8, the appellant was solely responsible and obliged to settle all claims in regard to FSI to be consumed at its own costs and expenses. As per clause No. 12, the appellant was required to incur all costs, charges and expenses required to obtain the revised letter of intent (LOI) and intimation of approval (IOA). Accordingly, as per the above stated terms and conditions described in the joint venture agreement dated July 25, 2008, the appellant was entrusted with several responsibilities and to perform its part of obligation under the contract which is spread over the years. Further, the appellant was entitled to recover the consideration under joint venture in a phased manner and therefore the Assessing Officer is not correct in holding that the entire consideration under the joint venture agreement had accrued during the impugned year. The Assessing Officer issued notice under section 133(6) to M/s. Shivalik Ventures Pvt. Ltd. and in reply, it is submitted that the appellant was required to perform the work including of leveling the ground. It is informed that a supplementary agreement was executed on April 5, 2012 and additional consideration of Rs. 86,40,000 was fixed, resultantly the aggregated consideration of joint venture was of Rs. 4,22,40,000. The said party had furnished the year-wise break-up of various payments made to the appellant of Rs. 3,73,80,000 which is spread in 5 years and Rs. 48,60,000 is still outstanding. I find that the Assessing Officer had not looked into the terms and conditions of the joint venture agreement which mandated the appellant to perform various work, obtain permissions, etc., and subject to fulfilment of the performance, the payments of the contract were to be released. The Assessing Officer's contention about part performance under section 53A of the Transfer of Property Act, 1882 would not apply since section 2(47)(v) relate to transfer of a capital asset whereas, in the impugned case, the appellant had offered the income under the head "Income from business". The Assessing Officer had incorrectly considered the joint

venture agreement as relating to transfer of development right without considering the various works to be performed by the appellant at various levels by both the parties and that the payments had been recovered in a phased manner of 5 years in accordance with the work completed by the appellant. The hon'ble jurisdictional High Court in *CIT* v. *Mrs. Hemal Raju Shete* (I. T. A. No. 2348 of 2014 dated March 29, 2016) decided that :

'In the present case, from the reading of the above clauses of the agreement the deferred consideration is payable over a period of four years, i. e., 2006-07, 2007-08, 2008-09 and 2009-10. Further, the formula prescribed in the agreement itself makes it clear that the deferred consideration to be received by the respondent-assessee in the four years would be dependent upon the profits made by M/s. Unisol in each of the years. Thus, in the case M/s. Unisol does not make net profit in terms of the formula for the year under consideration for payment of deferred consideration then no amount would be payable to the respondent-assessee as deferred consideration. The consideration of Rs. 20 crores is not an assured consideration to be received by the Shete family. It is only the maximum that could be received. Therefore, it is not a case where any consideration out of Rs. 20 crores or part thereof (after reducing Rs. 2.70 crores) has been received or has accrued to the respondent-assessee. As observed by the apex court in *Morvi Industries Ltd.* v. *CIT* [1971] 82 ITR 835 (SC). "The income can be said to accrue when it becomes due. . . The moment the income accrues, the assessee gets vested right to claim that amount, even though not immediately." In fact, the application of formula in the agreement dated January 25, 2006 itself makes the amount which is receivable as deferred consideration contingent upon the profits of M/s. Unisol and not unascertained amount. Thus, in the subject assessment year no right to claim any particular amount gets vested in the hands of the respondent-assessee. Therefore, the entire amount of Rs. 20 crores which is sought to be taxed by the Assessing Officer is not the amount which has accrued to the respondent-assessee. The test of accrual is whether there is a right to receive the amount though later and such right is legally enforceable. In fact as observed by the Supreme Court in *E. D. Sassoon and Co. Ltd.* v. *CIT* [1954] 26 ITR 27 (SC) "It is clear therefore that income may accrue to an assessee without the actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its

