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assessment. The Assessing Officer relied upon decision of the hon'ble Delhi High Court in the case of *Bawa Abhai Singh* v. *Dy. CIT* reported in [2002] 253 ITR 83 (Delhi) ; [2001] 117 Taxman 12 (Delhi HC) and also the decision of the hon'ble Patna Tribunal in the case of *Dy. CIT* v. *Narendra Mohan Bajrai*. The Assessing Officer observed that there has to be reasons to believe that income of the assessee has escaped assessment but sufficiency of the reasons to believe that income of the assessee has escaped cannot be investigated by the courts. Further, it was observed by the Assessing Officer that at the time of issuance of notice, it is not necessary for the Assessing Officer to come to the conclusive finding that the income of the assessee has escaped assessment and what is required is a prima facie belief of the Assessing Officer that income of the assessee has escaped assessment based on the material before the Assessing Officer. Thus, as per the Assessing Officer at this stage of reopening of the concluded assessment, sufficiency or correctness of the material is not a thing to be considered. Thus, the challenge as raised by the assessee on the legal jurisdictional ground as to the legality and validity of issuance of notice under section 148 of the 1961 Act was repelled by the Assessing Officer.

On the merits of the case, the Assessing Officer observed that the assessee has received a sum of Rs. 7.5 crores allegedly to compensate loss of the assessee as he was asked not to compete with the company to whom the shares of the assessee and his minor children's were sold. But the Assessing Officer was not satisfied with the clauses in the agreement filed by the assessee as there was no specific clause in the agreements as to what the assessee was doing earlier and also that it is not indicated as to what are the present activities of the company which purchased the shares. The Assessing Officer also observed that mere made to believe agreements were entered into by the assessee with the Pentamedia group concerns to enable the recipient of the money to avoid tax on the same and there was no specific restriction on the assessee to do professional activity parallel with the company. As per the Assessing Officer, this agreement was entered into without any basis to enable the assessee only to reduce the tax liability. The Assessing Officer also observed that the assessee is working as a director in the same company and it was not clear to the Assessing Officer as to the activities undertaken by the said company. The Assessing Officer also observed that there was no condition as to penalty to be levied in case the terms and conditions of the agreement are violated. Thus, as per the Assessing Officer these agreements are sham agreements which are not enforceable at law and the entire consideration received by the assessee and his minor child were held to be chargeable to tax as capital gains

on sale of shares which as per the Assessing Officer was camaflouged as non-compete fee. Thus, the Assessing Officer rejected the contentions of the assessee and income of the assessee was assessed as capital gains.

The second issue was with respect to the receipt of Rs. 4.25 crores which was claimed by the assessee to have been paid to the Indian Bank for clearing bank dues. The Assessing Officer observed from the details furnished by the assessee that the amount has not gone directly to the Indian Bank and amount was received by the assessee and thereafter it was utilised by the assessee for paying to the banker to discharge his liability and hence the same cannot be called as diversion of income by overriding title. The Assessing Officer observed that even if amount is paid directly to the banker but still said consideration is to be assessed to tax as capital gains. Thus, the Assessing Officer observed that these receipts by the assessee from the company cannot be said to be diverted by overriding title. It was observed by the Assessing Officer that there were some dues payable to the bank by one company, namely, "Aditya Leather Exports Private Limited" in which the assessee is a director and the bank has attached his shares of other companies also. The Assessing Officer observed that these dues are with reference to other companies and not in individual capacity of the assessee and hence there is no overriding title under which the assessee has not received the money.

The Assessing Officer also observed that the assessee has excluded a sum of Rs. 3 crores on the ground that the said amount has not been received. The Assessing Officer observed that this amount was considered by the assessee in his return of income filed under section 139(1) and this amount was due to the assessee as on March 31, 2001 and hence the entire amount is to be considered for computation of capital gains. But while computing the capital gains and tax payable by the assessee thereon, the Assessing Officer took the figure of Rs. 12 crores for computing capital gains on sale of shares instead of an amount of Rs. 15 crores which was total consideration as per the agreements entered into with the Pentamedia group of concerns. The aforesaid assessment was framed by the Assessing Officer vide assessment order dated December 31, 2008 passed under section 143(3) read with section 147 of the 1961 Act.

5 Aggrieved by an assessment framed by the Assessing Officer under section 143(3) read with section 147 of the 1961 Act, the assessee filed first appeal before the learned Commissioner of Income-tax (Appeals) raising both jurisdictional issue challenging the legality of reopening of the concluded assessment by invoking the provisions of section 147 of the 1961 Act as well raising challenge on the merits of the additions made by the

Assessing Officer. The learned Commissioner of Income-tax (Appeals) was, inter alia, pleased to dismiss the objections raised by the assessee on the jurisdictional ground as to the legality and the validity of reopening of the concluded assessment under section 147 of the 1961 Act by holding that the reopening of the concluded assessment by invoking the provisions of section 147 of the 1961 Act was validly initiated by the Assessing Officer under section 147 of the 1961 Act by holding as under :

> "5. I have carefully considered the facts of the case and the submissions of the learned authorised representative. I have also gone through the decisions and the circular relied on by the Assessing Officer and the learned authorised representative. In this case the return had only been processed under section 143(1) of the Act and no assessment order under section 143(3) was passed. Hence, the fact of the present case is different from the case of *CIT* v. *Kelvinator of India Ltd.* [2010] 320 ITR 561 (SC) where a regular order of assessment had been passed under section 143(3) on November 17, 1989 before issue of notice under section 148 on April 20, 1990. Intimation under section 143(1) is not an assessment. In similar circumstances, the hon'ble Supreme Court in the case of *Asst. CIT* v. *Rajesh Jhaveri Stock Brokers P. Ltd.* reported in [2007] 291 ITR 500 (SC) held that proceedings initiated under section 147 are valid. As intimation under section 143(1)(a) is not 'assessment', there is no question of treating reassessment in such a case as based on change of opinion. Since no decision had been taken at the first instance, there is no question of reviewing it based on change of opinion. Further, in the case of *CIT* v. *Sun Engineering Works Pvt. Ltd.* [1992] 198 ITR 297 (SC) the hon'ble Supreme Court has held that reassessment proceedings are for the benefit of the Revenue and are aimed at gathering the escaped income. The hon'ble Madras High Court in the case of *Madras Gymkhana Club* v. *Dy. CIT* [2010] 328 ITR 348 (Mad) has held the reopening to be valid under similar circumstances. In view of the above factual position and authoritative precedents, I am of the considered opinion that the reopening has been validly initiated. The ground is accordingly dismissed."

On the merits of the issue in appeal, the learned Commissioner of Income-tax (Appeals) accepted the contentions of the assessee that Rs. 7.5 crores was received by the assessee towards non-compete fee which is a capital receipt and is exempt from tax, by holding as under :

> "6.2 I have carefully considered the facts of the case and the submissions of the learned authorised representative. I have also gone

through the decisions relied on by the learned authorised representative. I have also perused the agreements for sale of shares, non-compete agreements and other details. The appellant was the promoter of the company, i.e., Kris Srikanth Sports Entertainment Pvt. Ltd. (KSEPL). This company was taken over by three companies of Pentamedia group by purchasing the shares of KSEPL. An agreement was entered into between appellant and the purchasers of shares whereby Sri K. Srikanth (the appellant) was not to engage himself in any competitive activity similar to that carried on by KSEPL for a period of 6 years. A sum of Rs. 7.5 crores was paid by the three buyer companies, as consideration for the above restrictive covenant. The appellant has claimed the compensation as a capital receipt exempt from taxation. There is no dispute regarding the fact that the appellant and the buyers are unrelated parties. Hence, the transaction entered at arm's length cannot be questioned. The agreements entered into between the appellant and the buyers are very clear regarding the purposes for which payments were made to the appellant. The relevant clause in the agreement is reproduced for reference and clarity.

'Whereas the party of the first part has assured the party of the second part that consequent on the purchase of one-third of the issued and subscribed share capital of the company by the party of the second part, the party of the first part shall not carry on either by himself or in association with any other person or persons or associate or involve directly or indirectly with any other company, firm or person in a business similar to that carried on by M/s. Kris Srikanth Sports Entertainment P. Ltd. for a period of 6 years. . .

That in consideration of the payment by the party of the second part to the party of the first part of the sum herein stated in the manner herein contained and of mutual covenants of the parties, the party of the first part hereby confirms and covenants with the party of the second part that he shall not for a period of six years from the date hereof carry on any business similar to that carried on by M/s. Kris Srikanth Sports Entertainment P. Ltd. either by himself or in association with any other person or persons nor shall he involved, or associate himself as proprietor, partner, director, consultant or advisor to any company, firm or other person carrying on or involved in a similar business.

That in consideration of the abovesaid covenant by the party of the first part, the party of the second part shall pay to the party of the

first part a sum of Rs. 2,50,00,000 (rupees two crores and fifty lakhs only)

The restrictive covenant of the party of the first part as herein contained shall ensure for a period of 6 years from the date hereof and shall cease on the expiry of the said period. . .'

6.2.1 It is clear from the reading of the above clauses that the compensation for restrictive non-compete covenant is a capital receipt as the income earning apparatus has been taken away from the appellant for a period of 6 years. It is to compensate the loss of income from sports media activities for 6 years that the appellant had received the impugned sum. The hon'ble Supreme Court in the case of *Gillanders Arbuthnot and Co. Ltd.* v. *CIT* [1964] 53 ITR 283 (SC) has held that compensation paid for agreeing to refrain from carrying on competitive business in the commodities ; in respect of which the agency was terminated, or for the loss of goodwill would, prima facie, be of the nature of capital receipt. The decision of the hon'ble Supreme Court in the case of *Guffic Chem. Pvt. Ltd. v.* CIT [2011] 332 ITR 602 (SC) also supports the case of the appellant. Non-compete fee was made specifically taxable by insertion of clause (va) in section 28 by the Finance Act, 2002 effective from April 1, 2003. Prior to the amendment, it was held to be not taxable where the non-compete fee related to a business as a whole, as for example decided in *CIT* v. *Rai Bahadur Jairam Valji* [1959] 35 ITR 148 (SC). In such cases, it would be a capital receipt. In a case, where there was an agreement for transfer of trade mark by the assessee-company to Ranbaxy, a pharmaceutical company with the assessee foregoing the right to carry on directly or indirectly the business hitherto carried on by it and the duration of the agreement was twenty years, it was held that it could not be treated as income of a revenue nature, and, therefore, the Supreme Court held it to be a capital receipt in *Guffic Chem. Pvt. Ltd.* v. *CIT* [2011] 332 ITR 602 (SC) reversing the decision of the Karnataka High Court to the contrary in Civil Appeal No. 2522, dated October 29, 2009. In the same common judgment, it also dealt with year another case in *CIT* v. *Mandalay Investment P. Ltd.* [2011] 332 ITR 602 (SC) wherein it was decided that the amount received for similar circumstances prior to the amendment could not be taxed upholding the decision of the Delhi High Court in I. T. A. No. 728 of 2009 dated July 29, 2009 to this effect. The facts of the appellant are covered by the above decisions. In view of the above factual and legal positions, the addition is deleted and the ground is allowed."

So far as the contentions of the assessee that Rs. 4.25 crores received by the assessee from the sale proceeds of shares is to be appropriated in discharge of liability through Indian Bank which was stated to be diversion by overriding title and hence the same cannot be brought to tax as contended by the appellant, was repelled by the learned Commissioner of Income-tax (Appeals) by holding as under :

> "7.3 I have carefully considered the facts of the case and the submissions of the learned authorised representative. I have also gone through the decision relied on by the learned authorised representative. I have also carefully perused the affidavit filed by Indian Bank, order of the Debt Recovery Tribunal in O. A. Nos. 1642/1998 and 1399/1998 dated February 23, 2001 and other details submitted by the appellant. From the facts on record, it is clear that the appellant was a guarantor in respect of the loan granted by Indian Bank to Aditya Leather Exports P. Ltd. (ALE). The borrower was unable to pay the dues to the bank on account of huge losses. The bank has a right to proceed against the guarantors if the borrower does not pay the loan. In the instant case, the bank on learning that the guarantor (appellant) was proposing to sell his securities without settling the dues of the bank, had filed an application before the Debt Recovery Tribunal at Chennai to grant interim injunction restraining the buyer from making payment to the appellant towards the sale of shares and to direct the buyer to pay the amount directly to the bank towards the loan outstanding. Subsequently, the bank entered into an out of court settlement whereby a sum of Rs. 4.25 cores from sale proceeds was to be paid to the bank.
>
> The appellant has claimed that the above amount of Rs. 4.25 crores should be allowed as deduction in computing the capital gain since it was an amount paid for removing the encumbrance on the sale of shares. I am unable to agree with the contentions of the appellant. In this case, the appellant as a guarantor of the loan was legally bound to repay the loan taken by the borrower in case the borrower was unable to pay back the amount. When the guarantor (appellant) wanted to sell the shares of KSEPL owned by him, the bank had filed an application before the Debt Recovery Tribunal only to have a right to receive the amount realised by way of sale so as to settle its dues. In my considered opinion, it will only be an application of income and not diversion of income by overriding charge. The decision of the hon'ble Supreme Court in the case of *CIT* v. *Sitaldas Tirathdas* [1961] 41 ITR 367 (SC) is relevant. It held that the true test for the

application of the rule of diversion of income by overriding charge is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, are there in every case, but it is the nature of obligation that is the decisive fact. There is difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of obligation cannot be said to be part of income of the assessee. Where by obligation the income is diverted before it reaches the assessee, it is deductible ; but where the amount is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another person of one's income, which has been received and since applied. The present case is a clear instance of application of money.

7.3.1 Further, the claim of the appellant that there were encumbrances in the property to be sold and therefore the amount paid was towards clearing these encumbrances, in my opinion, cannot be accepted. This was not the case of any encumbrance created on the property sold, the sale of which will necessarily presuppose clearing of those encumbrances. In fact, in this case there was no specific encumbrance ; on the said shares. Even, when there are specific encumbrances like that of a loan that has been obtained on the said shares, the clearances of the loan by way of sale of shares would only be an application of income that is received by way of sale of share and cannot be in any way said to be an expenditure incurred towards sale or improvement in the cost of the asset. The decision relied upon by the learned authorised representative in the case of *CIT* v. *Bradford Trading Co. Pvt. Ltd.* [2003] 261 ITR 222 (Mad) in my opinion, is not applicable to the facts of this case since the decision related to clearance of specific encumbrances on the assets sold. A suit was filed by one of the shareholders when the assessee-company transferred a building belonging to it. The hon'ble court held payment of Rs. 2 lakhs over and above return of share capital was deductible. The facts of the present case are totally different. Indian Bank was neither a shareholder of KSEPL nor it had any interest in KSEPL. Further, the application filed by the bank before the Debt Recovery Tribunal clearly shows that what is sought is only clearance of dues of the bank and not any restrain on sale of the shares. In fact, the bank could not have restrained the sale of shares as long as its interest was protected.

Therefore, in my considered opinion, the amount paid to Indian Bank towards settlement of its dues is only an application of income. Hence, the Assessing Officer has rightly made the addition which is upheld. Accordingly, this ground is dismissed."

6 Before we proceed further, it is to be stated that this order is being pronounced beyond 90 days from the date of hearing. The hearing of the appeals were concluded on January 29, 2020. There were extraordinary situation prevailing in the country owing to Covid 19 disease wherein the Government of India announced first National lockdown effective from March 25, 2020. There are further lockdowns announced from time to time by the GOI thereafter. The fourth lockdown is announced on May 17, 2020 by the GOI which will be effective from May 18, 2020 till May 31, 2020. The State Governments are also announcing their further stringent conditions for implementing these lockdown in their respective States. These lockdowns have crippled the normal functioning of the country. The order is to be pronounced within 90 days from the date of conclusion of hearing and this order is pronounced, much after the expiry of 90 days from the date of conclusion of hearing. Rule 34(5) of the Income-tax (Appellate Tribunal) Rules, 1963 will come into play. The co-ordinate Division Bench of the Income-tax Appellate Tribunal, Mumbai in *Dy. CIT v. JSW Ltd.* [2020] 79 ITR (Trib) 585 (Mumbai) (I. T. A. No. 6264/Mum/2018 vide orders dated May 14, 2020) has dealt with the delay in pronouncement of the orders by the Tribunal in these extraordinary period, by holding as under (page 591) :

"However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on January 7, 2020, this order thereon is being pronounced today on 14th day of May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income-tax (Appellate Tribunal) Rules, 1963, which deals with pronouncement of orders, provides as follows :

'(5) The pronouncement may be in any of the following manners :

(a) The Bench may pronounce the order immediately upon the conclusion of the hearing.

(b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.

(c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case

was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not *ordinarily* (emphasis[1] 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) herein 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[1]), by underlining, supplied by us now), all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment'. In the ruled so framed, as a result of these directions, the expression 'ordinarily' has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any 'extraordinary' circumstances.

Let us in this light revert to the prevailing situation in the country. On March 24, 2020, the hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income-tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a

1. Here printed in italics.

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. 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 *Black's Law Dictionary*, as 'an event or effect that can be neither anticipated nor controlled.' When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an 'ordinary' period.

In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time-limit for the pronouncement of the order. Law

is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act, 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of *Otters Club v. DIT(E)* [2017] 392 ITR 244 (Bom) the hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation the hon'ble Bombay High Court itself has, vide judgment dated April 15, 2020, held that directed 'while calculating the time for disposal of matters made time bound by this court, the period for which the order dated March 26, 2020 continues to operate shall be added and time shall stand extended accordingly'. The extraordinary steps taken suo motu by the hon'ble jurisdictional High Court and the hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time-limits are to remain in force. In our considered view, even without the word 'ordinarily', in the light of the above analysis of the legal position, the period during which lockout was in force is to excluded for the purpose of time-limits set out in rule 34(5) of the Income-tax (Appellate Tribunal) Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalised, but then, in our considered view, no such exercise was required to be carried out on the facts of this case."

We have also observed that the hon'ble Supreme Court has passed an order whereby in exercise of its powers under article 141/142 of the Constitution of India has extended limitation period in suo motu case , effective from March 15, 2020 by holding as under :

"To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective courts/tribunals across the country including this court, it is hereby ordered that a period of limitation in all such proceedings, irrespective

of the limitation prescribed under the general law or special laws whether condonable or not shall stand extended with effect from March 15, 2020 till further order/s to be passed by this court in the present proceedings."

The State of Tamil Nadu is also hit by Covid 19 disease as could be seen from the data of positive cases emerging in the State of Tamil Nadu. Thus, even if we exclude period of first national lockdown from March 25, 2020 to April 19, 2020, when offices were not allowed to be physically opened, the period with in which this order is now pronounced is within 90 days.

7 Both the assessee and the Revenue are aggrieved by the appellate order dated March 27, 2012 passed by the learned Commissioner of Income-tax (Appeals) who have come in appeal before the Tribunal and we shall take up the contentions of the assessee as well the Revenue after discussing the factual back ground of appeal filed by the assessee in I. T. A. No. 307/Chennai/2010 and I. T. A. No. 1016/Chennai/2012 for the assessment year 2001-02.