being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by somebody. There must be as is otherwise expressed debitum inpresenti, solvendum in future. . .". In this case all the co-owners of the shares of M/s. Unisol have no right in the subject assessment year to receive Rs. 20 crores but that is the maximum which could be received by them. This amount which could be received as deferred consideration is dependent/contingent upon certain uncertain events, therefore, it cannot be said to have accrued to the respondent-assessee. The Tribunal in the impugned order has correctly held that what has to be taxed is the amount received or accrued and not any notional or hypothetical income. As observed by the apex court in *CIT* v. *Shoorji Vallabhdas and Co*. [1962] 46 ITR 144 (SC) "Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which liability to tax is attracted, viz., the accrual of its income or its receipt ; but the substance of the matter is income, if income does not result, there cannot be a tax, even though in book keeping an entry is made about a hypothetical income, which does not materialise.'

Also, in the case of *E. D. Sassoon and Co. Ltd* v. *CIT* [1954] 26 ITR 27 (SC) the hon'ble Supreme Court laid down the principle that an income can be held to accrue only when the assessee acquired a right to receive that income.

Accordingly, the Assessing Officer is not justified in holding that the entire consideration of Rs. 3,36,00,000 under the joint venture agreement had accrued during the current year. Accordingly, the addition made by the Assessing Officer of Rs. 3,36,00,000 cannot be upheld.

4.5. The next question that needs to be answered is about the income that would have been earned by the appellant during the impugned year under joint venture. The Assessing Officer had allowed Rs. 58,80,000 as deductible expenses on considering the payments made by account payee cheques. The appellant had furnished a tabular chart along with the profit and loss account of 5 years from the assessment years 2008-09 to 2012-13 which is reproduced as under :

Amount received		*Payment made out of receipt from Shivalik Ventures*	
Financial year	*Amount received from Shivalik*	*Amount spent and payments made*	*Balance amount left offered to income-tax*
2008-09	1,00,80,000	83,65,000	17,15,000
2009-10	1,68,00,000	19,82,690	38,17,310
2010-11	20,00,000	20,00,000	—
2011-12	45,00,000	13,18,000	31,82,000
2012-13	40,00,000	10,00,000	30,00,000
Total	3,73,80,000	2,56,65,690	1,17,14,310

The return of income has been filed accordingly which has been accepted by the Revenue.

4.6. It is observed that the amounts received by the appellant over 5 years from M/s. Shivalik Ventures Pvt. Ltd. is disclosed of Rs. 3,73,80,000 and the amounts spent for the project is of Rs. 2,56,65,690, resultantly the balance gross amount of Rs. 1,17,14,310 has been considered as income from joint venture. However, on a perusal of the profit and loss account, it is also observed that the appellant had claimed various other expenses against the contract receipts and had disclosed the nominal profit of Rs. 3,19,806. The submission of the authorised representative about the applicability of section 44AD is rejected since his case does not fall within the definition of eligible business as the gross receipts exceeds Rs. 40,00,000. The appellant had filed the affidavits of certain contractors who had performed various work in the joint venture project. Also, M/s. Shivalik Ventures Pvt. Ltd. in reply to the notice under section 133(6), informed the Assessing Officer that the appellant was required to perform various work including of the levelling of land at its own cost. Accordingly, on considering the nature of business, terms of agreement and information available on record, it would be appropriate to estimate the income of the impugned year at 10 per cent. of the consideration received by the appellant of Rs. 1,00,80,000 at Rs. 10,08,000 (10 per cent. of Rs. 1,00,80,000) that would meet the ends of justice. I direct the Assessing Officer to sustain the addition at Rs. 10,08,000 and delete the balance addition of Rs. 2,67,12,000, i. e., (Rs. 2,77,20,000 minus Rs. 10,08,000). In the result, ground Nos. (a) to (f) are partly allowed.

Aggrieved as aforesaid, the Revenue is in further appeal before us. It appears that the assessee has accepted the verdict of the learned Commissioner of Income-tax (Appeals).

3.3 It is evident that the learned Commissioner of Income-tax (Appeals) has held that the provisions of section 2(47)(v) defining the term "transfer" would not be applicable since the income was assessed as business income. The learned Commissioner of Income-tax (Appeals), after considering the terms of the joint venture agreement, also came to a conclusion that only part payment accrued to the assessee during the year whereas the balance receipts were conditional receipts which were payable only in the event of the assessee performing various work, obtain requisite permissions, etc. The payments were subject to fulfilment of certain contractual performance by the assessee. The said facts were confirmed by M/s. Shivalik also, in response to the notice under section 133(6).

3.4 Another finding is that the payment was received in various trenches over next 5 years and the same has already been offered to tax in those years after deducting related expenditure. The detail of the same has already been tabulated in the impugned order, which is extracted hereinabove. These facts remain uncontroverted before us.

Upon a careful consideration of the impugned order, we find that the **4** learned Commissioner of Income-tax (Appeals) has clinched the issue in a correct perspective. The assessee was engaged as civil contractor and the income earned from the stated project was assessed as business income. Therefore, the term "transfer" as defined in section 2(47)(v), would not apply since the same is applicable only in the case of capital assets held by the assessee. The development rights were held as business assets. Proceeding further, it is evident from the terms of the joint venture agreement that only part income accrued to the assessee on execution of the project agreement. The balance consideration was conditional receipt and was to accrue only in the event of the assessee performing certain obligations under the agreement. Another pertinent fact to be noted is that the payments received in the subsequent years have already been offered to tax. The same was in line with the assessee's arguments that the balance receipts were conditional receipts. The response by M/s. Shivalik also confirmed the same. Therefore, no fault could be found in the impugned order in estimating the income at 10 per cent. of gross receipts. Once the income is estimated, no further disallowance under section 40A(3) would be warranted. Therefore, we confirm the stand of the learned Commissioner of Income-tax (Appeals) in the impugned order.

Reasons for delay in pronouncement of order

5.1 Before parting, we would like to enumerate the circumstances which **5** have led to delay in pronouncement of this order. The hearing of the matter was concluded on February 19, 2020 and in terms of rule 34(5) of the

Income-tax (Appellate Tribunal) Rules, 1963, the matter was required to be pronounced within a total period of 90 days. As per sub-clause (c) of rule 34(5), every endeavour was to be made to pronounce the order within 60 days after conclusion of hearing. However, where it is not practicable to do so on the ground of exceptional and extraordinary circumstances, the bench could fix a future date of pronouncement of the order which shall not ordinarily be a day beyond a further period of 30 days. Thus, a period of 60 days has been provided under the extant rule for pronouncement of the order. This period could be extended by the bench on the ground of exceptional and extraordinary circumstances. However, the extended period shall not *ordinarily* exceed a period of 30 days.

5.2 Although the order was well drafted before the expiry of 90 days, however, unfortunately, on March 24, 2020, a nationwide lockdown was imposed by the Government of India in view of adverse circumstances created by pandemic Covid-19 in the country. The lockdown was extended from time to time which crippled the functioning of most of the Government departments including the Income-tax Appellate Tribunal (ITAT). The situation led to unprecedented disruption of judicial work all over the country and the order could not be pronounced despite lapse of considerable period of time. The situation created by pandemic Covid-19 could be termed as unprecedented and beyond the control of any human being. The situation, thus created by this pandemic, could never be termed as ordinary circumstances and would warrant exclusion of lockdown period for the purpose of the aforesaid rule governing the pronouncement of the order. Accordingly, the order is being pronounced now after the reopening of the offices.

5.3 Faced with similar facts and circumstances, the co-ordinate Bench of this Tribunal comprising of the hon'ble President and the hon'ble Vice President, in its recent decision titled as *Dy. CIT* v. *JSW Ltd.* [2020] 79 ITR (Trib) 585 (Mum) (I. T. A. Nos. 6264 and 6103/Mum/2018) order dated May 14, 2020 held 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 May 14, 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* [2002] 3 BCR 360 (SC) 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 the 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 rules 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 coronavirus "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 the *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.