8 Now, we take up an appeal filed by the assessee in I. T. A. No. 307/Chennai/2010 for the assessment year 2001-02. The learned Commissioner of Income-tax on a perusal of the record observed that the Assessing Officer has stated in its assessment order dated December 31, 2008 that the entire sale consideration of Rs. 15 crores should be considered in the computation of capital gains and he has stated in his assessment order that the assessee has excluded a sum of Rs. 3 crores stating that the amount was not received and the assessee in his return of income filed under section 139(1) considered total consideration of Rs. 15 crores for capital gains and as on March 31, 2001, the amount was due to the assessee and hence the entire amount of Rs. 15 crores is to be considered for computation of income from capital gain. The learned Commissioner of Income-tax observed that however, while computing the sale value of each share, the Assessing Officer has adopted the gross sale consideration of Rs. 12 crores and divided the same by 375000 shares sold by the assessee and his minor sons. Thus, he has erroneously arrived at the sale price of each share of Rs. 320 instead of Rs. 400 per share (Rs. 15 crores/375000 shares), which led to invocation of the revisionary powers under section 263 by the learned Commissioner of Income-tax. The second issue on which the learned Commissioner of Income-tax invoked the revisionary powers under section 263 was with respect to the deduction allowed by the Assessing Officer under section 54F of the 1961 Act. The learned Commissioner of Income-tax observed that in computation of income filed by the assessee with the revised return of income, the assessee has claimed deduction under section

54F of the 1961 Act to the tune of Rs. 35,62,189 while the Assessing Officer has allowed deduction under section 54F of the 1961 Act to the tune of Rs. 43,69,613. It was also observed by the learned Commissioner of Income-tax that the Assessing Officer has failed to get facts of the investment and whether the assessee claim is in accordance with section 54F of the 1961 Act read with the proviso. The aforesaid reasons led to the invocation of revisionary powers by the learned Commissioner of Income-tax under section 263 of the 1961 Act by considering that the assessment order dated December 31, 2008 passed by the Assessing Officer under section 143(3) read with section 147 of the 1961 Act was erroneous so far as prejudicial to the interests of The Revenue, which led to issuance of notice dated October 13, 2009 issued by the learned Commissioner of Income-tax under section 263 of the 1961 Act. The assessee in response to the notice dated October 13, 2019 issued by the learned Commissioner of Income-tax under section 263 of the 1961 Act submitted in its reply vide letter dated November 5, 2009 that the assessee has not realised the sale consideration of Rs. 3 crores and hence the net realisation has been correctly taken in the workings of the assessment order passed by the Assessing Officer. It was submitted that when the return of income was originally filed under section 139(1) of the 1961 Act the assessee has assumed the possibility of realising Rs. 3 crores eventually but when the revised return of income was filed, it was certain that the said sum had become irrevocable and bad. Thus, the assessee submitted that the Assessing Officer has correctly taken net consideration of Rs. 12 crores instead of Rs. 15 crores. The learned Commissioner of Income-tax rejected the contentions of the assessee and observed that the Assessing Officer had already rejected contention of the assessee that the sale consideration is to be taken as only Rs. 12 crores instead of Rs. 15 crores, while framing assessment order dated December 31, 2008. Thus, the learned Commissioner of Income-tax observed that the Assessing Officer had rejected the contention of the assessee that sale consideration be adopted at Rs. 12 crores on account of bad debts being Rs. 3 crores and it is only by mistake the Assessing Officer adopted sale consideration of Rs. 12 crores instead of Rs. 15 crores which is purely a mistake on the part of the Assessing Officer and was blatantly erroneous so far as prejudicial to the interests of the Revenue and, therefore, directions were issued by the learned Commissioner of Income-tax to compute value of each share by taking total sale consideration of Rs. 15 crores and dividing the same by 375000 shares which gives value of Rs. 400 per share. Similarly for claiming deduction under section 54F, the assessee submitted that deduction was rightly allowed by the Assessing Officer and there is no

error in assessment order passed by the Assessing Officer. The learned Commissioner of Income-tax rejected contentions of the assessee as in view of the learned Commissioner of Income-tax, the assessee has claimed lower deduction of Rs. 35,62,189 under section 54F in the revised return of income as actual investment made in house property as also that the Assessing Officer has not verify as to whether conditions as prescribed under section 54F were fulfilled by the assessee or not. Thus, the learned Commissioner of Income-tax vide revisionary order dated January 22, 2010 passed under section 263 of the 1961 Act held that the assessment order dated December 31, 2008 passed by the Assessing Officer as erroneous so far as prejudicial to the interests of the Revenue. The assessee being aggrieved by the revisionary order dated January 22, 2010 passed by the learned Commissioner of Income-tax under section 263 of the 1961 Act has filed an appeal with the Tribunal in I. T. A. No. 307/Chennai/2010 for the assessment year 2001-02.

Further, vide appeal in I. T. A. No. 1016/Chennai/2012 for the assessment year 2001-02, the assessee has challenged consequential assessment order dated November 8, 2010 passed by the Assessing Officer under section 143(3) read with section 263 which assessment order was consequential to the revisionary order dated January 22, 2010 passed by the learned Commissioner of Income-tax under section 263 of the 1961 Act, vide assessment order dated November 8, 2010, wherein sale consideration for sale of shares was taken to be Rs. 15 crores as against Rs. 12 crores which was earlier erroneously adopted by the Assessing Officer while farming assessment under section143(3) read with section 147 of the 1961 Act but, however, the Assessing Officer while framing assessment order under section 143(3) read with section 263 of the 1961 Act allowed deduction under section 54F to the tune of Rs. 43,69,613. Thus, the second ground for invocation of section 263 of the 1961 Act by the learned Commissioner of Income-tax was held by the Assessing Officer to be in favour of the assessee while framing consequential assessment order under section 143(3) read with section 263 of the 1961 Act. The claim of the assessee that he has not received Rs. 3 crores and hence the same should be excluded from sale consideration was rejected by the Assessing Officer while passing consequential order under section 143(3) read with section 263 of the 1961 Act and hence this differential amount of Rs. 3 crores was also brought to tax by the Assessing Officer. The assessee being aggrieved by an assessment order dated November 8, 2010 passed by the Assessing Officer under section 143(3) read with section 263 of the 1961 Act filed first appeal with the learned Commissioner of Income-tax (Appeals) who rejected the

contentions of the assessee and adopted the gross sale consideration of Rs. 15 crores for computing capital gains and ground of the appeal raised by the assessee to that effect were dismissed by the learned Commissioner of Income-tax (Appeals), vide appellate order dated March 27, 2012 by holding as under :

"5. I have carefully considered the facts of the case and the submissions of the learned authorised representative. I have also gone through the order passed under section 143(3) read with section 147 dated December 31, 2008 and the order of the Commissioner of Income-tax under section 263 dated January 22, 2010. The Assessing Officer, in the order passed under section 143 read with section 147 dated December 31, 2008, has stated that the entire sale consideration of Rs. 15 crores should be considered in the computation of capital gains. He has stated as under :

'The assessee has excluded a sum of Rs. 3 crores stating that the amount has not been received. In fact, the assessee in the return of income filed under section 139(1) has considered for capital gain. As on March 31, 2001, the amount is due to the assessee. Hence, the entire amount has been considered for capital gain.'

However, while computing the sale value of each share he has adopted the total sale consideration at Rs. 12 crores only. The Commissioner of Income-tax-I, Chennai in his order under section 263 dated January 22, 2010 has discussed the facts narrated above and has held that it was mistake on the part of the Assessing Officer which was blatantly erroneous and prejudicial to the interests of the Revenue on the basis of his own decision in principle that the sale consideration was Rs. 15 crores. The Assessing Officer, in the order under section 143(3) read with section 263, has considered the submission of the assessee and held that the Assessing Officer has wrongly computed the value of shares by taking the total consideration at Rs. 12 crores instead of Rs. 15 crores. It is clear from the agreement of sale entered into by the appellant and his family members with three concerns of the Pentamedia group that the sale consideration was Rs. 15 crores. The agreements were made on November 27, 2000. The previous year relevant to the subject assessment year ended on March 31, 2001, i. e., only after four months from the date of agreement. The appellant has not brought on record any evidence or compelling circumstance which made him reduce the sale consideration by Rs.3 crores. Therefore, the Assessing Officer has rightly taken Rs. 15 crores as the total sale consideration. The appellant had a right to receive

Rs. 15 crores as per the agreement dated November 27, 2000. The agreement itself speaks that 'both parties, however agreed that their shareholders will have a lien over the said shares till such time as the payments are realised . . . The parties hereto agree that any dispute, difference or claim arising from out of this agreement including any difference in any opinion regarding interpretation of the terms of this agreement or the non-payment of sale consideration shall be referred to an arbitration consisting of a sole arbitrator to be named and appointed by the shareholder. . .' Nothing has been brought on record to show that the total consideration was disputed or was not due as at the end of the year. Under the Income-tax Act, the liability to pay income-tax arises on the accrual of the income. The appellant acquired the right to receive Rs. 15 crores on entering into the agreement on November 27, 2000 and, therefore, the income has accrued during the year. Hence, the Assessing Officer has rightly made the addition. The ground is accordingly dismissed."

The assessee being aggrieved by the consequential assessment order dated November 8, 2010 passed under section 143(3) read with section 263 of the 1961 Act against which appeal stood dismissed by the learned Commissioner of Income-tax (Appeals), has filed an appeal before the Tribunal which is listed in I. T. A. No. 1016/Chennai/2012 for the assessment year 2001-02.

9 Coming back, as we could see that all the issues in these four appeals revolves around taxability of gains arising from sale of share of the company "Kris Srikanth Sports Entertainment Private Limited" held by the assessee and his minor sons, to three entities belonging to the Pentamedia group of concerns and the alleged claim of the assessee that it entered into non-compete agreement with these purchasing entities and an amount of Rs. 7.50 crores was received towards non-compete fee by the assessee for not competing with these entities for a period of six years and the same could not be brought to tax for the impugned assessment year 2001-02 as amendment in section 28 of the 1961 Act wherein clause (va) was inserted by the Finance Act, 2002 with effect from April 1, 2003. Further, there is a claim of the assessee that income to the tune of Rs. 4.25 crores being allegedly diverted by overriding title to "Indian Bank" owing to bank loan availed of by a company, namely, "Aditya Leather Exports Private Limited" in which the assessee was a director and also a guarantor for the said loan which claim of deduction was repelled by the Revenue. Further, the assessee is also claiming that the assessee only received Rs. 12 crores under the agreement as against the stated consideration of Rs. 15 crores and an

amount of Rs. 3 crores was never realised by the assessee and hence the same could not be brought to tax. Thus, as could be seen all issues are integrated and interwoven and revolves around agreements entered into by assessee with respect to sale of shares held by him and his minor children in the company called "Kris Srikanth Sports Entertainment Private Limited" with companies belonging to the Pentamedia group concerns and simultaneous non-compete agreements entered into by the assessee with these entities, thus all these appeals were heard together and are adjudicated by this common order.

The learned counsel for the assessee opened the arguments before the Bench with respect to I. T. A. No. 1015/Chennai/2012 which is an assessee's appeal and submitted that ground No. 1 is general in nature and does not require separate adjudication. The learned Commissioner of Income-tax-Departmental representative did not raise any objection to the dismissal of ground No. 1 raised by the assessee in its appeal in I. T. A. No. 1015/ Chennai/2012 for the assessment year 2001-02 filed with the Tribunal. After hearing the contentions of both the parties and perusing material on record, ground No. 1 raised by the assessee in its appeal filed with the Tribunal stands dismissed as being general in nature which in our considered view does not requires separate adjudication. We order accordingly. 10

The learned counsel for the assessee submitted that in the aforesaid assessee's appeal in I. T. A. No. 1015/Chennai/2012 for the assessment year 2001-02, ground Nos. 2-5 concerns with challenge to reopening of the concluded assessment by the Assessing Officer by invoking the provisions of section 147 read with section 148 of the Act. It was submitted by the learned counsel for the assessee that the original return of income was filed by the assessee with the Revenue on March 28, 2002 along with the enclosures. The learned counsel for the assessee drew our attention to the acknowledgment of the return of income along with the enclosures which is stated to have been filed by the assessee with the Revenue, which are placed on record at page Nos. 1-17/paper book. It was submitted that the return of income was processed by the Assessing Officer under section 143(1) of the Act, vide intimation dated March 26, 2003, wherein an amount of refund of Rs. 94,24,254 was found to be payable to the assessee. The said intimation issued by the Assessing Officer under section 143(1) of the 1961 Act is placed at paper book at page No. 18. It was submitted by the learned counsel for the assessee that the return of income was manually processed under section 143(1) of the 1961 Act as it was for a period prior to when e-processing of return of income was started by the

Revenue. It was further submitted by the learned counsel for the assessee that reopening of the concluded assessment under section 147 of the 1961 Act was done by the Assessing Officer within four years from the end of the assessment year as notice under section 148 of the 1961 Act dated March 30, 2006 was issued by the Assessing Officer to the assessee which notice was issued within four years from the end of assessment. The said notice issued by the Assessing Officer under section 148 of the 1961 Act to the assessee is placed in the paper book at page No. 19. It was further submitted by learned counsel for the assessee that in response to the aforesaid notice issued by the Assessing Officer under section 148 of the 1961 Act, the assessee filed letter on June 12, 2006 with the Assessing Officer objecting to reopening of the concluded assessment under section 147 of the 1961 Act. The said letter filed by the assessee with the Assessing Officer on June 12, 2006 is placed in paper book at page 20. The Assessing Officer issued letter dated August 10, 2006 asking the assessee about objections to chargeability to tax of Rs. 7.50 crores claimed by the assessee to be consideration for restrictive covenants, which is placed in the paper book at page 21. It was also submitted by the learned counsel for the assessee that objections to reopening of the concluded assessment by invoking the provisions of section 147 of the 1961 Act and also chargeability to tax of Rs. 7.50 crores on the merits having been received as non-compete fee which as per the assessee is capital receipt not exigible to tax were filed on September 20, 2006, which are placed in page No. 22/paper book. It was submitted by the learned counsel for the assessee that the Assessing Officer issued fresh notice dated October 18, 2006 asking the assessee to file the relevant order of garnishee attachment and other material with reference to the claim made by the assessee for excluding Rs. 4.25 crores being paid to Indian Bank. The said notice dated October 18, 2016 is placed in the paper book/page 23. It was submitted by the learned counsel for the assessee that the assessee objected to reopening of the concluded assessment under section 147, vide letter dated November 4, 2006, on the grounds that the assessee has made all disclosures in the original return of income filed before the Revenue before regular assessment was completed, which reply dated November 4, 2006 is placed in paper books at page 24. The Assessing Officer issued two further letters show causing the assessee as to why an amount of Rs. 7.50 crores received as consideration for restrictive covenants be not treated as income chargeable to tax, the said notices are placed in paper book/pages 25 and 26. It was submitted by the learned counsel for the assessee that the assessee filed letter dated December 20, 2016 with the Assessing Officer submitting that the return of income filed

under section 139 may be treated as return of income filed in pursuance to the notice under section 148 of the 1961 Act subject to permitting the assessee to file a revised return of income before the assessment is completed and after knowing the reasons for reopening of the concluded assessment which led to issuance of notice under section 148 of the 1961 Act. The assessee's counsel claimed that the assessee also asked the Assessing Officer vide letter dated December 20, 2006 to furnish reasons for reopening of the concluded assessment under section 147 of the 1961 Act. The said letter dated December 20, 2006 is filed in the paper book at page 27. It was submitted by the learned counsel for the assessee that the assessee filed a writ petition before the hon'ble Madras High Court and the hon'ble Madras High Court was pleased to stay the proceedings under section 147 of the Act invoked by the Revenue for a period of two weeks by order in M. P. No. 1 of 2006 in W. P. No. 49683 of 2006, vide interim orders dated December 21, 2006. It was submitted by the learned counsel for the assessee that thereafter, vide interim order dated January 8, 2007, the interim order earlier granted by the hon'ble Madras High Court was further extended. Thereafter, vide order dated December 14, 2007, the hon'ble Madras High Court was pleased to observe as under :

> "2. What is challenged in the writ petition is the notice issued under section 147 of the Income-tax Act, 1961. The petitioner has already filed a letter dated December 20, 2006 stating that the return filed under section 139 of the Act may itself by treated as one filed under section 148 of the Act for the present.
>
> 3. Therefore, suffice is to permit the petitioner to confirm whether the return filed under section 139 of the Act is the return proposed to be submitted to the impugned notice or the petitioner proposed to submit a fresh return within a period of eight weeks from today. On completion of eight weeks, the respondents are permitted to proceed with the assessment proceedings. However, the final decision shall be given effect to subject to the result in the above writ petition."

The aforesaid order dated December 14, 2007 passed by the hon'ble Madras High Court is placed in paper book/pages 32-33. The learned counsel for the assessee submitted that the assessee exercised its right conferred by the hon'ble Madras High Court and submitted a fresh return of income with the Revenue without prejudice to his rights in the above writ petition, vide letter dated February 7, 2008, wherein, gross total income was declared to the tune of Rs. 20,42,510 and income claimed to be an exempt income was to the tune of Rs. 12,41,65,190, as against the earlier claimed exempt income to the tune of Rs. 11,98,48,643. The learned

counsel for the assessee submitted that the said return of income filed on February 8, 2008 is placed in the paper book at page Nos. 35 to 57, along with the enclosures filed by the assessee with the Assessing Officer. The learned counsel for the assessee submitted that reasons for reopening of the concluded assessment under section 147 of the 1961 Act were furnished by the Assessing Officer vide letter dated December 26, 2008, which is placed in the paper book volume III at page 5. It was submitted by the learned counsel for the assessee that objections were filed by the assessee on December 30, 2008 to reopening of the concluded assessment with the Assessing Officer which are placed in page numbers 6-8/paper book volume III. It was brought to the notice of the Bench that the hon'ble Madras High Court has dismissed the writ petition filed by assessee in W. P. No. 49683 of 2006 and M. P. No. 1 of 2006 vide orders dated January 23, 2019, with the following observations :

> "4. This apart, the final assessment order passed by the Assessing Officer was taken by way of an appeal to the appellate authority and thereafter, to the Income-tax Appellate Tribunal and the said appeal is now pending adjudication.
>
> 5. Under these circumstances, all the grounds raised in the present writ petition as well as the additional grounds, if any shall be raised before the Appellate Tribunal by the writ petitioner by producing documents or other materials.
>
> 6. With the above liberty, the writ petition stands dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is also dismissed."

The learned counsel for the assessee submitted that the Assessing Officer framed reassessment under section 143(3) read with section 147, vide orders dated December 31, 2008. It was submitted by the learned counsel for the assessee that the company whose shares were transferred was engaged in coaching of cricket. It was also explained by the learned counsel for the assessee that the total sale consideration as stated in the agreements was to the tune of Rs. 15 crores out of which consideration for restricted covenant was to the tune of Rs. 7.5 crores. It was also submitted by the learned counsel for the assessee that Rs. 4.25 crores was paid by the assessee to 'Indian Bank' to clear bank liabilities as there was an overriding garnishee attachment. It was also submitted that the assessee only received Rs. 12 crores out of Rs. 15 crores stated to be the total agreed amount payable by three entities of the Pentamedia group of concerns with respect to transfer of shares and towards restrictive covenants and an balance amount of Rs. 3 crores was never received by the assessee. It was submitted by the

learned counsel for the assessee that notice was issued by the Assessing Officer under section 148 of the 1961 Act on March 30, 2006 which was served on the assessee on April 2, 2006. It was submitted that at that time the old provisions of section 143(1)(a) of the 1961 Act were prevalent and no adjustment could have been made in 2002. There was a failure on the part of the Assessing Officer to issue notice under section 143(2) of the 1961 Act within stipulated time prescribed under law and there was no fresh incriminating tangible material available with the Assessing Officer to reopen the concluded assessment by invoking the provisions of section 147 of the 1961 Act and hence no reopening of the concluded assessment could have been made by the Assessing Officer within the provisions of section 147/148 of the 1961 Act. It was submitted that even to reopen concluded assessment within four years from the end of the assessment year, the Assessing Officer should have in his possession tangible incriminating material which led to formation of belief that income of the assessee had escaped assessment necessitating invocation of the provisions of section 147 of the 1961 Act. Our attention was drawn to the appellate order dated March 27, 2012 passed by the learned Commissioner of Income-tax (Appeals) and it was submitted that there was no fresh tangible incriminating material available before the Assessing Officer to reopen the concluded assessment within 4 years. It was submitted that reasons recorded by the Assessing Officer for reopening of the concluded assessment are silent and our attention was drawn to page No. 5 of the paper book volume III, wherein, reasons for reopening of the concluded assessment were recorded. It was submitted that dispute is with respect to non-compete fee which was treated by the Assessing Officer as part of sale consideration of shares and accordingly brought to tax. The reliance was placed by the learned counsel for the assessee on the decision of the hon'ble Supreme Court in the case of *Guffic Chem. Pvt. Ltd.* v. *CIT* [2011] 332 ITR 602 (SC). The learned counsel for the assessee relied upon the decision of the hon'ble Delhi High Court in the case of *CIT* v. *Orient Craft Ltd.* reported in [2013] 354 ITR 536 (Delhi) and submitted that reopening of the concluded assessment under section 147 of the 1961 Act was bad in law. The said decision is placed in the paper book/volume II at pages 5-13. The assessee also relied upon the decision of the hon'ble Madras High Court in the case of *Tanmac India* v. *Dy. CIT* reported in [2017] 78 taxmann.com 155 (Mad). It was submitted by the learned counsel for the assessee that there should be reasons to believe that the income of the assessee has escaped assessment and that there should be fresh tangible incriminating material available with the Assessing Officer before reopening of the

concluded assessment by invoking the provisions of section 147 of the 1961 Act. It was submitted by the learned counsel for the assessee that *Explanation 2* to section 147 creates a deeming fiction as to escapement of income wherein, inter alia, it provides that in case return of income is filed but no assessment is framed, then in that case if the assessee has understated its income or has claimed excessive loss, deduction, relief or allowance, then it is deemed that income of the assessee has escaped assessment. The assessee's counsel submitted that there was no fresh tangible material before the Assessing Officer to reopen the concluded assessment. The assessee's counsel submitted that time-limit for invoking the provisions of section 143(2) of the 1961 Act for framing scrutiny assessment under section 143(3) against the original return of income filed by the assessee, has expired and now the time-limit cannot be extended by adopting the indirect route by invoking the provisions of section 147 of the 1961 Act relying on the decision of the hon'ble Delhi High Court in the case of *Orient Craft* (cited supra). The assessee also relied upon the decision of the hon'ble Madras High Court in the case of *Tenzing Match Works* v. *Dy. CIT* (TCA No. 702 of 2009, vide judgment dated July 11, 2019 [2019] 419 ITR 338 (Mad)). The assessee relied upon decision in the case of *Jayaram Paper Mills Ltd.* v. *CIT* reported in [2010] 321 ITR 56 (Mad). It was submitted by the learned counsel for the assessee that there was lack of fresh information before the Assessing Officer as also there was lack of application of mind by the Assessing Officer. Our attention was drawn to page number 18/paper book 1 wherein intimation dated March 26, 2003 issued by the Assessing Officer under section 143(1) of the 1961 Act for the assessment year 2001-02 is placed, wherein the Assessing Officer has undertaken a manual processing of return of income. It was submitted by the learned counsel for the assessee that refund of Rs. 94,24,254 was granted by the Department while processing return of income under section 143(1) of the 1961 Act. It was submitted by the learned counsel for the assessee that there was clearly an application of mind by the Assessing Officer while granting refund to the assessee. It was submitted by the learned counsel for the assessee that notice under section 143(2) was not issued to the assessee by the Assessing Officer against original return of income filed by the assessee and clearly there is a change of opinion by the Assessing Officer, as the Assessing Officer changed his opinion by invoking the provisions of section 147 of the Act. The learned counsel for the assessee submitted that the Assessing Officer made roving enquiries to fortify his assumption of jurisdiction that he has reasons to belief that income has escaped assessment. It was submitted by the learned counsel for the

assessee that original return of income was filed by assessee in time. It was submitted by the learned counsel for the assessee that the Assessing Officer asked for copies of agreement to reopen concluded assessment which clearly leads to one and only one conclusion that the Assessing Officer made roving enquiries to reopen concluded assessment, which is not permissible. Our attention was also drawn to page No. 3 of the paper book volume III, wherein, the assessee has claimed some expenses in connection with the sale of the shares. The total sale consideration as per agreement was Rs. 15 crores, out of which Rs. 3 crores were never received by the assessee. Our attention was also drawn to page No. 2 of the paper book volume III, wherein, reconciliation between the original return and the revised return of income filed with the Revenue, is placed. It was submitted that the return of income under section 148 was filed in February, 2008 and the assessment was completed on December 31, 2008. It was submitted that no fresh tangible incriminating evidence were available with the Assessing Officer and the reopening of concluded assessment was done wrongly wherein roving enquiries were made by the Assessing Officer to justify reopening of the concluded assessment by invoking the provisions of section 147 and there was clearly a change of opinion by the Assessing Officer. It was submitted by the learned counsel for the assessee that the original return of income was processed under section 143(1) of the 1961 Act and manual processing of return of income was done by the Assessing Officer and there was an application of mind by the Assessing Officer while initially processing return of income under section 143(1) of the 1961 Act. Our attention was also drawn to the decision of the hon'ble Madras High Court in *CIT* v. *S and S Power Switchgear Ltd.* [2018] 92 taxmann.com 429 (Mad). It was submitted by the learned counsel for the assessee that the assessee participated in proceedings to protect its interest and it was submitted the provisions of section 292BB of the 1961 Act will not come to rescue of the Department. It was submitted by the learned counsel for the assessee that the reasons recorded for reopening of the concluded assessment were furnished by the Assessing Officer to the assessee on December 26, 2008 and objections were filed by the assessee on December 30, 2008 . It was submitted that the assessment was framed by the Assessing Officer under section 143(3) read with section 147 of the 1961 Act on December 31, 2008. It was submitted that it is not known to the assessee as to when the assessee asked the Assessing Officer to furnish reasons for reopening of the concluded assessment under section 147 of the 1961 Act. It was submitted that revised return of income was filed by the assessee on February 8, 2008.

On the merits of the case, it was submitted by the learned counsel of the assessee that ground Nos. 12-14 are general in nature, which need to be dismissed as being general in nature. The learned Commissioner of Income-tax-Departmental representative did not raise any objections to the dismissal of ground Nos. 12-14 raised by the assessee in its appeal filed with the Tribunal, being general in nature. After hearing both the parties, ground Nos. 12-14 raised by the assessee in its appeal filed with the Tribunal are dismissed as being general in nature. We order accordingly.

It was submitted that ground Nos. 6-11 raised by the assessee in its appeal filed with the Tribunal deals with merits of the issue in appeal. It was submitted by the learned counsel for the assessee that payments were made to "Indian Bank" to the tune of Rs. 4.25 crores to settle loan and lien was created on the shares of "Kris Srikanth Sports Entertainment Private Limited" for a loan taken by "Aditya Leather Exports Private Ltd." It was submitted that the assessee was the guarantor for loan taken by "Aditya Leather Exports Private Limited" and there was a lien on the shares of "Kris Srikanth Sports Entertainment Private Limited". Our attention was drawn to para Nos. 7-7.2 of the appellate order passed by the learned Commissioner of Income-tax (Appeals) and it was submitted that the learned Commissioner of Income-tax (Appeals) held that it is application of income and not diversion of income by overriding title. It was submitted by the learned counsel for the assessee that these expenses were incurred in connection with the transfer of shares. The learned counsel for the assessee relied upon the decision of the hon'ble Madras High Court in the case of *CIT* v. *Bradford Trading Co. Pvt. Ltd.* reported in [2003] 261 ITR 222 (Mad). It was submitted that here was an impediment to transfer of shares of "Kris Srikanth Sports Entertainment Private Limited" and the assessee paid an amount of Rs. 4.25 crores to remove that impediment and hence, it is a diversion of income by overriding title. The learned counsel for the assessee relied upon the decision of the hon'ble Supreme Court in the case of *Dy. CIT* v. *T. Jayachandran* reported in [2018] 406 ITR 1 (SC) and submitted that only real income of the assessee can be brought to tax and this amount of Rs. 4.25 crores has to be treated as an expenditure under section 48(1) of the 1961 Act and is not taxable and it was submitted that it was rightly excluded by the assessee while computing income of the assessee. It was submitted that the Assessing Officer did not consider submissions of the assessee while deciding whether Rs. 4.25 crores was expenses under section 48(1) of the 1961 Act . Our attention was drawn by the learned counsel for the assessee to the order passed by the learned Debt Recovery Tribunal in O. A. No. 1642/1998 and O. A. No. 1399/1998

dated February 23, 2001, which is placed in the paper book at page Nos. 125-132. It was also explained by the learned counsel for the assessee that an amount of Rs. 4.25 crores never reached the assessee and hence the same cannot be brought to tax.

The learned Commissioner of Income-tax-Departmental representative in rebuttal submitted that the assessee's concluded assessment was reopened by invocation of the provisions of section 147/148 of the 1961 Act. It was submitted by the learned Commissioner of income-tax Departmental representative that income was originally filed on March 28, 2002 which was beyond the due date prescribed for filing of the return of income under section 139(1) of the Act as due date for filing of return of income was July 31, 2001 and hence the return of income was filed belatedly beyond the time prescribed under section 139(1) of the 1961 Act. It was submitted that the return of income was initially processed under section 143(1) of the 1961 Act. It was submitted by the learned Commissioner of Income-tax-Departmental representative that enclosures were claimed to have been filed along with the return of income and it was submitted that form No. 30 was filed along with return of income and the assessee sought refund from the Department for which form number 30 was enclosed with the return of income. It was submitted that the return of income was initially processed under section 143(1) of the 1961 Act. Our attention was drawn by the learned Commissioner of Income-tax-Departmental representative to the list of enclosures which are claimed to have been filed by the assessee along with the return of income which are at page Nos. 4-17 of the paper book. It was submitted that at page number 4 is the list of enclosures which were claimed to have been filed by the assessee along with the return of income. Our attention was drawn to page Nos. 5-7 of the paper book and it was submitted that this is the statement of income of the assessee. It was submitted by the learned Commissioner of Income-tax-Departmental representative that page No. 15 is not signed by the assessee nor page No. 15 is referred to in the list of documents attached with the return of income. It was submitted that the assessee did not furnish any details of the exempt income along with the return of income and the Assessing Officer did not had details of exempt income available with it as claimed to have been filed along with the return of income filed by the assessee with the Revenue. It was also submitted by the learned Commissioner of Income-tax-Departmental representative that in this document at S. No. 15 of the paper book there is a mention about the garnishee attachment by "Indian Bank", and if this document at Sl. No. 15/paper book is excluded which is a suspect document, the Assessing Officer did not had

any information about "Indian Bank" overriding the garnishee attachment. It was submitted by the learned Commissioner of Income-tax-Departmental representative that originally assessment was framed under section 143(1)(a) of the 1961 Act. Thus, in a nutshell it was submitted by the learned Commissioner of Income-tax-Departmental representative that this document number 15 is a dubious/suspect document which is planted by the assessee subsequently and the Assessing Officer had rightly invoked the provisions of section 147 of the 1961 Act. The assessment was originally not framed under section 143(3) of the 1961 Act but the return of income was processed under section 143(1)(a) of the 1961 Act and the Assessing Officer did not had any evidence of two claims of exemption made by the assessee in the return of income. The notice under section 143(2) of the 1961 Act was not originally issued and the return of income was manually processed by invoking the provisions of section 143(1) of the 1961 Act. It was submitted that the Department has all the right to invoke the provisions of section 147 of the 1961 Act. The learned Commissioner of Income-tax-Departmental representative relied upon the decision of the hon'ble Delhi High Court in the case of *CIT* v. *Orient Craft Ltd.* [2013] 354 ITR 536 (Delhi) and also the decision of the hon'ble Supreme Court in the case of *Asst. CIT* v. *Rajesh Jhaveri Stock Brokers P. Ltd.* [2007] 291 ITR 500 (SC). It was submitted by the learned Commissioner of Income-tax-Departmental representative that the Assessing Officer was required to record reasons for reopening of the concluded assessment which were duly recorded by the Assessing Officer. It was submitted by the learned Commissioner of Income-tax-Departmental representative that the Assessing Officer was having reasons to believe that the income of the assessee has escaped income. It was submitted by the learned Commissioner of Income-tax-Departmental representative that the Assessing Officer was having cogent material to come to belief that the income of the assessee has escaped assessment. It was submitted by the learned Commissioner of Income-tax-Departmental representative that merely because notice under section 143(2) of the 1961 Act was not issued and regular scrutiny assessment was not framed will not preclude the Assessing Officer from proceeding under section 147/148 of the 1961 Act. It was submitted by the learned Commissioner of Income-tax-Departmental representative that the return of income was filed by the assessee on March 28, 2002 and time-limit for issuing notice under section 143(2) was 12 months from the end of the month in which return of income was filed by the assessee. The learned Commissioner of Income-tax-Departmental representative relied upon the decision of the hon'ble Supreme Court in the case of *CIT* v. *Kelvinator of*

India Ltd. [2010] 320 ITR 561 (SC) and submitted that the rigours of section 147 was rightly applied by the Assessing Officer. It was submitted by the learned Commissioner of Income-tax-Departmental representative that there were tangible material before the Assessing Officer to come to the conclusion that the income of the assessee has escaped assessment and the reasons for reopening of the concluded assessment were having a live link with the formation of belief that the income of the assessee has escaped assessment. The learned Commissioner of Income-tax-Departmental representative relied upon decision of the hon'ble Supreme Court in the case of *Rajesh Javeri Stock Brokers P. Ltd.* (supra). It was submitted by the learned Commissioner of Income-tax-Departmental representative that in the case of the judgment of the hon'ble Delhi High Court in the case of *CIT v. Orient Craft Ltd.* (supra), only tangible material is required and it is not necessary that there should be a fresh material for assuming the jurisdiction under section 147 of the Act. Our attention was drawn to para 18 of the judgment of the hon'ble Supreme Court in the case of *Rajesh Javeri Stock Brokers P. Ltd.* (supra). It was submitted by the learned Commissioner of Income-tax-Departmental representative that failure to take steps under section 143(2) will not make the Assessing Officer remediless under section 147/148 of the 1961 Act. The learned Commissioner of Income-tax-Departmental representative relied upon the decision of the hon'ble Supreme Court in the case of *CIT* v. *P. V. S. Beedies P. Ltd.* reported in [1999] 237 ITR 13 (SC) and it was submitted that even objections raised by the internal audit party could be the basis for reopening of the assessment under section 147/148 of the 1961 Act. It was submitted by the learned Commissioner of Income-tax-Departmental representative that the assessee has not furnished full and true particulars in the return of income filed by the assessee. Our attention was drawn by the learned Commissioner of Income-tax-Departmental representative to page No. 15 volume 1 of the paper book and it was submitted that the assessee has not furnished full and true particulars before the Assessing Officer. The learned Commissioner of Income-tax-Departmental representative also relied upon decision of the hon'ble Supreme Court in the case of *Girilal and Co.* v. *ITO* reported in [2016] 387 ITR 122 (SC). It was submitted by the learned Commissioner of Income-tax-Departmental representative that the assessee has furnished information only after the hon'ble High Court allowed the proceedings under section 147 of the 1961 Act to go ahead. Our attention was drawn by the learned Commissioner of Income-tax-Departmental representative to page No. 32 of the paper book, wherein the decision of the hon'ble Madras High Court is placed. Our attention was also drawn to

page No. 27 of the paper book wherein the assessee has asked for reasons recorded for issuance of notice under section 148 of the Act, vide communication dated December 20, 2006. It was submitted that a fresh return of income was filed by the assessee under section 148 of the Act on February 8, 2008. Our attention was drawn to page No. 35 of the paper book, wherein the revised return of income under section 148 is placed, filed on February 8, 2008. It was submitted that in the original return of income, exemptions were claimed by the assessee to the tune of Rs. 11.98 crores, while in the revised return of income, exemptions were claimed to the tune of Rs. 12.41 crores. Our attention was drawn to page No. 36 of the paper book, wherein the details of exempt income as claimed by the assessee in the notes to the return of income filed on February 8, 2008 are placed. It was submitted that this information was not placed before the Assessing Officer when the original return of income was filed and the Assessing Officer had rightly brought to tax the income claimed as exempt on the grounds of restrictive covenants and also on account of garnishee payments to the bank. Our attention was drawn to page No. 4 of the reassessment order passed by the Assessing Officer. It was submitted that the total consideration in the agreement was Rs. 15 crores while it is claimed by the assessee that they had only received Rs. 12 crores. It was submitted that the assessee received Rs. 4.25 crores and then paid to "Indian Bank" to clear the loan taken by "Aditya Leather Exports Private Limited" and there was no overriding garnishee attachment which was rightly rejected by the Assessing Officer. The learned Commissioner of Income-tax-Departmental representative relied upon the decision of the hon'ble Supreme Court in the case of *Rajesh Javeri Stock Brokers P. Ltd.* (supra). It was submitted that there was no formation of opinion while processing of the return of income under section 143(1) of the Act and hence there is no change of opinion merely because notice under section 143(2) of the 1961 Act was not issued to the assessee while processing the original return of income, which cannot preclude the Assessing Officer to reopen the assessment under section 147 of the Act. Our attention was drawn by the learned Commissioner of Income-tax-Departmental representative to page No. 5 of the paper book/volume III, where the reasons for reopening of the concluded assessment were recorded. It was submitted that the original return of income was filed and thereafter the revised return of income was filed, which is different from the original return of income filed by the assessee. Our attention was drawn to page No. 2 of the paper book III wherein the reconciliation statement reconciling both the return of income(s) are filed. It was submitted that the assessee was only holding 125 equity shares in

the company, namely, "Kris Srikanth Sports Entertainment Private Limited", while majority of shares are held by other shareholders which mainly consisted of minor children of the assessee whose income were clubbed with the income of the assessee as per the provisions of the 1961 Act. Our attention was drawn to page No. 42 of the paper book and page No. 104 of the paper book. Our attention was drawn by the learned Commissioner of Income-tax-Departmental representative to the decision of the hon'ble Supreme Court in the case of *Rajesh Javeri Stock Brokers P. Ltd.* (supra) para No. 18. Our attention was also drawn to *Explanation 1* to section 147 and *Explanation 1(b)* to section 147 of the 1961 Act. It was submitted that if the income is assessed under section 143(1)(a), then *Explanation 2(c)* to section 147 will come into play and only tangible material is required to reopen the concluded assessment and there is no requirement of having a fresh material to reopen the concluded assessment. It was submitted that if audit objections is based on the factual errors, then it can be a valid ground for reopening of the concluded assessment under section 147 of the 1961 Act. Reliance was placed by the learned Commissioner of Income-tax-Departmental representative on the decision of the hon'ble Supreme Court in the case of *CIT* v. *P. V. S. Beedies Pvt. Ltd.* [1999] 237 ITR 13 (SC). Thus, the learned Commissioner of Income-tax-Departmental representative would contend that the factual error was brought to the notice of the Assessing Officer and hence the reopening of the concluded assessment by invoking the provisions of section 147 is justified by relying on the decision of the hon'ble Supreme Court in the case of *Rajesh Javeri Stock Brokers P. Ltd.* (supra), para 18 and it was submitted by the learned Commissioner of Income-tax-Departmental representative that even in the cases covered under section 143(1) wherein no assessment is framed under section 143(3) of the 1961 Act, if the ingredient of section 147 are fulfilled, reopening of the concluded assessment under section 147 of the 1961 Act is justified. It was submitted that under assessment of income/excessive loss deduction/ relief can lead to the invocation of section 147 of the Act. The learned Commissioner of Income-tax-Departmental representative submitted that there has to be a live link to form a belief that income of the assessee has escaped assessment which would justify the reopening of the concluded assessment under section 147 of the 1961 Act. It was submitted that any material which would lead to forming of a belief that the income of the assessee is underassessed or excessive loss was claimed or excessive deduction/relief was claimed by the taxpayer would be sufficient to invoke the provisions of section 147 of the 1961 Act. Our attention was drawn by the learned Commissioner of Income-tax-Departmental representative to para

Nos. 16 and 17 of the decision of the hon'ble Supreme Court in the case of *Rajesh Javeri Stock Brokers P. Ltd.* (supra) and it was submitted that in the instant case the proviso to section 147 is not applicable as no scrutiny assessment was framed under section 143(3) of the 1961 Act. It was submitted that intimation under section 143(1) is not assessment and the only requirement is that reasons are to be recorded for reopening of the concluded assessment and then section 147 can be invoked. It was submitted by the learned Commissioner of Income-tax-Departmental representative that the factual error can be pointed out by anybody and if there is a live link with the income escaping assessment and reasons to believe, section 147 can be invoked. Reliance was placed by the learned Commissioner of Income-tax-Departmental representative on the decision of the hon'ble Supreme Court in the case of *CIT v. P. V. S. Beedies P. Ltd.* (supra). The reliance was also placed by the learned Commissioner of Income-tax-Departmental representative on the decision of the hon'ble Supreme Court in the case of *Girilal and Co.* v. *ITO* reported in [2016] 387 ITR 122 (SC) and also upon the decision of the hon'ble Madras High Court in the case of *Smt. A. Sridevi* v. *ITO* reported in [2018] 409 ITR 502 (Mad). The learned Commissioner of Income-tax-Departmental representative would also rely on the decision of the hon'ble Madras High Court in the case of *Jayaram Paper Mills Ltd.* v. *CIT* reported in [2010] 321 ITR 56 (Mad). It was submitted by the learned Commissioner of Income-tax-Departmental representative that garnishee payments to "Indian Bank" is not connected with earning of capital gains and disclosure made by the assessee was not true and correct. The learned Commissioner of Income-tax-Departmental representative relied upon the decision of the hon'ble Madras High Court in the case of *CIT* v. *Ideal Garden Complex P. Ltd.* reported in [2012] 340 ITR 609 (Mad) and also the decision of the hon'ble Supreme Court in the case of *Honda Siel Power Products Ltd.* v. *Dy. CIT* reported in [2012] 340 ITR 64 (SC). The learned Commissioner of Income-tax-Departmental representative would also rely on the decision of the hon'ble Bombay High Court in the case of *Hinduja Foundaiton* v. *ITO* (W. P. No. 2866 of 2018, vide order dated February 15, 2019). The learned Commissioner of Income-tax-Departmental representative also relied upon the decision of the hon'ble Delhi High Court in the case of *Consolidated Photo and Finvest* v. *Asst. CIT* reported in [2006] 281 ITR 394 (Delhi). The learned Commissioner of Income-tax-Departmental representative summarised his contention as to the validity of reopening of the concluded assessment, as under :

(a) The assessee has not furnished any material before the Assessing Officer, wherein the Assessing Officer could come to know

whether the assessee has received non-compete fees or garnishee payments were made by the assessee. Therefore, he relied upon the decision of the hon'ble Supreme Court in the case of *Rajesh Javeri Stock Brokers P. Ltd.* (supra) and *Calcutta Discount Co. Ltd.* v. *ITO* reported in [1961] 41 ITR 191 (SC) and submitted that the key ingredients for invoking the provisions of section 147 are fulfilled in the instant case and hence reopening of the concluded assessment be upheld.

(b) It was also submitted by the learned Commissioner of Income-tax-Departmental representative that the material with the Assessing Officer was sufficient to reopen the concluded assessment under section 147 of the 1961 Act. The learned Commissioner of Income-tax-Departmental representative relied upon the decision of the hon'ble Delhi High Court in the case of *CIT* v. *Orient Craft Ltd.* reported in [2013] 354 ITR 536 (Delhi) and submitted that there is a requirement of having tangible material to come to the conclusion that income of the assessee has escaped assessment and there is no requirement of having fresh material to reopen the concluded assessment under section 147 of the 1961 Act. He also relied upon the decision(s) of the hon'ble Madras High Court in the case of *Mrs. A. Sridevi* (supra) and also in the case of *Jayaram Paper Mills Pvt. Ltd.* (supra) and submitted that if the assessee has made claim which is not supported by material then the Assessing Officer can make reassessment. The learned Commissioner of Income-tax-Departmental representative would submit that decision(s) of the hon'ble Madras High Court in the cases of *Tanmac India v. Dy. CIT* reported in [2017] 78 taxmann.com 155 (Mad) and also the decision in the case of *Tenzing Match Works* v. *Dy. CIT* (T. C. A. No. 702 of 2009) ; [2019] 419 ITR 338 (Mad) be not taken into consideration.

The learned Commissioner of Income-tax-Departmental representative would submit that original return of income was filed by assessee on March 28, 2002. The learned Commissioner of Income-tax-Departmental representative submitted that return of income was originally processed under section 143(1) of the Act on March 26, 2003 and reopening of the concluded assessment was done under section 147 of the 1961 Act, vide notice dated March 30, 2006 issued under section 148 of the 1961 Act. Our attention was drawn to page Nos. 19 and 20 of the paper book volume 1, wherein the aforesaid notice is placed. The learned Commissioner of Income-tax-Departmental representative would also draw our attention to various orders passed by the hon'ble Madras High Court in a writ petition

filed by the assessee challenging reopening of the concluded assessment. We have already referred to these orders in the preceding paras of this order and for sake of brevity they are not repeated. It is claimed by the learned Commissioner of Income-tax-Departmental representative that in the return filed in pursuance to notice issued under section 148 of the 1961 Act the assessee is claiming higher exemption than what was claimed by it earlier in the original return of income filed with the Revenue. It was submitted that the proceedings under section 147/148 are for the benefit of the Revenue and the assessee cannot now challenge reopening of the assessment under section 148 of the 1961 Act. It was submitted that the assessee is indulging in approbation and reprobation at the same time which is not permissible. It was submitted by the learned Commissioner of Income-tax-Departmental representative that the assessee can claim deduction for non-recovery of dues of Rs. 3 crores in the subsequent years but the assessee cannot challenge the proceedings under section 148 of the Act. The learned Commissioner of Income-tax-Departmental representative submitted on the merits of the issue that the assessee has claimed garnishee deduction on account of payments made to "Indian Bank". Our attention was drawn to the reassessment order passed by the Assessing Officer and it was submitted that the assessee in fact received the amount and then it was paid to the banker, namely, "Indian Bank", hence there is no diversion of income by overriding title. Our attention was also drawn to the appellate order passed by the learned Commissioner of Income-tax (Appeals). It was submitted by the learned Commissioner of Income-tax-Departmental representative that the shares were not pledged with "Indian Bank" but since "Indian Bank" came to know about the sales of shares by the assessee to the Pentamedia group of concerns through media reports and hence the said "Indian Bank" stepped in to protect its interest. It was submitted that there was no overriding title over the shares as the shares were never pledged with the bank and overriding title is where the property is encumbered. It was submitted that the assessee, namely, Mr. K. Srikanth was only guarantor for certain loans availed of by "Aditya Leather Exports Private Limited" and to recover their money from the said "Aditya Leather Exports Private Limited", the bank, namely, "Indian Bank" issued a garnishee notice and the assessee was merely a guarantor and the shares were never in the picture when the assessee stood guarantor. It was submitted by the learned Commissioner of Income-tax-Departmental representative that it was a liability of the assessee to repay the loans availed of by the said "Aditya Leather Exports Private Limited" as the assessee was the guarantor, and since the assessee was selling the shares of "Kris Sriknanth Sports

Entertainment Private Limited", the assessee entered into a deal with "Indian Bank" to settle the bank loan, for which the assessee paid Rs. 4.25 crores to the bank. The learned Commissioner of Income-tax-Departmental representative submitted that this settlement will not impinge upon the sale consideration as the shares were not carrying any obligation to be discharged. It was submitted that garnishee has come at a later date only when "Indian Bank" came to know that the assessee is selling his shares. It was submitted by the learned Commissioner of Income-tax-Departmental representative that the title of the share was perfect with Mr. K. Srikanth (assessee) and/or minor sons. Our attention was drawn by the learned Commissioner of Income-tax-Departmental representative to the hon'ble Debt Recovery Tribunal order of 2001 which is placed in page Nos. 125-132 of the paper book and was submitted that compromise petition was filed and shares were not impugned by any of the proceedings. It was submitted that the money was received by the assessee and then discharged to the bank. It was submitted that a memo of compromise was entered into with Indian Bank, which was settled out of court, and there was no order of court of garnishee and it was settlement out of court entered into by the assessee with the "Indian bank". It was submitted by the learned Commissioner of Income-tax-Departmental representative that there is no garnishee order of the court but rather it was only a threat of garnishee. At this stage the learned counsel for the assessee placed on record a letter in File No. 2/5/2016-Recovery, issued by the Government of India, Ministry of Finance, Department of Financial Services and contended that all properties of the guarantor is subject to charge and the Debt Recovery Tribunal can order for attachment and sale of such property under section 19(12) to (18) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and prayers were made to allow deduction (the said letter is placed in file). The Commissioner of Income-tax-Departmental representative drew our attention to para No. 7.3 of the appellate order passed by the learned Commissioner of Income-tax (Appeals)) and submitted that there were no encumbrance on sale of shares. It was submitted that the learned Commissioner of Income-tax (Appeals)) has clearly held that the decision of the hon'ble Madras High Court in the case of *CIT* v. *Bradford Trading Co. P. Ltd.* reported in [2003] 261 ITR 222 (Mad) shall not be applicable as the facts in that case were different. It was submitted that the garnishee application was to recover the amount due to the bank and rather it is application of income and not diversion of income by overriding title. The learned Commissioner of Income-tax-Departmental representative relied upon the decision of the hon'ble Supreme Court in the case of *CIT* v.

Sitaldas Tirathdas reported in [1961] 41 ITR 367 (SC) and submitted that there were no diversion of income by overriding title rather it was only application of income. The learned Commissioner of Income-tax-Departmental representative would also draw our attention to the provisions of section 48(1) of the 1961 Act and submitted that deduction from capital gains can only be allowed when the amount is incurred wholly and exclusively in connection with transfer of shares. It was submitted by the learned Commissioner of Income-tax-Departmental representative that the decision of the hon'ble Madras High Court in the case of *Bradford Trading Co. P. Ltd*. (supra) is different and not applicable to the facts of the case in the instant case. It was submitted that approbation and reprobation is not allowed as in the original return of income filed with the Department, the assessee has declared the sale consideration to the tune of Rs. 15 crores while it was claimed at Rs. 12 crores in the return of income pursuant to the orders passed by the hon'ble Madras High Court in the writ proceedings. It was submitted that the sale consideration was not considered at Rs. 15 crores by the Assessing Officer but was considered at Rs. 12 crores and hence the learned Commissioner of Income-tax had rightly invoked the proceedings under section 263 of the 1961 Act and brought to tax the remaining Rs. 3 crores.

The learned counsel for the assessee drew our attention to page Nos. 1 and 35 of the paper book, which is the acknowledgment of the original return of income filed by the assessee as well the revised return of income filed by the assessee under section 147 of the 1961 Act in pursuance of the orders of the hon'ble Madras High Court. It was submitted that in the original return of income, exemption claimed was Rs. 11.94 crores, while in the revised return of income, the exemption claimed was Rs. 12.41 crores and the difference was on account of dividend income received which was in any case exempt from tax and there was no income-tax impact owing to such differential. Our attention was drawn to page 36 of the paper book and it was submitted that the dividend income of Rs. 66,65,190 was received by the son of the assessee, namely, Mr. Adityaa Srikanth. It was submitted that there is no difference in the income-tax liability owing to such differential in the exempt income owing to dividend income received by the minor son of the assessee. The assessee relied upon the decision in the case of *CIT* v. *Orient Craft Ltd.* [2013] 354 ITR 536 (Delhi) and also the decision in the case of *Rajesh Javeri Stock Brokers P. Ltd.* (supra) and it was submitted that the information was received from the Revenue audit which is fresh material. It was submitted that the Revenue missed to frame the scrutiny assessment under section 143(2)

read with section 143(3) of the 1961 Act and the reasons to believe which formed basis of invoking the provisions of section 147 for reopening of the concluded assessment were based on the old material and once no notice under section 143(2) of the 1961 Act was issued at that time for framing the scrutiny assessment, the Revenue has missed the bus and now it cannot rely on the stale material to get extended limitation period by invoking the provisions of section 147 of the 1961 Act. It was submitted that the assessee made full and true disclosure in the return of income filed with the Department originally. It was submitted that the Revenue can no doubt invoke the provisions of section 147 of the 1961 Act, if there are factual errors in disclosures as held by the hon'ble Supreme Court in the case of *P. V. S. Beedies* (supra) and in that case reopening was done after four years based on the audit objections and the Revenue is empowered to see that there is true and full disclosure. The assessee's counsel also submitted that the Revenue is empowered to reopen the concluded assessment after four years by invoking the provisions of section 147 of the 1961 Act and to see that there is true and full disclosure as held in the case of *Girilal and Co.* (supra). The assessee's counsel also tried to distinguish the case law relied upon by the learned Commissioner of Income-tax-Departmental representative to contend that reopening of the assessment was not done properly within the provisions of section 147 of the 1961 Act and it was submitted that there was no triggering point for invoking the provisions of section 147/148 of the 1961 Act in the instant case. It was submitted that three separate agreements were entered into by the assessee for sale of shares and the three agreements for non-compete fees. It was submitted that there was a diversion of income by overriding title relying on the real income theory. The learned counsel for the assessee relied upon the decision of the hon'ble Supreme Court in the case of *CIT* v. *Sitaldas Tirathda*s reported in [1961] 41 ITR 367 (SC) and the decision of the hon'ble Supreme Court in the case of *Dy. CIT* v. *T. Jayachandran* [2018] 406 ITR 1 (SC). It was submitted by the learned counsel for the assessee that only real income can be brought to tax. It was submitted that the sale was made under compelling circumstances and it was the court monitored sale of share and hence the payment of Rs. 4.25 crores to "Indian Bank" is an expense in connection with transfer of shares and was rightly claimed by the assessee. The prayers were made by the learned counsel for the assessee to quash the assessment. It was submitted that contract of minor was entered into through the assessee who is the natural guardian of the minor sons being father and income is to be clubbed for tax purposes. On being asked by the Bench, the learned counsel for the assessee submitted that the

minor money being sale consideration of shares were diverted towards payment of loan due from "Aditya Leather Exports Private Limited" without any orders of the court for using the minor's money for payment of the aforesaid dues to Indian Bank. On being confronted, the learned counsel for the assessee admitted that page 15 of the paper book is an unsigned page which is claimed to be attached to the return of income, while the rest of the enclosures were signed, thus strengthening doubt on the claim of the assessee that the said document was at all attached with the return of income originally filed by the assessee. The assessee was also present during the course of hearing before the Bench on October 17, 2019. The learned Commissioner of Income-tax-Departmental representative relied upon the decision of the hon'ble Supreme Court in the case of *R. N. Gosai A* v. *Yashpal Dhir* SLP (C) No. 4325 of 1992 (judgment dated October 23, 1992) and the decision of the hon'ble Madras High Court in the case of *G. Kumar* v. *Samuthiradevi* (vide judgment dated December 19, 2012). The learned Commissioner of Income-tax-Departmental representative submitted that in the case of share agreement, there are no consequences provided for making default in payment of sale consideration of shares. The learned counsel for the assessee submitted that no basis for valuation of shares and of compete fees is there and it was a negotiated price between the buyer and seller. It was submitted by the learned counsel for the assessee that it is only because of Mr. K. Srikanth, the assessee who was a renowned cricket player in the Indian team that non-compete fees was paid by the Pentamedia group concerns. The learned Commissioner of Income-tax-Departmental representative submitted at this is point of time that it is merely a tax avoidance scheme and non-compete fees is nothing but sale consideration of shares and the Assessing Officer had rightly included the same as income of the assessee while computing capital gains. The learned Commissioner of Income-tax-Departmental representative referred to para No. 6.1 of the appellate order passed by the learned Commissioner of Income-tax (Appeals) and submitted that the learned Commissioner of Income-tax (Appeals) allowed relief to the assessee. It was submitted that neither the learned Commissioner of Income-tax (Appeals) nor the assessee has furnished any reply to the issues raised by the Assessing Officer. It was submitted that there is no specific clarification as to what the assessee was doing earlier and what the assessee was doing later and this is merely an agreement to avoid tax and the assessee is continuing as a director in the new company. It was brought to the notice by the learned Commissioner of Income-tax-Departmental representative that non-compete fee was brought to tax by the provisions of section 28(va) read with

section 2(24)(xii) of the 1961 Act by the Finance Act, 2002 with effect from April 1, 2003 and submitted that prior to that reasonableness is to be seen for which quantum is to be found out and the basis of computing non-compete fee is to be seen. The learned Commissioner of Income-tax-Departmental representative relied upon the decision of the hon'ble Madras High Court in the case of *CIT* v. *Chemech Laboratories Ltd.* (TCA No. 1492 of 2007, dated December 23, 2016, November 11, 2016). The learned Commissioner of Income-tax-Departmental representative would also rely on the decisions in the following case law :

(a) *CIT* v. *Mediworld Publications P. Ltd.* [2011] 337 ITR 178 (Delhi)

(b) *Mrs. Hami Aspi Balsara* v. *Asst. CIT* [2010] 126 ITD 100 (Mad)

(c) *Ramesh D. Tainwala* v. *ITO* (TS-594-ITAT-2011(Mum)

It was submitted by the learned Commissioner of Income-tax-Departmental representative that if consideration is paid to the shareholders then capital gains are to be computed and brought to tax and not non-compete fee as contended by the assessee. It was submitted by the learned Commissioner of Income-tax-Departmental representative that if only business is snatched away, then non-compete fee will come into picture otherwise it is business receipt which is to be brought to tax in the hands of the assessee. The learned Commissioner of Income-tax-Departmental representative submitted that the assessee is continued with the company even after transfer of shares as a director and hence there is no question of non-compete fee being claimed as an exempt income by the assessee and the entire consideration of Rs. 15 crores is to be brought to tax as per the provisions of the 1961 Act. The learned Commissioner of Income-tax-Departmental representative relied upon the decision of the hon'ble Authority for Advance Rulings in the case of *H. M. Publishers Holdings Ltd., In re* (AAR No. 1238 of 2012) ; [2018] 405 ITR 441 (AAR).

The learned authorised representative submitted that the reasoning of the learned Commissioner of Income-tax (Appeals) is sound and needs to be confirmed and no substance in the arguments of the Revenue and the decisions relied upon by the Revenue are all after the insertion of section 28(va) by the Finance Act, 2002 with effect from April 1, 2003 while presently we are concerned with the assessment year 2001-02 and the amendment brought in by the Finance Act, 2002 by introducing section 28(va) are prospective in nature. The learned counsel relied upon the decision of the Tribunal in the case of *R. K. Swamy* v. *Asst. CIT* reported in [2004] 88 ITD 185 (Chennai-Trib.) and the decision in the case of *G. Raveendran* v. *CIT* reported in [2015] 375 ITR 326 (Mad) and it was submitted that there was no need to interfere with the orders of the learned Commissioner of

Income-tax (Appeals) so far as the Department appeal is concerned and prayers were made to dismiss the appeal filed by the Revenue. It was submitted that there is a separate contract between unrelated parties for non-compete fee. It was submitted that the wisdom of businessmen should prevail as it is a contractual transaction between unrelated parties which is at the arm's length price. It was submitted that shareholders who transferred shares are minor and the assessee is a separate "person" under the 1961 Act albeit father of the minor sons. The learned Commissioner of Income-tax-Departmental representative relied on the grounds of appeal and it was submitted that non-compete fees is in the context of sale of share and it was submitted that it is immaterial whether the assessee sold shares or minors son shares were sold, these shares are to be treated as the assessee's share and the assessee sold the shares of minor children. The learned counsel for the assessee submitted that in the year ended March 31, 2001, the assessee and minor children received Rs. 9.50 crores while Rs. 2.5 crores was received in the year ended March 31, 2002. Thus, it was submitted by the learned counsel for the assessee that only Rs. 12 crores was received while Rs. 3 crores was never received and hence the same cannot be brought to tax as only real income can be brought to tax. Our attention was drawn to page 53 of the paper book, wherein sundry debtors as at March 31, 2001 were to the tune of Rs. 5.51 crores. On being asked and directed to produce the bounced cheque of Rs. 300 lakhs, the learned counsel for the assessee submitted that the assessee does not have bounced cheque of Rs. 300 lakhs and the same cannot be produced. Thus, the learned counsel for the assessee expressed inability to produce the bounced cheque of Rs. 300 lakhs. It was also submitted that no proceedings for recovery of the said Rs. 300 lakhs was initiated by the assessee/minor sons against the Pentamedia group concerns for bouncing of cheque. It is also submitted that 99 per cent. shares in "Kris Srikanth Sports Entertainment Private Limited" were held by his minor sons. It was also explained that as on March 31, 2002, sundry debtors included the said sum of Rs. 3 crores. The assessee has filed the balance-sheet as on March 31, 2002 wherein sundry debtors to the tune of Rs. 300.66 lakhs are reflected and the assessee is claiming the said amount of Rs. 3 crores. is still receivables as on March 31, 2002. It was submitted that the Assessing Officer has recognised that Rs. 3 crores was not received by the assessee and the Assessing Officer took a view which is a plausible view and the learned Commissioner of Income-tax cannot substitute its view with its opinion by invoking the provisions of section 263 of the 1961 Act which is not permissible. The learned authorised representative relied upon the decision of

A. R. Real Estate Developers Pvt. Ltd. v. *ITO* (I. T. A. No. 804/Chennai/2019 dated September 18, 2019) for the assessment year 2014-15. The learned Departmental representative submitted that an amount of Rs. 5.5 crores was receivable by the assessee as on March 31, 2001 and an amount of Rs. 3 crores was receivable as on March 31, 2002. It was submitted by the learned Commissioner of Income-tax-Departmental representative that this amount of Rs. 300 lakhs was due to the assessee as per its balance-sheet as good money and hence the entire amount of Rs. 15 crores including an outstanding amount of Rs. 3 crores is chargeable to tax. It was submitted that it was the Assessing Officer's mistake that he took total consideration at Rs. 12 crores as chargeable to tax instead of Rs. 15 crores which was rectified by the learned Commissioner of Income-tax by invoking the provisions of section 263 of the 1961 Act. It was submitted by the learned Commissioner of Income-tax-Departmental representative that the assessee has accounted for his income on accrual basis and it was submitted that invocation of the provisions of section 263 is valid. The learned Commissioner of Income-tax-Departmental representative submitted that the assessee has not submitted that there is any error on the basis of accounting followed by the assessee, viz., cash or mercantile. So far as regards computation of deduction under section 54F of the 1961 Act, the learned Commissioner of Income-tax-Departmental representative submitted that the learned Commissioner of Income-tax invoked the provisions of section 263 of the 1961 Act and directed the Assessing Officer to verify the claim of the assessee under section 54F of the Act. The learned Commissioner of Income-tax-Departmental representative submitted that the Assessing Officer verified and allowed the claim of deduction under section 54F to the tune of Rs. 43 lakhs, instead of Rs. 35 lakhs, even while framing the assessment under section 143(3) read with section 263 of the Act. The case of the assessee was refixed for clarification to find out as to the basis/quantification of valuation of shares and as to whether any valuation report at the behest of the contracting parties, was prepared to value shares. The assessee has filed the written submissions and it was submitted by the learned counsel for the assessee that it was a contractual agreement between the parties to value the shares and no valuation report was prepared nor any basis for valuation of shares is available with the assessee, rather it is submitted that it was a negotiated price entered into between two parties to the contract. The assessee's counsel also relied upon the decision of the Chennai Tribunal in the case of *Empee Holdings Ltd.* v. *Dy. CIT* (I. T. A. No. 1503/Chennai/2014 for the assessment year 2005-06, dated November 7, 2019) to which both of us were part of the Division

Bench who pronounced the said order. It was also submitted that in the assessment year 2001-02 with which we are concerned, sections 50C and 43CA of the 1961 Act were not in the statute and hence actual sale consideration entered into between two contracting parties voluntarily cannot be substituted by invoking the deeming fiction of the said sections. The learned Commissioner of Income-tax-Departmental representative submitted that the assessee has himself admitted that there was no quantification/valuation report for valuing the shares and hence the entire amount of Rs. 15 crores be treated as consideration for sale of shares. It was also submitted that so far as reopening of the concluded assessment under section 147 is concerned, it will not make any difference between manual processing of return of income and electronic processing of return.

11 We have considered rival contentions and perused the material on record including the case law cited by both the rival parties and the impugned order of the authorities below. We have observed that the assessee is engaged in the business of modelling, cricket commentary, journalism, consulting and BPCL dealership. It is an admitted fact that the assessee is an renowned cricketer of international fame and was at one point of time part of Indian/National cricket team and later also rose to become captain of the Indian cricket team. It is also admitted fact that later on after retiring from the cricket team, the assessee turn to the cricket commentary and other activities associated with sport of cricket. Thus, undisputedly the assessee is a known name in the field of sports of cricket. It is also an admitted fact that in India, sport of cricket is one of the frontline sporting activities and a large number of people are keenly interested in the sport of cricket. With this background now, we will proceed to adjudicate all these four appeals. The assessee originally filed its return of income under section 139 on March 28, 2002 for the impugned assessment year 2001-02. The said return of income was not filed within the prescribed time under section 139(1) of the 1961 Act but was admittedly filed belatedly, albeit within the time prescribed under section 139(4) of the 1961 Act. The income declared by the assessee under the said return of income was to the tune of Rs. 20,42,507. The exempt income claimed in the said return of income originally filed by the assessee under section 139 of the Act was to the tune of Rs. 11,98,48,643 as per the acknowledgment of the return of income placed in the paper book at page 1, wherein the column of exempt income, the aforesaid amount of Rs. 11,98,48,643 is duly filed in at column 24 (page 1/paper book). The assessee also filed a claim for refund of an amount of Rs. 85,20,565 which was filed along with the return of income in form No. 30, placed at page 3 of the paper book. Along with this return of income filed by the assessee, it has claimed to have filed a covering letter

which specify the list of enclosures to the return of income. The said covering letter did not specify about the enclosure as to the details of exempt income being furnished but however it is now claimed by the assessee that the details of the aforesaid exempt income claimed by him were filed, which is stated to be placed at page 15 of the paper book which on our perusal we found that it is an unsigned enclosure. The Revenue on its part is averring that this document stated to be placed at page 15/paper book is a suspect document which is planted by the assessee and was not part of the return of income originally filed by the assessee. We will see at a later point of time in this order as to the validity of reliance on this document and whether the disclosure of exempt income even if it was made by the assessee was sufficient on the part of the assessee to discharge the primary onus cast on it to make true and full disclosure to come out of the clutches of section 147/148 of the 1961 Act. The return of income was admittedly originally processed by the Revenue under section 143(1) of the 1961 Act and intimation dated March 26, 2003 was issued to the assessee by the Assessing Officer under section 143(1) of the 1961 Act computing the refund of Rs. 94,24,254 being made payable to the assessee. This processing of the return of income was done manually prior to the introduction of e-processing of the return of income by the Department. If we refer to section 143(1) of the 1961 Act as it was existing in the statute at that point of time, it is clear that the scope of section 143(1) is very restrictive and is limited to correcting any arithmetical errors or to an incorrect claim apparent from any information in the return of income filed by the assessee. The provisions of section 143(1) of the 1961 Act as were applicable at that point of time when the return of income was processed on March 26, 2003 are reproduced below :

"143. *Assessment*.— (1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142,—

(i) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid, any tax paid on self-assessment and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under section 156 and all the provisions of this Act shall apply accordingly ; and

(ii) if any refund is due on the basis of such return, it shall be granted to the assessee and an intimation to this effect shall be sent to the assessee :

Provided that except as otherwise provided in this sub-section, the acknowledgment of the return shall be deemed to be an intimation under this sub-section where either no sum is payable by the assessee or no refund is due to him :

Provided further that no intimation under this sub-section shall be sent after the expiry of one year from the end of the financial year in which the return is made :

Provided also that where the return made is in respect of the income first assessable in the assessment year commencing on the 1st day of April, 1999, such intimation may be sent at any time up to the 31st day of March, 2002."

Thus, the Assessing Officer cannot go into merits of the claim made by the assessee and such corrections are limited to correcting any arithmetical errors and to correcting the incorrect claims apparent from any information in the return. Thus, even if the return of income was processed manually in the instant case, the Assessing Officer had restrictive powers to correcting only arithmetical errors in the return of income and to an incorrect claim which is apparent from any information in the return of income and it cannot be equated with the scrutiny assessment framed under section 143(3) read with section 143(2) of the 1961 Act. It is an admitted position that in the instant case, no scrutiny assessment was framed by the Assessing Officer originally under section 143(3) of the 1961 Act. It is also an admitted position that the reopening of the concluded assessment in the instant case by the Assessing Officer by invoking the provisions of section 147 of the 1961 Act was done in the instant case by the Revenue within four years from the end of assessment year, viz., notice of reopening of the concluded assessment was issued on March 30, 2006 while we are presently seized of the assessment year 2001-02. It is also admitted position that the return of income was not originally securitised by the Revenue under section 143(2) read with section 143(3) and merely processing of the return of income was done within the provisions of section 143(1) of the 1961 Act which cannot be equated with the scrutiny assessment under section 143(3) read with section 143(2) of the 1961 Act. The ratio of the decision of the hon'ble Supreme Court in the case of *Rajesh Javeri Stock Brokers P. Ltd.* (supra) shall be clearly applicable and the Revenue can validly reopen the concluded assessment by invoking the provisions of section 147 of the 1961 Act. In the instant case, the return of income was not originally scrutinised under section 143(2) read with section 143(3) and the reopening of the concluded assessment was done within four years from the end of the assessment, clearly the proviso to

section 147 is not applicable and the reopening of the concluded assessment can be done within a period of four years from the end of the assessment year by invoking the provisions of section 147 of the 1961 Act. Moreover, first of all the disclosure as is contemplated to have been made by the assessee in the instant case has been doubted by the Revenue to be suspect and it is claimed by the Revenue that the document at page 15 of the paper book is a planted document which is planted afterwords and this document was never part of the return of income originally filed by the assessee with the Revenue under section 139(4) of the 1961 Act on March 28, 2002. It is also claimed by the Revenue that this document was also not specified as one of the enclosed documents in the list of documents enclosed with the return of income. It is also claimed by the Revenue that this is the only document which is not signed by the assessee, while the rest of the other documents as were made part of the return of income as enclosures were signed by the assessee. Now, let us see the content of this document which is placed at paper book/page 15 which is claimed by the Revenue to be a planted document, and while going through the aforesaid document, it is observed that the following disclosure was made by the assessee, as under :

"K. Srikanth

Assessment year 2001-02

Annexure to the statement of income

(a) Income claimed to be exempt and not included in the total income—consideration for restrictive covenant Rs. 7.50 crores.

(b) Residuary sale proceeds of shares after mandatory diversion of Rs. 4.25 crores by Indian Bank overriding the garnishee attachment Rs. 3.25 crores.

K. Srikanth

Assessment year 2001-02

Income claimed to be exempt

(Rs.)

(a)	Restrictive covenant	7,50,00,000
(b)	Indian Bank overriding garnishee attachment	4,25,00,000
(c)	Dividend : Minor Adityaa	23,48,643
		11,98,48,643

A perusal of the above disclosure as was allegedly claimed to have been made by the assessee which is albeit disputed by the Revenue to be planted/suspect document, it clearly appears that these are bald disclosures

made by the assessee and it cannot be said that the assessee has made true and complete disclosure of the primary facts and in our view clearly primary onus cast on the assessee is not discharged. Reliance is made to the decision of the hon'ble Supreme Court in the case of *New Delhi Television Ltd.* v. *Dy. CIT* reported in [2020] 116 taxmann.com 151 (SC). The above disclosure do not give complete disclosure of the loans availed of by a company named "Aditya Leather Exports Private Limited" from "Indian Bank" which was in default by the said company. The above disclosure also did not disclose that the assessee was a director of the said company, namely, "Aditya Leather Exports Private Limited" and also stood a guarantor of the loan availed of by the said company "Aditya Leather Exports Private Limited". It also did not disclose that the shares of "Kris Srikanth Sports Entertainment Private Limited" were not a subject matter of charge with "Indian Bank". It also did not mention that it is under the memo of compromise that the said amount of Rs. 4.25 crores was paid by the assessee to "Indian Bank" in the settlement of the aforesaid defaulted loan by "Aditya Leather Exports Private Limited" and the payments were never made under the direction of any court orders but were made under a compromise arrangement entered into by the assessee voluntarily with the said "Indian Bank". The aforesaid disclosure also did not mention about the agreements made simultaneously by the assessee and his minor sons (through the assessee) for transfer of the entire shareholding of the said company "Kris Srikanth Sports Entertainment Private Limited" for an aggregate value of Rs. 7.50 crores (wherein majority shareholding to the tune of 99 per cent. was held by the minor sons of the assessee), and that also the assessee entered into a non-compete agreement with the buyers, namely, Pentamedia group of concerns, of the entire shareholding of the said company "Kris Srikanth Sports Entertainment Private Limited" agreeing not to compete for a period of six years with the said company "Kris Srikanth Sports Entertainment Private Limited" for a non-compete fee of Rs. 7.50 crores. This disclosure also did not specify that the minor sons of the assessee who were holding 99 per cent. of shareholding of "Kris Srikanth Sports Entertainment Private Limited" were never guarantor of loan availed of by the said "Aditya Leather Exports Private Limited" from "Indian Bank" nor were they directors of Aditya Leather Exports Private Limited and he being the natural guardian of minor sons were under duty under law relating to minors and guardianship as are applicable in India to protect the interest of minor sons who in fact were holder of share capital of "Kris Srikanth Sports Entertainment Private Limited" which was a subject matter of transfer. The assessee as per laws applicable to minor and guardianship in India

could not have diverted sale proceed of shares held by minor sons to repay Indian Bank for loan of Rs. 4.25 crores availed of by "Aditya Leather Exports Private Limited" to the prejudice of minors interest without permission of courts as per the laws applicable to the minors and guardianship in India. It was a blatant illegal act and the Income-tax Act, 1961 cannot be read in vaccum de hors other prevailing laws in India. The assessee if so desire could have always contended that the proceeds of non-compete fee received by him was utilised for payment of dues to Indian Bank but to claim that the assessee appropriated proceeds of sale of shares of the minor sons for the purposes of payment to Indian Bank while utilising non-compete fee received by him, which he is claiming as an exempt income, for other purposes is a perversity which cannot be accepted. The assessee has not come to court with clean hands and courts cannot be a party to such an act of the assessee. Further, the assessee is claiming that he has not received Rs. 3 crores out of the total consideration of Rs. 15 crores. The said consideration of Rs. 15 crores is bifurcated into sale of shares of "Kris Shrikant Sports Entertainment Private Limited" to the tune of Rs. 7.50 crores while the rest of Rs. 7.50 crores is claimed towards non-compete fee. The assessee did not produce the bounced cheque of Rs. 3 crores despite being directed by the court and, secondly, the assessee is claiming that Rs. 3 crores which is not received shall be attributed towards sale of shares of "Kris Srikanth Sports Entertainment Private Limited" and not towards non-compete fee, which is claimed as an exempt income. It is again a perverse claim as the assessee has duly transferred the entire shareholding of "Kris Srikanth Sports Entertainment Private Limited" to the buyers Pentamedia group of concerns and later no legal suit was filed for non-payment of the alleged part sale proceeds of shares of "Kris Srikanth Sports Entertainment Private Limited". The majority of shares of "Kris Srikanth Sports Entertainment Private Limited" to the tune of 99 per cent. were held by the minor sons of the assessee and the assessee is the natural guardian of the minor sons was duty bound to protect the interest of minor as per the law prevailing in India as to minors and guardianship. Reference is drawn to the provisions of the Hindu Minority and Guardianship Act, 1956 especially to the provisions of section 8. The assessee has claimed that Rs. 12 crores in all was received as against the total consideration in both the agreements of Rs. 15 crores, out of which Rs. 7.50 crores being for sale of shares and Rs. 7.50 crores being towards non-compete fee. Thus, the proceeds of sale of shares shall be deemed to have been fully received to the tune of Rs. 7.50 crores firstly being belonging to minor and, secondly, the entire shareholding stood transferred to the buyers. It is again a perversity

to claim that sale proceeds of shares of "Kris Srikanth Sports Entertainment Private Limited" held by the minor sons under a simultaneous agreements made for sale of shares as well non-compete fee, was not received but the entire non-compete fee was received which is claimed as an exempt income. It is clearly visible that an attempt is made by the assessee to evade taxes. Thus, we reject the claim of the assessee and hold that the entire sale proceeds of sale of shares by the minor sons of the assessee of the company, namely, "Kris Srikanth Sports Entertainment Private Limited" to the Pentamedia group of concerns to the tune of Rs. 7.50 crores was received by the assessee which shall be brought to tax under the provisions of the 1961 Act including the provisions of sections 60-64 of the 1961 Act. Further, we hold that the non-receipt of Rs. 3 crores (out of the total non-compete fee of Rs. 7.50 crores) as was the claim set up by the assessee was towards non-compete fee payable by the Pentamedia group of concerns to the assessee for not competing with them for a period of six years. Further, we also hold that proceeds of non-compete fee of Rs. 4.50 crores actually received by the assessee was utilised by the assessee to pay "Indian Bank" an amount of Rs. 4.25 crores towards defaulted loan availed of by "Aditya Leather Exports Private Limited" of which the assessee was the director as well the guarantor. As we will also see in the later part of this order that the claim of exemption/deduction made for payment of Rs. 4.25 crores to Indian Bank by diversion by overriding title was a wrong claim made by the assessee even on the merits and he was not entitled for deduction/exemption of the said income even within the provisions of the 1961 Act. Thus, we hold that the primary facts were not completely, correctly and truly disclosed by the assessee in the return of income originally filed by the assessee with the Revenue and there is clearly an attempt to evade taxes, even if we accept the contention of the assessee that the disclosure of exempt income was made by the assessee in the return of income originally filed with the Revenue, as is placed in the paper book/page 15 (although it is a suspect disclosure as the Revenue is alleging that this document is planted by the assessee before the Income-tax Appellate Tribunal and this document was never filed by the assessee along with the original return of income filed by the assessee with the Revenue). Thus, we hold that the Revenue has rightly invoked the provisions of section 147 of the 1961 Act and we uphold the reopening of the concluded assessment within four years from the end of the assessment as was made by the Revenue in the instant case and more so even scrutiny assessment was not framed by the Revenue initially under section 143(3) of the 1961 Act and the return was merely processed under section 143(1) of the 1961 Act. Thus, we reject the

contentions of the assessee and uphold the reopening of the concluded assessment by the Revenue under section 147 of the 1961 Act. While upholding the reopening of the concluded assessment under section 147 in the instant case, we note that there was a tangible material before the Assessing Officer to reopen the concluded assessment as the assessee is claiming a huge exemption of income by making incomplete, untrue and wrong claim before the Assessing Officer and scrutiny assessment having not been made earlier by the Revenue by invoking the provisions of section 143(3) read with section 143(2) of the 1961 Act while originally processing the return of income, and the reopening of the concluded assessment under section 147 of the 1961 Act is sought to be done within four years from the end of assessment, the Revenue is within its right to reopen the concluded assessment under section 147 of the 1961 Act. The ratio of the decision of the hon'ble Supreme Court in the case of *Rajesh Javeri Stock Brokers P. Ltd.* (supra) shall be clearly applicable as processing of the return of income under section 143(1) cannot be equated to the scrutiny assessment under section 143(3) read with section 143(2) of the 1961 Act. It is also laid down by the hon'ble Supreme Court in the case of *P. V. S. Beedies* (supra) that the reopening of the concluded assessment under section 147 of the 1961 Act can be made by the Assessing Officer based on the factual errors pointed out by the audit team of the Department. Hence, in the instant case, we hold that the Revenue was within its right to reopen the concluded assessment under section 147 of the 1961 Act and we uphold the reopening of the concluded assessment by the Revenue in the instant case. We order accordingly.

Now, coming to the merits of the issues before us. We have observed that the assessee along with his minor sons has entered into sale of entire shareholding of "Kris Srikanth Sports Entertainment Private Limited" with the Pentamedia group of concerns. It is observed that almost the entire shareholding to the tune of 99 per cent. was held by the minor sons of the assessee and the assessee merely held 125 shares of the said company. The clubbing provisions as are contained in sections 60 to 64 of the 1961 Act are attracted and the income of the minor sons are to be clubbed with the income of the assessee. The perusal of these agreements will reveal that the assessee has entered into an agreement of sale of shares to the tune of Rs. 7.50 crores by virtue of which the entire shareholding in the said company "Kris Srikanth Sports Entertainment Private Limited" will stand transferred to the Pentamedia group of concerns. Simultaneously, there were agreements entered into by the assessee with the said Pentamedia group concerns for non-compete by the assessee with the said company,

namely, "Kris Srikanth Sports Entertainment Private Limited" for a period of six years for a total consideration of Rs. 7.50 crores. The said company, namely, "Kris Srikanth Sports Entertainment Private Limited" is engaged in providing cricket coaching through electronic media. The said agreements are claimed to be entered into based on negotiated price between two independent parties. It is also a matter of fact that the assessee is a renowned cricketer who was part of the Indian/national cricket team at one point of time and also was the captain of the Indian cricket team. It is also a fact that the assessee resorted to cricket commentary and other activities associated with sport of cricket after retiring from the cricket team. The assessee undoubtedly enjoys reputation and brand value in sporting activities more specifically in cricket. The name of the assessee is also part of the name of the company, namely, "Kris Srikanth Sports Entertainment Private Limited" whose shares are transferred. The assessee has agreed not to compete with the said company "Kris Srikanth Sports Entertainment Private Limited" for a period of six years for a total consideration of Rs. 7.50 crores. The said company is engaged in the business of providing cricket coaching through electronic media. The period of six years for not competing with the said company "Kris Srikanth Sports Entertainment Private Limited" by the assessee vide non-compete agreement is by no means a small period. The Revenue has merely rejected the non-compete fee charged by the assessee and no cogent reasons are provided. The Revenue has also not brought on record cogent reasons for discarding the valuation of shares of Rs. 7.50 crores for sale of the entire shareholding of "Kris Srikanth Sports Entertainment Private Limited". The assessee has discharged its primary onus and now it was for the Revenue to have rebutted the said primary onus by bringing on record cogent material to dislodge the claim of the assessee. For the relevant year under consideration, there were no specific provision/section in the 1961 Act brought to our notice by the Revenue which debarred negotiated price for the valuation of share or which created a deeming fiction for valuing shares. Thus, we accept the valuation of shares and non-compete fee charged by the assessee, based on the negotiated agreement as we do not find them to be unconscionably or patently wrong requiring interference in the business deal entered into by and between the willing parties, as there is no material brought on record to take a contrary view. Now, coming to the sale consideration of Rs. 7.50 crores for sale of shares of "Kris Srikanth Sports Entertainment Private Limited", we have observed that majority of shares exceeding 99 per cent were held by the minor sons. It is the assessee who was the natural guardian for his minor sons of the assessee and the assessee executed

the agreement for sale of shares on behalf of his minor sons. The assessee being the natural guardian was duty bound to protect the interest of minor sons. There are minority and guardianship laws prevalent in India which protects the interest of minors and the guardians are duty bound to protect interest of minors and if the proceeds belong to minor are to be diverted or minor are to be divested of their assets then permission of court is required. Attention is drawn to the Hindu Minority and Guardianship Act, 1956 especially to the provisions of section 8 of the said Act. The purpose and intent of these laws and indulgence by courts as provided under law is to protect the interest and welfare of minor which is paramount. The assessee being the natural guardian was duty bound to protect the interest of his minor sons. The shares held by minor sons in "Kris Srikanth Sports Entertainment Private Limited" were divested for a total consideration of Rs. 7.50 crores. The shares in "Kris Srikanth Sports Entertainment Private Limited" to the tune of 99 per cent. were held by the minor sons of the assessee. The shares of the minor stood transferred to the Pentamedia group concerns and minors were divested of their shareholding in "Kris Srikanth Sports Entertainment Private Limited". There are simultaneous agreement for sale of shares as well for non-compete which were simultaneously entered by the assessee on his behalf as well on behalf of the minor, of which total value was Rs. 15 crores out of which Rs. 12 crores stood realised. Thus, it is to be held that the entire consideration of Rs. 7.50 crores towards sale of shares of the minor in "Kris Srikanth Sports Entertainment Private Limited" stood realised and to be brought to tax within the provisions of the 1961 Act including the provisions of sections 60-64 of the 1961 Act. It is admitted fact that no permission of court for selling/ divesting of shares of minor is brought on record. Under these circumstances, we are of the considered view that the assessee was duty bound to protect the interest of the minor sons. Thus, we hold that sale consideration of Rs. 7.50 crores towards sale of shares stood fully realised and it is required to be brought to tax by invoking the provisions of the 1961 Act including clubbing the provisions as are contained in sections 61 to 64 of the 1961 Act. So far as the consideration of Rs. 7.50 crores towards non-compete fee is concerned which is for non-competing by the assessee with "Kris Srikanth Sports Entertainment Private Limited", we are of the considered view that the said amount is not chargeable to tax as in the impugned assessment year 2001-02, the said amount was not chargeable to tax as the amendment in section 28 wherein clause (va) was inserted by the Finance Act, 2002 with effect from April 1, 2003 and prior to that, it could not be brought to tax as it was held to be capital receipt. The ratio of

the decision of the hon'ble Supreme Court in the case of *Guffic Chem. P. Ltd.* (cited supra) is applicable, as we are presently dealing with the assessment year 2001-02 which is prior to the aforesaid amendment made by the Finance Act, 2002 which is applicable from April 1, 2003. Thus, an amount of Rs. 7.50 crores which was purportedly towards non-compete fee is not chargeable to tax within the provisions of the 1961 Act as were applicable for the assessment year 2001-02. Under these circumstances once it is held that Rs. 7.50 crores which was towards non-compete fee is exempt from tax in the instant case, it will not matter as to how this is applied by the assessee as the income at source is held to be exempt from tax. Thus, even if an amount of Rs. 3 crores is not received, it will not matter as the income at source of Rs. 7.50 crores towards non-compete fee is held to be exempt from income-tax and at the same time even if Rs. 4.25 crores is paid to Indian Bank to clear the loan of "Aditya Leather Exports Private Limited", then also it is an application of exempt income which will not have a bearing on the taxability of the assessee's income. However for sake of completeness, it is held that the assessee has paid an amount of Rs 4.25 crores to Indian Bank under a memo of compromise with the said bank and there was no garnishee attachment of the bank on the said shares. The shares of "Kris Srikanth Sports Entertainment Private Limited" were never the subject matter of charge with Indian Bank. The shares were held by the minor sons of the assessee in "Kris Srikanth Sports Entertainment Private Limited" and the minor sons were not the guarantor of the said loan availed of by "Aditya Leather Exports Private Limited" from Indian Bank which stood defaulted. The minor sons of the assessee also could not be made to pay for the default of the said Aditya Leather Exports Private Limited of which the assessee was director/guarantor not the minor sons. The assessee was the director of the said company, namely, "Aditya Leather Exports Private Limited" as well guarantor of the said loan but the assessee had no right to transfer the proceeds of sale of shares held by his minor sons in "Kris Srikanth Sports Entertainment Private Limited" to Indian Bank, except with permission of courts. No such permission was obtained by the assessee. The said act of claiming deduction for amount paid to Indian Bank out of sale proceed of shares held by minor sons is clearly an act of perversity/illegality as well an attempt made to evade taxes. The assessee also simultaneously received non-compete fee to the tune of Rs. 4.50 crores out of total agreed non-compete fee of Rs. 7.50 crores and the said proceed shall be deemed to have been applied for payment to Indian Bank. The said amount of Rs. 4.50 crores is already held by us to be exempt from tax and it will not matter even if the said sum was paid to discharge to loan of Indian

Bank . Further, there was no charge held by Indian Bank on shares of "Kris Srikanth Sports Entertainment Private Limited". In any case as discussed above, the shares were held by the minor sons of the assessee. The minor sons of the assessee were neither the director of Aditya Leather Exports Private Limited nor the guarantors for the said loan granted by Indian Bank to Aditya Leather Exports Private Limited. The assessee being the natural guardian of minor son has no right to use sale proceeds belonging to minor sons to discharge Indian Bank loan without permission of the court and then turn back and say that the said amount paid to Indian Bank is to be allowed deduction on the ground of diversion of overriding tittle, which will lead to traversity of justice and illegality. The assessee has not come to the court with clean hand and we cannot be party to such illegal and perverse act of the assessee. Thus, we hold that the said amount of Rs. 4.25 crores was paid by the assessee out of non-compete fee received by the assessee and further it is mere application of income and there is no diversion by overriding title as the shares were never part of the charge in favour of Indian Bank. The said amount of Rs. 4.25 crores was paid by the assessee to Indian Bank to settle the defaulted loan obligation of Aditya Leather Exports Private Limited. Further, the assessee has entered into a simultaneous agreement for sale of shares as well for non-compete fee and Indian Bank was also in a position to exercise restraint over non-compete fee which belonged to the assessee and even Indian Bank could not have exercised any extended lien over shareholding of minor sons in "Kris Srikanth Sports Entertainment Private Limited" without permission of court keeping in view laws prevailing in India relevant to minor and guardianship. No such permission was ever taken from courts by Indian Bank or by the assessee under the laws applicable to minor and guardianship and hence extended lien if at all it is available was over non-compete fee which in any case is held to be an exempt income. Thus, the assessee will not get any deduction from taxable income of amount paid to Indian Bank to discharge liability of "Aditya Leather Exports Private Limited" of the misconceived cannot be part of scheme of illegitimate tax evasion undertaken by the assessee. Further, we also hold that the payments made to Indian Bank by the assessee to the tune of Rs. 4.25 crores was merely an application of income. Reference is drawn to the decision of the Third Member of the Income-tax Appellate Tribunal, Mumbai in the case of *Perfect Thread Mills Ltd.* v. *Dy. CIT* reported in [2020] 77 ITR (Trib) 603 (Mumbai) ; [2020] 181 ITD 1 (Mum-Trib.) (TM). We order accordingly.

Thus, we summarise and conclude our decision as under :

"(a) We uphold reopening of the concluded assessment by the Assessing Officer invoking the provisions of section 147 of the 1961 Act.

(b) We hold that sale consideration of Rs. 7.50 crores was duly received for sale of shares of 'Kris Srikanth Sports Entertainment Private Limited' which is to be brought to tax under the provisions of the 1961 Act including sections 60-64 of the 1961 Act.

(c) We hold that non-compete fee of Rs. 7.50 crores was exempt from tax being capital receipt.

(d) We hold that the payment of Rs. 4.25 crores was made by the assessee to 'Indian Bank' to settle the loan availed of by 'Aditya Leather Exports Private Limited' which was in default, out of non-compete fee earned by the assessee which we have already held to be exempt from tax and now it is academic whether there was any diversion of income by overriding title or not. In any case for completeness, we hold that the assessee was not entitled for deduction by way of diversion by overriding title as there was no charge held by 'Indian Bank' and there was merely a compromise entered into by the assessee with Indian Bank voluntarily to pay defaulted loans availed of by the said 'Aditya Leather Exports Private Limited. Thus, the payment to Indian Bank was merely an application of income and that too of an exempt income.

(e) The question of taxability of Rs. 3 crores which was not received by the assessee is again an academic question as we have already held that this non-receipt of Rs. 3 crores was on account of non-compete fee which is held to be exempt income."

12 In the result, all the four appeals adjudicated by us in this order are partly allowed.

Order pronounced on the May 19, 2020 in Chennai.

[2020] 80 ITR (Trib) 341 (Ahmedabad)

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

BHAGWATIBEN VINODKUMAR SURANI

v.

INCOME-TAX OFFICER

SANDEEP GOSAIN *(Judicial Member)* and
AMARJIT SINGH *(Accountant Member)*

March 5, 2020.

SS ▸ ITA 1961, s 68
AY ▸ 2014-15
HF ▸ Department

CASH CREDITS—UNEXPLAINED CASH CREDITS—LONG-TERM CAPITAL GAINS FROM SALE OF SHARES—ADDITIONS BASED ON DETAILED ENQUIRIES BY INVESTIGATION WING AND SECURITIES AND EXCHANGE BOARD OF INDIA—SCRIP A PENNY STOCK, PURCHASED AT A LOW PRICE—OFF MARKET PURCHASES, BACK DATED AND NOT REPORTED ON EXCHANGE—PURCHASES IN PHYSICAL FORM AND DEMATERIALISED ONLY SUBSEQUENTLY—INVESTEE A PENNY STOCK COMPANY WITH NO CREDENTIALS SALE RATES ARTIFICIALLY HIKED, WITH NO REAL BUYER—ADDITIONS JUSTIFIED—INCOME-TAX ACT, 1961, S. 68.

During the course of assessment proceedings, the assessee was asked to explain certain cash credits but in spite of numerous opportunities, the assessee could not explain them. The Assessing Officer made additions on account of unexplained cash credits under section 68 of the Income-tax Act, 1961. This was confirmed by the Commissioner (Appeals). On appeal :

Held, *that the additions made by the Assessing Officer were on account of detailed enquiries carried out by the Kolkata Investigation Directorate with regard to 84 penny stock companies and the Securities and Exchange Board of India. The modus operandi involving operators, intermediaries and the beneficiaries had already been detailed in the investigation report prepared and disseminated by the Kolkata Investigation Directorate. Similar investigations were also conducted by the Directorate of Investigation at Mumbai and Ahmedabad. After a thorough investigation, the Assessing Officer concluded that : (a) the scrip was a penny stock, purchased at a low price, which was over a period of time ramped up by the operators acting in benami names or name lenders, the purchases were off market purchases and not reported on the exchange ; (b) the purchases were back dated, i. e., per a back dated*

contract note, paid for in cash, so that there was no trail ; (c) the purchases were in the physical form, and dematerialised only subsequently ; generally long after the purchase date, being back dated and, further, close to the date of sale ; and (d) the investee was a penny stock company, with no credentials, and the sale rates were artificially hiked, with no real buyers, so that the inference of the sales being bogus, was unmistakable. No new facts or circumstances had been placed on record. Therefore, there was no reason to interfere with the findings of the authorities and of the Commissioner (Appeals).

Cases referred to :

CIT *v.* Abhinandan Investment Ltd. [2016] 6 ITR-OL 139 (Delhi) (para 6)

CIT *v.* Biju Patnaik [1986] 160 ITR 674 (SC) (para 6)

CIT *v.* Durga Prasad More [1971] 82 ITR 540 (SC) (para 6)

CIT (Dy.) *v.* Housing Development and Finance Corp. Ltd. [2006] 98 ITD 319 (Mum) (para 6)

CIT *v.* Mohanakala (P.) [2007] 291 ITR 278 (SC) (para 6)

CIT (Asst.) *v.* Som Nath Maini [2006] 7 SOT 202 (Chd) (para 6)

Govindarajulu Mudaliar (A.) *v.* CIT [1958] 34 ITR 807 (SC) (para 6)

ITO *v.* Shamim M. Bharwani [2016] 69 taxmann.com 65 (Mumbai) (para 6)

Kale Khan Mohammad Hanif *v.* CIT [1963] 50 ITR 1 (SC) (para 6)

McDowell and Co. Ltd. *v.* CTO [1985] 154 ITR 148 (SC) (para 6)

Parimisetti Seetharamamma *v.* CIT [1965] 57 ITR 532 (SC) (para 6)

Pavankumar M. Sanghvi *v.* ITO [2017] 59 ITR (Trib) 389 (Ahd) (para 6)

Sreelekha Banerjee *v.* CIT [1963] 49 ITR (SC) 112 (para 6)

Sumati Dayal *v.* CIT [1995] 214 ITR 801 (SC)(para 6)

Ziauddin A. Siddique *v.* Jt. CIT (I. T. A. Nos. 4699 and 4700 (Mum) of 2011, dated April 25, 2014) (para 6)

I. T. A. No. 1309/Ahd/2018 (assessment year 2014-15).

None appeared for the assessee.

R. A. Dhyani, Additional Commissioner of Income-tax, for the Department.

ORDER

1 The order of the Bench was pronounced by

SANDEEP GOSAIN ***(Judicial Member)***.—The captioned appeal has been filed at the instance of the assessee against the order of the Commissioner of Income-tax (Appeals)–5, Ahmedabad (CIT(A) in short) vide Appeal

No. CIT(A)-5/ITO. Wd. 5(2)(1)/262/2016-17 dated March 12, 2018 arising in the assessment order passed under section 143(3) of the Income-tax Act, 1961(hereinafter referred to as "the Act") dated December 26, 2016 relevant to the assessment year (AY) 2014-15.

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

"1. The learned Commissioner of Income-tax (Appeals) has erred in confirming the addition of Rs. 15,06,889 made by the Assessing Officer treating the long-term capital gain on sale of shares of Alang Gases Ltd. including the cost thereof as alleged unexplained cash credits under section 68 of the Income-tax Act, 1961 and thereby erred in disallowing exemptions claimed by the appellant under section 10(38) of the Income-tax Act, 1961.

2. The learned Commissioner of Income-tax (Appeals) has erred in confirming the above addition made by the Assessing Officer as income from other sources only on the basis of the investigation carried out by the Director General of Income-tax (Investigation) Kolkata and the Securities and Exchange Board of India that the scrip of Alang Ind. Gases Ltd. is penny stock indulged in providing bogus long-term capital gain of which the appellant is one of the beneficiaries.

3. The learned Commissioner of Income-tax (Appeals) has erred in confirming the action of the Assessing Officer in completing the assessment without providing copy of the statements, material, etc., relied upon by him hence the same being against the principles of natural justice and law requires to be cancelled.

4. The learned Commissioner of Income-tax (Appeals) has erred in confirming the action of the Assessing Officer in not granting an opportunity for cross-examination of the persons making the statement on the basis of which addition has been made. Hence, the assessment so made being against the principles of natural justice and law is illegal and void ab initio."

Today, the case was fixed for hearing but none appeared on behalf of **3** assessee nor any adjournment application has been filed on record.

From the records, we observe that the required notice was sent to the **4** assessee by registered post which was duly served upon the assessee and in this respect acknowledgment from the Department of Posts has already been placed on record which shows that even in spite of service of notice, the assessee or his representative has not come before this court for attending the hearing which goes to show that the assessee is not inter-

ested in pursuing with her present appeal. However, the learned Departmental representative present in the court is ready to the arguments, therefore we proceed to decide the appeal on the merits ex parte qua the assessee, after hearing the learned Departmental representative.

5 The brief facts of the case are that assessee has filed her return of income on March 22, 2015 declaring a total income of Rs. 2,45,560. The case was selected for scrutiny and serving a statutory notice and after seeking reply of the assessee, assessment order under section 143(3) read with section 147 of the Act was framed on December 26, 2016 thereby making addition on account of unexplained cash credits under section 68 of the Act.

Aggrieved by the order of the Assessing Officer, the assessee preferred an appeal before the learned Commissioner of Income-tax (Appeals), who after considering the case of both the parties, dismissed the appeal filed by the assessee.

Aggrieved by the order of the learned Commissioner of Income-tax (Appeals), now the assessee is in appeal before us on the grounds mentioned hereinabove. Although the assessee has raised four grounds but all the four grounds raised by the assessee are interconnected, interrelated and relates to challenging the order of the learned Commissioner of Income-tax (Appeals) in confirming the addition made by the Assessing Officer on account of unexplained cash credits under section 68 of the Act.

6 We have heard the learned Departmental representative and perused the material placed on record as well as the orders passed by the Revenue authorities. In the instant case, we find that during the course of assessment proceedings, the assessee was asked to explain the impugned cash credits but even in spite of availing of numerous opportunities, the assessee could not explain the impugned cash credit. Thus, additions were made by the Assessing Officer. After considering the submissions as well as the facts of the present case, we find that the Commissioner of Income-tax (Appeals) has decided these issues in paragraph No. 4 of his order. However, the operative portion is contained in paragraph Nos. 4.3 to 4.11 which are reproduced hereunder :

"*Decision*

4.3. I have carefully considered the assessment order and the submission filed by the appellant. During the course of assessment proceedings, the Assessing Officer has observed that on during the financial year under consideration, the assessee has claimed exemption of long-term capital gain for Rs. 14,78,289 under section 10(38) of the Act in respect of sale of share of Alang Industries Gases Limited.

The assessee claimed that 28600 shares of Alang Industries Gases Ltd. have been purchased on April 1, 2012 at one rupee per share.

The appellant has obtained share certificates in physical form and the same was dematerialised later on by him and then such shares were sold in the market. The appellant has claimed that as sale was a subject matter of securities transaction tax and the shares were sold through the Securities and Exchange Board of India registered brokers. The appellant has mainly argued that the entire transactions are supported by documentary evidences like purchase bill, payment, sale bill, consideration received through cheque, d-mat statement, etc., hence such amount cannot be a subject matter of addition relying upon findings of the Kolkata Investigation Directorate and the Securities and Exchange Board of India as well as other information including the statements of various persons including operators, entry providers and stock brokers.

4.4. On a careful consideration of the entire facts, it is observed that the Kolkata Investigation Directorate had undertaken investigation into 84 penny stocks (Turbo Tech being one of it) and has given detailed findings indicating bogus long-term capital gain/short-term capital gain entries claimed by a large number of beneficiaries. The modus operandi involving operators, intermediaries and the beneficiaries has been detailed in the investigation report prepared and disseminated by the Kolkata Directorate. Similar investigations were also conducted by the Directorate of Investigation at Mumbai and Ahmedabad. These being circumstantial evidence are most relevant for deciding the issue whether the appellant has earned genuine capital gain or bogus capital gain.

4.5. Before dealing with the facts of the appellant's case, it is important to discuss the issue of penny stock and its modus operandi of transactions. If a person who is having unaccounted income who wants to convert this income into white then he approaches an entry operator. The entry operator maintains accounts of numerous persons and legal entities and is in constant touch with the persons who are engaged in managing an entry giving penny stock company. A penny stock company is that company whose shares are listed on a stock exchange like the Bombay Stock Exchange and has very low market capitalisation and are traded at a very low price. More often entry giving penny operator companies do not do any real business activity. The unique feature of entry giving penny stock company is tremendous jump and slump in the share prices in a short span of time. In

fact in a typical technical analysis one may find that the fluctuation in share prices of entry giving company runs into thousands of percentage. Once the person "A" having unaccounted income contacts the person "E" (entry operator) the person "E" gives person "A" to invest certain amount in a company at a very low price. This purchase may happen through either stock exchange or preferential allotment wherein shares of "P" (an entry giving penny stock company) will be bought by "A". It may also happen that "E' will ask "A" to buy shares of some other private limited company which will be subsequently merged with company "P" and by virtue of this merger the shares of "P" will automatically come to "A". Once the shares of "P" will get credited to account of "A" then the entry operator "E" along with the share brokers will jack up the prices of shares of "P". As such common investors are not interested in "P" hence the shares of this company is extremely sterile without much volatility. Through circular trading the shares of "P" is increased. Once the prices of the shares are rigged to an optimum amount, the entry operator asks the beneficiary to deliver the unaccounted cash. This may be delivered in parts as well as in one go. Once the unaccounted cash is delivered by the beneficiary "A", the same is then routed by the operator to the books of counter-parties (purchasers), through a maze of various other paper companies, which ultimately buy the shares belonging to the beneficiary at high prices. When the corresponding amount reaches into the account of these counter parties, either by way of cheque or RTGS, the operator instructs the beneficiary to place a option for the shares in a particular lot size on a particular date and time. Accordingly the same is being conveyed to the counter parties or the person operating the terminal behalf counter parties and on the given date and time transaction, i. e., purchase of shares from the beneficiary through stock exchange, is executed.

4.6. In this way, the shares of the beneficiaries are bought by the dummy concern (counter parties) and the unaccounted money of the beneficiary is routed to the books the beneficiary as a bogus entry of long-term capital gain. After one year the entry operator ask the person "A" to sell these shares of "P" and get the capital gain. This capital gain arises through stock markets and after one year hence this gain is an exempt income of person "X". This one way of doing transactions in penny stock and transferring unaccounted money and obtaining long-term capital gain or loss as the case may be. Even in some of the cases, the shares of the penny stock companies are

acquired by the beneficiaries of long-term capital gain at very low prices through the route of preferential allotment (private placement) and of market transaction. These shares have a lock-in-period of 1 year as per the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009. It is also observed that in some of the cases all the transactions are back dated means purchases are shown to be made in cash one year prior to sale even though the actual purchase has not happened. As companies are also involved in such transactions, back dated letter is given to the assessee for allotment of shares and transfer of physical shares one year prior to sale of shares but in fact no such act has been carried out. These activities are carried out only at the time of dematerialisation of shares meaning thereby the assessee is given physical shares when the assessee gives such shares for dematerialisation but papers are artificially created such that shares were purchased by the assessee one year prior to dematerialisation and shares were held by him. By adopting these various methods, the assessee obtains bogus long-term capital.

4.7. It can be seen from the financial data of the company which is available at public domain ; no prudent person will invest in such companies. When there are a large number of fundamental companies are available in the market, why the appellant has chosen to invest in these types of shares clearly prove that the appellant wishes to obtain exempt capital gain by obtaining accommodative entries. It is an established law that income-tax proceedings fall in the domain of preponderance of probabilities, meaning that the action of the assessee is considered to be rational and well inform falling in the domain where probable choice are exercised. In *Sumati Dayal* v. *CIT* [1995] 214 ITR 801 (SC) the hon'ble Supreme Court has held as under (page 805) :

'It is no doubt true that in all cases in which a receipt is sought to be taxed as income, the burden lies upon the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee. (See *Parimisetti Seetharamamma* v. *CIT* [1965] 57 ITR 532 (SC) at page 536). But, in view of section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year the same may be charged to income-tax as the income of the assessee of that previous year if the explanation offered by the assessee about the

nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such case there is prima facie, evidence against the assessee, viz., the receipt of money and if he fails to rebut the said evidence being unrebutted, can be used against him by holding that it was a receipt of an income nature. While considering the explanation of the assessee the Department cannot, however, act unreasonably.'

The financial analysis made hereinabove clearly prove that the decision of investment in non-descript penny stock is highly unlikely for a prudent investor and also that the quantum jump in stock prices of Alang Industrial Gases Ltd.

4.8. The Assessing Officer has also referred to the Securities and Exchange Board of India report wherein the Securities and Exchange Board of India dated December 19, 2014 has found various persons as fraudulent in their market practices and restrained them from further trading. The scrip in which the appellant has made the transaction is listed in penny stock by the Securities and Exchange Board of India and no prudent person would invest in such type of shares. As discussed hereinabove, transactions of shares were not governed by market practices and payment was made in cash which prove that transactions are non-genuine and the appellant has resorted to preconceived scheme to procure the long-term capital gain by way of price difference in share transactions which is not support by market.

4.9. The statement of Shri Sanjay Dhirajlal Vora, the regional director (east zone) of M/s. Anand Rathi Shares and Stock Brokers Ltd. recorded on April 8, 2015 reveals the modus operandi adopted to avail of bogus short-term capital loss.

4.10. With regard to the observation of the appellant that the entire transactions are supported by various documentary evidence, it is observed that shares in which the appellant has carried out transaction is penny stock, brokers have also confirmed that there are manipulative transactions in the above scrip which is further supported by the Securities and Exchange Board of India order relied on by the Assessing Officer, the entire circumstantial evidence clearly suggest that the appellant has obtained accommodation entries. This issue and modus operandi in similar transaction is discussed by the Mumbai Income-tax Appellate Tribunal in the case of *ITO* v. *Shamim M. Bharwani* [2016] 69 taxmann.com 65 (Mumbai) as under :

'4.1 As shall be evident from the foregoing narration of events, the primary facts (and figures) of the case are not in dispute, which (dispute) arises principally on account of the different inferences

drawn from the same set of primary facts by the two Revenue authorities. The issue is, thus, essentially factual, revolving or centering around as to which of the two inferential findings are maintainable in law, i. e., in view of the surrounding facts and circumstances of the case. The Revenue's principle and the only charge is qua the genuineness of the transaction/s, and which has been acceded to by the first appellate authority in view of the documentary evidence furnished by the assessee in support of his claims. That genuineness could validly be tested on the ground of principle of preponderance of human probabilities, which could thus form a valid ground or parameter for determining the genuineness, stands since settled by the apex court in *Sumati Dayal* (supra), relied upon by the Revenue, wherein the apex court, in declaring the transaction as non-genuine, discarded a host of documentary evidence filed or relied upon by the assessee-appellant. That documentary evidence are not by themselves conclusive, and the truth of the matter or the documents could be determined on the basis of or on the anvil of the surrounding facts and circumstances of the case is well-settled, and for which the Revenue relies on the decision in the case of *CIT* v. *Durga Prasad More* [1971] 82 ITR 540 (SC). What is relevant, more so where the genuineness of the transaction is in issue, is the truth of the document/s furnished in substantiation, as well as the substance of the transaction and not its form, and which is to be determined on the basis of and on the conspectus of the entirety of the facts and circumstances of the case.

The issue before us is whether the documents furnished by the assessee, including the averments made by him, or even his broker, satisfy the test of preponderance of human probabilities. In our view, if the assessee has reasonably explained the "intriguing" facts and circumstances as pointed by the Assessing Officer and on the strength of which the genuineness is assailed by him, and which further agree with that observed in the case of a penny stock company, no case for treating the transaction as not genuine shall arise. The onus under section 68 though is on the assessee, so that his explanation would, however, require being substantiated or proved. The case law in the matter is legion, and toward which we may, if only for the sake of completeness of our order, advert to the some of the celebrated decisions by the apex court in the matter :

A. Govindarajulu Mudaliar v. *CIT* [1958] 34 ITR 807 (SC) ;

Sreelekha Banerjee v. *CIT* [1963] 49 ITR (SC) 112 ;

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

Durga Prasad More [1971] 82 ITR 540 (SC) (supra) ;

CIT v. *Biju Patnaik* [1986] 160 ITR 674 (SC) ; [1986] 26 Taxman 324 (SC) ;

Sumati Dayal [1995] 214 ITR 801 (SC) (supra) ; and

CIT v. *P. Mohanakala* [2007] 291 ITR 278 (SC) ; 161 Taxman 169 (SC).

We may further clarify that in proceeding with the matter, we have circumscribed the entire material on record.

4.2 The assessee, to begin with, has nowhere explained as why the shares were purchased in cash, the source of which is ascribed to cash-in-hand, and not to any contemporaneous evidence, as cash withdrawn from bank on that or nearby dates. How was the cash, one may ask, transmitted from Mumbai, where the assessee is resident, to Kolkata, where the purchase stands made, and the broker, to whom it is paid, located ?

4.3 Then, again, why was the transaction not carried through a recognised stock exchange (SE), mandatory in law, even as it was done through its registered member. This becomes relevant and significant for more than one reason. Firstly, it proves the time of the transaction, which is of essence inasmuch as it determines the holding period of the shares/asset, with reference to which, where over 12 months, exemption from tax to gains arising on transfer is granted by law per section 10(38) read with other relevant defining provisions of the Act. The first appellate authority has in this regard mentioned the settlement number of the transaction as D-2005326. The same, even as stated by the Assessing Officer (refer para 4.8 of the assessment order), is the number of the contract note issued by the broker. The settlement, where the transaction is carried through the stock exchange, which is admittedly not the case, is between the brokers or the members of the stock exchange and, accordingly, only a net amount is payable or receivable by a particular broker for a particular period, called the settlement period, which extends to generally one week or a fortnight, and which is to or from the stock exchange, which aggregates the financial impact, i. e., the net result of all the transactions amongst all the brokers for the settlement period, acting as a collecting/disbursing agency. A single amount is thus either payable or receivable by each broker to or from the stock exchange for a particular period, which is again numbered (i. e., as settlement

number), and serves to settle the financial obligations to or claims on all the other members of the exchange, i. e., of each broker, for that period. This is of course accompanied by giving and taking delivery of the shares, either in physical form or by issuing or accepting delivery, which in either case is remitted by the member to his clients, for on behalf of whom he acts, charging a fee called brokerage/commission, for his services. The whole purport of the forgoing note on the trading process is to clarify that the settlement only signifies a settlement between the brokers, carried out through the exchange acting as a nodal agency, so that the purchase transaction/s under reference may not be so construed inasmuch the same is admittedly off the market (exchange), which stands established by the Revenue through the communication per its letter to the Assessing Officer in response to a notice under section 133(6) by the Calcutta Stock Exchange. This aspect is in fact not disputed by the assessee. The same may not necessarily imply that the transaction is not genuine or not undertaken at the relevant time but then the same would have to be shown with reference to some corroborative, external evidence. The contract note/bill by the broker is only an "internal voucher", i. e., by person who is a party to the transaction and, thus, acting in cohesion, if not it collusion. It is after all a document generated by him, so that its truth, in the context of paper companies, the "selling" of "gains" and "losses" in which the brokers, as operators, play a significant role, cannot therefore be decided with reference thereto or the statement by the broker, a related party. This, however, would be so only where there are strong factors or circumstances which cause serious doubt about the transaction. For example, how one may ask, were the shares transmitted to the assessee, located at Mumbai, who would have signed the transfer form ?

The broker or the assessee nowhere states the reason for carrying out the transaction in the manner done, i. e., off the market, which is not ordinarily permissible, and is subject to some legal constraints under the Securities Contracts (Regulation) Act, 1956. Rather, how could he deal with the assessee, who is not his client. Then, again, why was it paid for in cash, for which there is no evidence, and neither has the broker been shown to accept cash in the ordinary course of his business. Why, for the persons trading therein, this would be an impediment to claim the cost of shares traded in, in view of the non obstante clause of section 40A(3).

The brokers are in fact required to maintain a separate bank account for the funds received from or on behalf of the clients, so that the same do not merge with that of the broker himself. What is equally important is the date on which the shares were dematerialised. This is as no transaction could be carried out in listed shares, i. e., in the physical form, where the shares stand dematerialised by the company. Why were the shares sent for dematerialisation only in May 2005, i. e., after a delay of over a year, having been dematerialised only on July 12, 2005 (paper book page 10), i. e., days prior to their sale on July 22, 2005. That is, assuming that the shares were actually purchased and delivered to the assessee in May, 2004. Rather, as it would appear to us, the dematerialisation of the shares coincides with the spiraling price of the scrip, so that an orchestration of the "events" is apparent. The shares, even assuming a valid purchase, thus, would be close to the date/s of dematerialisation. The assessee states of having reported its purchase (of shares) on May 6, 2004, per his balance-sheet as at March 31, 2005, enclosing it along with his return of income for the assessment year 2005-06 (paper book pages 15, 16). The return of income, however, is filed only on October 28, 2005, which is even subsequent to the sale of shares on July 12, 2005, so that the said reporting of the transaction, which of course does not bear the date of purchase, is to no moment. The assessee relies on a communication from the company dated May 17, 2004 (paper book page 2) to show that the shares were lodged for transfer with the company immediately upon purchase on May 6, 2004, evidencing, thus, the validity of the purchase date. In this regard, we may firstly clarify that proving purchase as genuine ; the Revenue doubting the price rise and, thus the gain, would therefore only make out a case for the exclusion of a part (Rs. 54,250) of the impugned sum of Rs. 12.15 lakhs, which represents the entire sale proceeds of the shares. It needs to be appreciated that what is essentially under cloud, and being seriously doubted as to the genuineness, is the gain stated to arise on the transaction. It is the gain which is abnormal, i. e., both qua the scrip ; its trading and, thus, its quantum, and unexplained, besides being tax exempt, and which is independent of its purchase. The purchase of shares of a little known company of the face value of Rs. 10 each at Rs. 21-22 would even otherwise hardly raise any eye-brow or doubt. The purchase gets doubted examined only for the reason that it represents a part of the overall transaction, which is considered by the Revenue as an artifice. In other words, proving the

purchase would by itself not prove the transaction of gain, which stands impugned and, further, being at a minor sum has little bearing in the matter. In fact, the Assessing Officer states precisely this (refer para 4.9(a) of his order), that even assuming the purchase as genuine, the sales, given the high rates for such penny stocks, with no real buyers, are bogus. Coming to the assessee's contention on the merits, the letter dated May 17, 2004 supra inspires little confidence. It does not specify the name of the authorised signatory, the sign being otherwise not visible. It bears no serial number, even as it represents a communication, which a company or its secretarial department is required to make in the regular course of its business. It further does not bear any indication of the manner in which it is conveyed to the assessee, i. e., by hand, per post-ordinary or registered ; per courier, etc., which is, again, a norm, besides establishing its date. Such remittances are generally through registered post, so that it would constitute evidence with the company for having delivered the shares, which are even otherwise valuable documents. The incidental question that arises is the date when the shares were dematerialised by the company. This is as it clearly shows that the shares, issued only on March 31, 2004, being remitted to the transferee in the physical form on May 17, 2004, were not converted into the d-mat form till then. This is relevant as the trading on the exchange, which only would make the share a listed share, gain on which is exempt under section 10(38), could as per the guidelines only be in the d-mat form. No wonder, the trading on the exchange in the said scrip commences only on March 3, 2005. "How could, in that case, it be said that the assessee has transferred/sold a listed share after holding it for a period of a year (or more) ?" The assessee speaks of having deposited STT, but then the question is whether the said payment would make a non-genuine transaction, genuine.

4.4 Further on, why, and on what basis, the assessee, a teacher by profession as well as a partner in a partnership, with no documented or reported experience in trading in shares or investment therein—his balance-sheet as on March 31, 2005 reflecting no investment in shares except the 2500 shares in ECL (besides another for a meagre amount of Rs. 2100), pick the said shares, i. e., selected the said scrip for investment, and which in fact stood issued only days earlier on March 31, 2004. The company reportedly has no standing either in the industry or in the market (i. e., for the goods or services it presumably deals in), or even in the trading circles, i. e., for shares. That

apart, no material to establish its business activity, viz., its annual reports, or of the companies under the same management/industry, etc., to exhibit its credentials in any manner, stands adduced by the assessee at any stage of the proceedings. Continuing further, how and on what basis, a share trading in the range of Rs. 21 to Rs. 22 in May 2005, witness a rise to Rs. 465 to Rs. 490 inside a couple of months—the assessee's sale, at Rs. 487 a piece, being on July 22, 2005. This is amasing by any standard, and which has not been explained in any manner, i. e., assuming it to be not a case of price manipulation, which is the modus operandi adopted for reflecting prices on the stock exchange. Who, one may ask, are the purchasers of such shares, i. e., in a non-descript company at such high prices ; no information qua which stands furnished at any stage, even as it is they who have apparently bought the shares, supplying the credit to the assessee, which is being questioned and examined as to its genuineness under section 68 of the Act. All this definitely casts serious doubts on the genuineness of the sale price and, thus, the ensuing gain. This, in fact, is a classical feature of a penny stock, the price zooming for no apparent, economic or even technical, reasons. One could understand where the same is in sympathy with the market sentiment or some industry-wise favourable development, even as the share ostensibly trades, i. e., going by the market quote, at over 22 times its price obtaining two months earlier, implying, by correspondence, a jump in the market index to the same or similar extent, i. e., 2200 per cent., over the same period, which is both unheard of—work as it does to, a growth rate of 13200 per cent. per annum, and, of course, not shown. There is again no whisper and, consequently, no information on record of the particular industry/s in which, if any, the said company operates, or its financials, much less future prospects, the information on all of which gets factored into and captured in what is called 'price', representing an equilibrium of the supply and demand forces. In fact, each of the other incidences, i. e., for a penny stock company, are exhibited in the present case, as pointed out by the Assessing Officer per paras 4.8 and 4.9 of his order, as under :

(a) The scrip is a penny stock, purchased at a low price, which is over a period of time ramped up by operators acting in benami names or name lenders. The purchases are off market purchases, and not reported on the exchange ;

(b) purchase/s is back dated, i. e., per a back dated contract note, paid for in cash, so that there is no trail ;

(c) the purchases are in the physical form, and dematerialised only subsequently ; generally long after the purchase date, being back dated and, further, close to the date of sale ; and

(d) The investee is a penny stock company, with no credentials, and the sale rates artificially hiked, with no real buyers, so that inference of the sales being bogus, is unmistakable.

4.5 The assessee was show caused on all these parameters, seven in number, listed at para 4.11 (page 7) of the assessment order, to no satisfactory reply by the assessee and, in fact, at any stage. There is in fact no reply to the Assessing Officer (refer para 4.14(i) of the assessment order), whose satisfaction the law mandates, so that the purview of the appellate authority is as to whether the Assessing Officer in being not satisfied had acted reasonably, i. e., given the assessee's explanation, including the materials/evidence furnished in support, or not. The Assessing Officer, accordingly, treated the impugned transaction as not satisfactorily explained, and added the same under section 68 of the Act. Reliance was placed by him on the decisions by the Tribunal in the case of *CIT (Asst.)* v. *Som Nath Maini* [2006] 7 SOT 202 (Chd), also reproducing therefrom, as well as in the case of *Dy. CIT* v. *Housing Development and Finance Corp. Ltd.* [2006] 98 ITD 319 (Mum) rendered applying the first principles and the legal propositions enunciated by the apex court per the decisions cited by the Assessing Officer (supra). The Tribunal in the case of *Ziauddin A. Siddique* v. *Jt. CIT* (I. T. A. Nos. 4699 and 4700 (Mum) of 2011, dated April 25, 2014) issued a finding of fact, of course on the basis of the material on record, as to circular trading, in case of a penny stock company, Eltrol Ltd., exposing or validating the modus operandi as stated to be adopted in the case of such stocks—the price, de hors any fundamentals or other factors, of paper companies being raked up on the exchange, so as to yield "gain", and then again, equally without basis, grounded to yield "loss", both of which, i. e., "gain" and "loss", find ready "customers" or "takers". The purpose is to evade tax or to yield some tax benefit. True, this has not been established in the present case, but the features are strikingly the same, with the impugned transaction bearing the same incidents, so that odds are loaded heavily against the genuineness of the transaction. The onus to establish the same, it is to be borne in mind, is on the assessee. The learned Commissioner of Income-tax (Appeals) has dismissed the same as merely suspicions. We are, however, unable to, for the reasons aforestated, persuade ourselves to agree with him, each of the several

incidents and, therefore, the questions arising, that impugn the genuineness in the present case, are based on admitted and undisputed facts. The issue, as clarified at the beginning of the discussion, being the validity of the inferential findings—there being a difference between the two Revenue authorities. We find the observations by the Assessing Officer as valid and relevant, to no satisfactory answer or explanation by the assessee, i. e., to the questions, incidents or the phenomenon observed. Dismissing the same as mere suspicions, as does the learned Commissioner of Income-tax (Appeals), is, to our mind, glossing over the many attendant facts and incidents, the most vital, and on which we observe complete silence or absence of any explanation, is the absence of any credentials of the investee-company. The learned Commissioner of Income-tax (Appeals) picks up one incident or aspect of the transaction at a time to note of it being backed by documentary evidence/s and, therefore, genuine. The approach is fallacious. Firstly, documentary evidence, in the face of unusual events, as prevailing in the instant case, and without any corroborative or circumstantial evidence/s, cannot be regarded as conclusive. Two, the preponderance of probabilities only denotes the simultaneous existence of several "facts", each probable in itself, albeit low, so as to cast a serious doubt on the truth of the reported "facts", which together make up for a bizarre statement, leading to the inference of collusiveness or a device set up to conceal the truth, i. e., in the absence of credible and independent evidence. For a scrip to trade at nearly 50 times its face value, only a few months after its issue, only implies, if not price manipulation, trail blazing performance and/or great business prospects (with of course proven management record, so as to be able to translate that into reality), while even as much as the company's business or industry or future programme (all of which would be in public domain), is conspicuous by its absence, i. e., even years after the transaction/s. The company is, by all counts, a paper company, and its share transactions, managed. We, accordingly, reversing the findings of the first appellate authority, confirm the assessment of the impugned sum under section 68 of the Act. We decide accordingly.

4.6 The assessee has relied on several case law. As would be apparent from the forgoing, abundant case law has been relied upon by the both sides. The issue is not of the application of any particular case law. The legal propositions being well-settled, each case rests on its own facts. Our decision, likewise, and as would also be apparent,

is guided solely by the facts and circumstances of the instant case, including the assessee's explanation in respect thereof. The reliance on case law, the facts of none of which were gone through at the time of hearing, even as the issue is principally factual, would thus be of no assistance to the assessee's case. We may though clarify that the Revenue having invoked the provision of section 68, the burden to prove the credit transaction/s and, thus, its genuineness is on the assessee. It is therefore not necessary or incumbent on the Revenue to, i. e., for the purpose of application of section 68, to either disprove or exhibit the transaction as sham or bogus, and its obligation only extends to show that the genuineness of the impugned credit transaction is doubtful or has not been satisfactorily proved by the assessee.

5. In the result, the Revenue's appeal is allowed.'

It is also observed that in the recent decision the hon'ble Ahmedabad Income-tax Appellate Tribunal in the case of *Pavankumar M. Sanghvi* v. *ITO* [2017] 59 ITR (Trib) 389 (Ahd) ; [2017] 81 taxmann.com 308 (Ahd) has held that when the assessee received unsecured loan but could not produce the lenders for verification and these lenders were found to be shell companies, the said loan transactions could not be said to be genuine merely because the assessee filed loan confirmations, copies of ledger accounts and other supporting evidence. The relevant observation of the Income-tax Appellate Tribunal is also reproduced hereinbelow (page 398 or 59 ITR (Trib)) :

'8 As I proceed to deal with the genuineness aspect, it is important to bear in mind the fact that what is genuine and what is not genuine is a matter of perception based on the facts of the case vis-a-vis the ground realities. The facts of the case cannot be considered in isolation with the ground realties. It will, therefore, be useful to understand as to how the shell entities, which the loan creditors are alleged to be, typically function, and then compare these characteristics with the facts of the case and in the light of well-settled legal principles. A shell entity is generally an entity without any significant trading, manufacturing or service activity, or with high volume low margin transaction to give it colour of a normal business entity, used as a vehicle for various financial maneuvers. A shell entity, by itself, is not an illegal entity but it is their act of abatement of, and being part of, financial maneuverings to legitimise illicit monies and evade taxes, that takes it actions beyond what is legally permissible. These entities

have every semblance of a genuine business its legal ownership by persons in existence, statutory documentation as necessary for a legitimate business and a documentation trail as a legitimate transaction would normally follow. The only thing which sets it apart from a genuine business entity is lack of genuineness in its actual operations. The operations carried out by these entities, are only to facilitate financial maneuverings for the benefit of its clients, or, with that predominant underlying objective, to give the colour of the genuineness to these entities. These shell entities, which are routinely used to launder unaccounted monies, are a fact of life, and as much a part of the underbelly of the financial world, as many other evils. Even a layman, much less a Member of this specialised Tribunal, cannot be oblivious of these ground realities.'

4.11. The sequence of facts and the modus operandi adopted by the appellant shows that the entire transaction made by him was nothing but accommodation entries taken by him to camouflage his undisclosed income under the garb of capital gains, income from which is exempt income. This is nothing but a colourful device adopted to avoid payment of tax which is not permissible as per law, in view of the decision of the *McDowell and Co. Ltd.* v. *CTO* [1985] 154 ITR 148 (SC). The hon'ble Supreme Court has held that "the taxing authority is entitled and is indeed bound to determine the true legal relation resulting from transaction. If the parties have chosen to conceal by a device the legal relation, it is open to the taxing authorities to unravel the device and to determine the true character of the relationship". Moreover, the hon'ble High Court of Delhi in a recent decision in the case of *CIT* v. *Abhinandan Investment Ltd.* (I. T. A. No. 130 of 2001, dated November 19, 2015 ; [2016] 6 ITR-OL 139 (Delhi)) has categorically explained the principle laid down by the Supreme Court in the case of *McDowell and Co.* and the same is fully applicable to the facts of penny stock cases.

In the present case the appellant has dealt in penny stock, which is similar to shell companies for which various investigations were already carried out by the Calcutta Investigation Wing and the Securities and Exchange Board of India order referred to supra hence long-term capital gain in the present case is also an accommodative entry and the Assessing Officer is correct in treating such sale value as income from other sources. In view of the judicial pronouncements referred to hereinabove and the circumstantial evidences, I am inclined to agree with the Assessing Officer in holding

the transactions as non-genuine and this ground of appeal is, therefore, dismissed."

After having gone through the facts of the case, we find that this case **7**
pertains to the additions made by the Assessing Officer on account of detailed enquiries being carried out by the Kolkata Investigation Directorate with regard to 84 penny stocks company as well as the Securities and Exchange Board of India. The modus operandi involving operators, intermediaries and the beneficiaries have already been detailed in the investigation report prepared and disseminated by the Kolkata Investigation Directorate. Similar investigations were also conducted by the Directorate of Investigation at Mumbai and Ahmedabad. After thorough investigation, the Assessing Officer concluded in his order at paragraph Nos. 4.8 and 4.9. The relevant particulars are extracted hereunder :

(a) The scrip is a penny stock, purchased at a low price, which is over a period of time ramped up by operators acting in benami names or name lenders. The purchases are off market purchases, and not reported on the exchange ;

(b) purchase/s is back dated, i. e., per a back dated contract note, paid for in cash, so that there is no trail ;

(c) the purchases are in the physical form, and dematerialised only subsequently ; generally long after the purchase date, being back dated and, further, close to the date of sale ; and

(d) The investee is a penny stock company, with no credentials, and the sale rates artificially hiked, with no real buyers, so that inference of the sales being bogus, is unmistakable.

Even before us, no new facts or circumstances have been placed on record and the orders passed by the Revenue authorities have also gone unrebutted, therefore, we find no reason to interfere into or to deviate from such findings of the authorities below and we uphold the findings of the learned Commissioner of Income-tax (Appeals) and reject the ground raised by the assessee.

In the result, the appeal of the assessee is dismissed. **8**

Order pronounced in the court on March 5, 2020 at Ahmedabad.

[2020] 80 ITR (Trib) 360 (Ahmedabad)

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

ARROW DIGITAL P. LTD.

v.

DEPUTY COMMISSIONER OF INCOME-TAX

RAJPAL YADAV *(Vice-President)* and
WASEEM AHMED *(Accountant Member)*

March 5, 2020.

SS ▸ ITA 1961, s 271(1)(c)
AY ▸ 2012-13
HF ▸ Assessee

PENALTY—CONCEALMENT OF INCOME—FURNISHING INACCURATE PARTICULARS OF INCOME—GRATUITY EXPENSES—ASSESSING OFFICER GETTING INFORMATION ABOUT DISALLOWANCE AND PROVISION FOR GRATUITY FROM TAX AUDIT REPORT—EXHIBITION EXPENSES—GENUINENESS OF EXPENSES NOT DOUBTED—NOT A CASE OF FURNISHING INACCURATE PARTICULARS OF INCOME—PENALTY NOT LEVIABLE—INCOME-TAX ACT, 1961, s. 271(1)(c).

The Assessing Officer levied penalty on the assessee on two counts : on the claim of the assessee representing the provision for gratuity amounting to Rs. 1,33,781 and for failure by the assessee to deduct tax at source on the exhibition expenses of Rs. 3,48,640. The Commissioner (Appeals) confirmed the levy of penalty. On appeal :

Held, *(i) that the auditor in his tax audit report in form 3CD had clearly mentioned that the gratuity expenses were not allowable. Similarly, the Assessing Officer got information about the disallowance of the provision for gratuity from the tax audit report only. He had not carried out any investigation for detecting the claim of the assessee towards the provision for gratuity which was not allowable as deduction. Thus, the assessee had not furnished any inaccurate particulars of income deliberately. Accordingly he could not be visited with the penalty under section 271(1)(c) of the Income-tax Act, 1961.*

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

(ii) That the genuineness of exhibition expenses claimed was not found incorrect by the authority. Therefore the assessee should not be visited with penalty merely because the claim made by the assessee was not maintainable

in the view of the Department unless and until the genuineness of the expenses claimed found to be incorrect or erroneous. The provisions of law permit the assessee to claim the deduction in the year in which the assessee deducts the tax at source and deposits the amount to the Department. Thus the assessee had not furnished any inaccurate particulars of income deliberately. Accordingly he could not be visited with the penalty under section 271(1)(c).

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

Cases referred to :

CIT *v.* Reliance Petroproducts (P.) Ltd. [2010] 322 ITR 158 (SC) (paras 4, 7)

CIT *v.* Zoom Communication P. Ltd. [2010] 327 ITR 510 (Delhi) (para 4)

Price Waterhouse Coopers Pvt. Ltd. *v.* CIT [2012] 348 ITR 306 (SC) (para 7)

I. T. A. No. 1568/Ahd/2018 (assessment year 2012-13).

S. N. Divatia, authorised representative, for the assessee.

Deelip Kumar, Senior Departmental representative, for the Department.

ORDER

The order of the Bench was pronounced by

WASEEM AHMED ***(Accountant Member)***.—The captioned appeal has 1
been filed at the instance of the assessee against the order of the learned Commissioner of Income-tax (Appeals)-1, Ahmedabad, dated May 18, 2018 (in short, "learned CIT(A)") arising in the matter of assessment order passed under section 143(3) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") dated December 29, 2014 relevant to the assessment year 2012-13.

The assessee has raised the following grounds of appeal.

"1.1 The order passed under section 250 on May 18, 2018 for the assessment year 2012-13 by the Commissioner of Income-tax (Appeals)-1, Ahmedabad, upholding the penalty imposed under section 271(1)(c) of Rs. 1,49,068 in respect of disallowance of expenses is wholly illegal, unlawful and against the principles of natural justice.

1.2 The learned Commissioner of Income-tax (Appeals) has grievously erred in law and on facts in not considering fully and properly the submissions made and evidence produced by the appellant.

2.1 The learned Commissioner of Income-tax (Appeals) has grievously erred in law and on facts in confirming the penalty imposed under section 271(1)(c) of Rs. 1,49,068 by the Assessing Officer.

2.2 That in the facts and in the circumstances of the case as well as in law, the learned Commissioner of Income-tax (Appeals) ought not to have upheld the penalty imposed under section 271(1)(c) of Rs. 1,49,068 by the Assessing Officer.

3.1 The learned Commissioner of Income-tax (Appeals) has grievously erred in law and on facts in not appreciating that in the absence of any clear finding as to the nature of default under section 271(1)(c) made out by the Assessing Officer, the penalty proceedings as well as penalty imposed both were illegal and unlawful.

It is, therefore, prayed that penalty imposed under section 271(1)(c) of Rs. 1,49,068 upheld by the Commissioner of Income-tax (Appeals) may kindly be deleted."

2 The effective issue raised by the assessee is that the learned Commissioner of Income-tax (Appeals) erred in confirming the penalty levied under section 271(1)(c) of the Act on account of furnishing inaccurate particulars of income.

3 The facts in brief are that the assessee in the present case is a private limited company and engaged in the business of trading of printing machine. The assessment was framed under section 143(3) of the Act after making the disallowance/addition on account of gratuity expenses and exhibition expenses for Rs. 1,33,781 and Rs. 3,48,640 respectively vide order dated December 29, 2014. The Assessing Officer accordingly in the assessment order initiated the penalty proceedings on account of furnishing inaccurate particulars of income.

3.1 However, the assessee during the penalty proceedings claimed that the expenses claimed by it are genuine but the same has been disallowed on account of difference in the view for allowing such claim. As such, the expenses claimed by the assessee were treated as income under the deeming provisions. Therefore, there cannot be any penalty on the disallowance of the claim made by the assessee. However, the Assessing Officer was of the view that the expenses claimed by the assessee are not allowable by the operations of the provisions of the Act. Had there not been any scrutiny assessment, the assessee would have been allowed the expenses as discussed above which would have resulted under the assessment of income. Accordingly, the Assessing Officer levied the penalty for Rs. 1,49,068 being 100 per cent. of the amount of tax sought to be evaded.

Aggrieved the assessee preferred an appeal to the learned Commissioner of Income-tax (Appeals) who confirmed the order of the Assessing Officer by observing as under : 4

> 2.4. On a careful consideration of entire facts, it is seen that during the course of assessment proceedings, the contention of the appellant cannot be accepted by the Assessing Officer that the claim of the expenses in the profit and loss account was right. However, the appellant has not submitted any bona fide explanation regarding why he has not deducted TDS on the payment of exhibition expenses. Hence, cannot be allowed as revenue expenditure. The contention of the appellant that it had claimed deduction on account of Maersk India Pvt. Ltd. after making due payments. Maersk India Pvt Ltd. is an Indian company and any payment made to this company, the TDS requires to be deducted. The case cited by the appellant of the hon'ble Income-tax Appellate Tribunal, Delhi in the case of *Syndicate Labtes* v. *CIT* Delhi Tribunal, is on different footing and related to the freight expenses paid. Here, the question is of the expenditure made on exhibition expenses. The contention of the appellant is not acceptable as he has not deducted TDS on the above payment. The appellant has unnecessarily tried to bring the issue as disputed and claimed that no penalty is leviable. All the case law cited by the appellant in regard and their ratios are not applicable to this case. It is pertinent to note that the hon'ble Delhi High Court in the case of *CIT* v. *Zoom Communication P. Ltd.* [2010] 327 ITR 510 (Delhi) has held as under :
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> 'Section 271(1}(c) of the 'income-tax Act, 1961—Penalty—For concealment of income. Whether so long as assesses has not concealed any material fact or any factual information given by him has not been found to be incorrect, he will not be liable to imposition of penalty under section 271(1)(c), even if claim made by him is unsustainable in law, provided that he either substantiates explanation offered by him or explanation, even if not substantiated, is found to be bona fide—*Held*, yes—Whether if assessee makes a claim which is not only incorrect in law, but is also wholly without any basis and explanation furnished by him for making such a claim is not found to be bona fide, *Explanation 1* to section 271(1}(c) would come into play and the assessee will be liable to penalty—Held, yes.'

The hon'ble Delhi High Court in the above case has also considered the decision of the hon'ble Supreme Court in the case of *CIT* v. *Reliance Petroproducts (P.) Ltd.* [2010] 322 ITR 158 (SC) and held as under (page 518) :

"In the case of *Reliance Petroproducts (P.) Ltd.* (supra), the addition made by the Assessing Officer in respect of the interest claimed as a deduction under section 36(1)(iii) of the Act was deleted by the Commissioner of Income-tax (Appeals) though it was later restored, by the Tribunal, to the Assessing Officer. The appeal filed by the assessee against the order of the Tribunal was admitted by the High Court, it was, in these circumstances, that the Tribunal came to the conclusion that the assessee had neither concealed the income nor filed inaccurate particulars thereof. In recording this finding, the Tribunal felt that if two views of the claim of the assessee were possible, the explanation offered by it could not be said to be false. This, however, is not the factual position in the case before us. The facts of the present case thus are clearly distinguishable.

It is true that mere submitting a claim which is incorrect in law would not amount to giving inaccurate particulars of the income of the assessee, but it cannot he disputed that the claim made by the assessee needs to be bona fide. If the claim besides being incorrect in law is mala fide, *Explanation 1* to section 271(1) would come into play and work to the disadvantage of the assessee."

The facts of the appellant case are similar as have been discussed in the case of the *CIT* v. *Zoom Communication (P.) Ltd.* [2010] 327 ITR 510 (Delhi) ; [2010] 40 DTR (Delhi) 249. Considering the facts discussed hereinabove, it is held that the claim made by the assessee is not bona fide. The claim besides being incorrect in law is mala fide, and *Explanation 1* to section 271(1}(c) would come into play and work to the disadvantage of the assessee. Even in the present case, the appellant has failed to establish its claim of Rs. 4,82,421 which was not added back to the total income. In view of the above discussion and judicial ratios (supra). Assessing Officer was justified in levying penalty of Rs. 1,49,068 under section 271(1)(c) of the Act for concealment and furnishing inaccurate particulars. Hence, the penalty levied of Rs. 1,49,068 for the default is confirmed. The ground of appeal with sub grounds is dismissed.

Being aggrieved by the order of the learned Commissioner of Income-tax (Appeals), the assessee is in appeal before us.

5 The learned authorised representative before us filed a paper book running from pages 1 to 68 and claimed that it has not furnished any inaccurate particular of income. Therefore the assessee cannot be subject to the penalty under section 271(1)(c) of the Act.

On the other hand, the learned Departmental representative vehemently supported the order of the authorities below. 6

We have heard the rival contentions of both the parties and perused the materials available on record. In the present case the penalty has been levied on two counts. Firstly, on the claim of the assessee representing the provision for gratuity amounting to Rs. 1,33,781 and secondly the assessee failed to deduct the TDS on the exhibition expenses of Rs. 3,48,640 under the provisions of section 195 of the Act. 7

7.1 Regarding the claim of the assessee for the gratuity expenses, we note that the auditor in his tax audit report has clearly mentioned that the impugned expenses are not allowable under the Act. But despite that the assessee did not make any disallowance in the computation of income and also contested for the deduction of the same till the learned Commissioner of Income-tax (Appeals). However, it is transpired that there was the disclosure made by the tax auditor in the tax audit report furnished in form 3CD. Thus it cannot be that the assessee deliberately furnished inaccurate particulars of income. Similarly, the Assessing Officer got information about the disallowance of the provision for gratuity from the tax audit report only. The Assessing Officer has not carried out any investigation for detecting the claim of the assessee towards the provision for gratuity which was not allowable as deduction. In holding so, we find support and guidance from the judgment of the hon'ble Supreme Court in the case of *Price Waterhouse Coopers Pvt. Ltd.* v. *CIT* reported in [2012] 348 ITR 306 (SC) ; [2012] 25 taxmann.com 400 (SC) wherein, it was held as under (page 318 of 348 ITR) :

> "The contents of the tax audit report suggest that there is no question of the assessee concealing its income. There is also no question of the assessee furnishing any inaccurate particulars. It appear to us that all that has happened in the present case is that through a bona fide and inadvertent error, the assessee while submitting its return, failed to add the provision for gratuity to its total income. This can only be described as a human error which we are all prone to make. The caliber and expertise of the assessee has little or nothing to do with the inadvertent error. That the assessee should have been careful cannot be doubted, but the absence of due care, in a case such as the present, does not mean that the assessee is guilty of either furnishing inaccurate particulars or attempting to conceal its income.
>
> We are of the opinion given the peculiar facts of this case, the imposition of penalty on the assessee is not justified. We are satisfied that the assessee had committed an inadvertent and bona fide error

and had not intended to or attempted to either conceal its income or furnish inaccurate particulars."

In view of the above, we hold that the assessee has not furnished any inaccurate particular of income deliberately. Accordingly he cannot be visited with the penalty under section 271(1)(c) of the Act, in the given facts and circumstances.

7.2 Regarding the disallowance of the exhibition expenses under the provisions of section 40(a)(i) read with section 195 of the Act, we note that the claim of the assessee was not doubted by the authorities below. As such, the assessee has incurred expenses for the purpose of the business but the same was disallowed by virtue of the provisions of section 40(a)(i) read with section 195 of the Act. Accordingly, the same was deemed as income of the assessee by the operation of law. But the controversy arises whether the assessee has furnished inaccurate particulars of income by claiming the deduction on account of exhibition expenses which was disallowed on account of non-deduction of TDS under section 195 of the Act. In this connection, we note that the term "inaccurate particulars" has not been defined under the Act. However, various courts including the hon'ble apex court defined the term as the details of claim made are not accurate, not according to the truth, not exact or erroneous. In this regard we find support and guidance from the order of the hon'ble apex court in the case of *Reliance Petroproducts Pvt. Ltd.* reported in [2010] 322 ITR 158 (SC). The relevant extract of the order is reproduced as under (page 164) :

". . . it must be shown that the conditions under section 271(1)(c) must exist before the penalty is imposed. There can be no dispute that everything would depend upon the return filed because that is the only document, where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise.

The word 'particulars' must mean the details supplied in the return, which are not accurate, not exact or correct, not according to truth or erroneous. In the instant case, there was no finding that any details supplied by the assessee in its return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under section 271(1)(c). A mere making of the claim, which is not sustainable in law by itself will not amount to furnishing of inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to the inaccurate particulars."

7.3 However in the present case the genuineness of expenses claimed was not found as incorrect by the authority. Therefore in the present facts and circumstances the assessee should not be visited with penalty merely on the basis of the claim made by the assessee is not maintainable in the view of the Revenue unless and until the genuineness of expenses claimed found to be incorrect or erroneous. Moreover, it is not like this that the assessee shall never be allowed deduction for the exhibition expenses. As such the provisions of law permits to claim the deduction in the year in which the assessee deduct the TDS and deposits the same to the Income-tax Department. In view of the above, we hold that the assessee has not furnished any inaccurate particular of income deliberately. Accordingly he cannot be visited with the penalty under section 271(1)(c) of the Act in the given facts and circumstances.

In the result the appeal filed by the assessee is allowed. 8

Order pronounced in the court on March 5, 2020 at Ahmedabad.

[2020] 80 ITR (Trib) 367 (Ahmedabad)

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

AJAY BALDEVBHAI PATEL

v.

INCOME-TAX OFFICER

SANDEEP GOSAIN ***(Judicial Member)*** and
AMARJIT SINGH ***(Accountant Member)***

March 5, 2020.

SS ▸ ITA 1961, s 144
AY ▸ 2009-10
HF ▸ Department

INCOME FROM UNDISCLOSED SOURCES—ASSESSMENT—EX PARTE ASSESSMENT—ASSESSEE NOT INTERESTED IN PURSUING APPEAL AND FAILING TO EXPLAIN ASSESSMENT BEFORE ASSESSING OFFICER AND COMMISSIONER (APPEALS)—NO NEW FACTS OR CIRCUMSTANCES PLACED ON RECORD AND ADDITION MADE UNREBUTTED—ADDITION JUSTIFIED—INCOME-TAX ACT, 1961, S. 144.

The assessee traded on the stock exchange and according to the annual income-tax return details with the Assessing Officer, the assessee made transactions of Rs. 56,94,807 on stock exchanges and at the same time made payment of Rs. 33,09,504 to credit card companies. During the course of

assessment proceedings, the assessee was asked to explain the investments but in spite of numerous opportunities, the assessee could not explain the investments. Thus, additions were made by the Assessing Officer. Before the Commissioner (Appeals) the assessee did not put appearance on several dates, and the appeal was dismissed on the merits and the addition under section 69B of the Income-tax Act, 1961 of Rs. 21,17,676 confirmed. On appeal :

Held, *that the assessee was not interested in pursuing his present appeal and had failed to explain the assessment before the Assessing Officer and the Commissioner (Appeals). Therefore, the Assessing Officer and the Commissioner of (Appeals) had decided against the assessee while making additions. No new facts or circumstances had been placed on record and the orders passed by the Revenue authorities had also gone unrebutted. Therefore, there was no reason to interfere with the findings of the authorities.*

RAKESH C. RASTOGI *v.* APPROPRIATE AUTHORITY [2002] 253 ITR 94 (SC) (para 7) *referred to.*

I. T. A. No. 1341/Ahd/2018 (assessment year 2009-10).

None appeared for the assessee.

R. A. Dyani, Additional Commissioner of Income-tax, for the Department.

ORDER

The order of the Bench was pronounced by

1 SANDEEP GOSAIN ***(Judicial Member)***.— The captioned appeal has been filed at the instance of the assessee against the order of the Commissioner of Income-tax (Appeals)–3, Ahmedabad ("CIT(A)", in short), vide Appeal No. CIT(A)-3/264/Wd. 3(3)(1)/16-17, dated March 22, 2018 arising in the assessment order passed under section 143(3) of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), dated December 1, 2011 relevant to the assessment year (AY) 2009-10.

2 The assessee has raised the following grounds of appeal :

> "1. The learned Commissioner of Income-tax (Appeals) has erred in law as well as on the facts in passing an ex parte order without proper consideration and appreciation of facts and circumstances at the appellant's end as explained to the learned Commissioner of Income-tax (Appeals). That since the appellant was in search of a new authorised representative, the previous authorised representative having withdrawn his LOA as also admitted by the learned Commissioner of Income-tax (Appeals) in his order deciding the penalty appeal, the appellant bona fidely presumed that he would be given

some time prior to any adverse inference. The appellant thus humbly states that the appeal be set aside to the file of the learned Commissioner of Income-tax (Appeals) for decision afresh in the interest of natural justice and equity.

2. That on the facts of the case and in law, the learned Commissioner of Income-tax (Appeals) has erred in upholding the best judgment assessment order passed by the Assessing Officer under section 144 of the Act without appreciating the fact that since the copy of AIR information leading to the addition in question having not been furnished by the Assessing Officer though having been specifically asked for, the appellant was prevented by sufficient and reasonable cause in defending his case. The impugned assessment order thus requires to be quashed as bad in law and void ab initio on this ground itself.

3. The learned Commissioner of Income-tax (Appeals) has grievously erred in confirming the addition of Rs. 21,14,476 on account of the alleged unexplained investment under section 69B of the Act made by the Assessing Officer on contradictory observations.

4. The learned Commissioner of Income-tax (Appeals) further erred in not appreciating the fact that the entire transactions, i. e., either unsecured loans or loans and advances having been routed through banking channels and keeping in view the fact that the source of the same being the transactions with the stock exchange, the impugned addition was even otherwise not justified in the absence of any adverse material on record and hence the impugned addition of Rs. 21,14,476 requires to be deleted."

Today, the case was fixed for hearing but none appeared on behalf of assessee nor any adjournment application has been filed on record. **3**

From the records, we observe that the required notice was sent to the assessee by registered post which was duly served upon the assessee and in this respect acknowledgment from the Department of Posts has already been placed on record which shows that even in spite of service of notice, the assessee or his representative has not come before this court for attending the hearing which goes to show that the assessee is not interested in pursuing with his present appeal. However, the learned Departmental representative present in the court is ready to the arguments, therefore we proceed to decide the appeal on the merits ex parte qua the assessee, after hearing the learned Departmental representative. **4**

We have heard the learned Departmental representative and perused the material placed on record as well as the orders passed by the Revenue authorities. As per the facts of the present case, the assessee has indulged **5**

in a trading activity of stock exchange and as per the AIR details with the Assessing Officer, the assessee made transaction of Rs. 56,94,807 in stock exchanges with the same time the assessee has made payment of Rs. 33,09,504 being payment made to credit card companies as per the AIR details.

6 During the course of assessment proceedings, the assessee was asked to explain the impugned investments but even in spite of availing of numerous opportunities, the assessee could not explain the impugned investments. Thus, additions were made by the Assessing Officer.

7 Aggrieved by the order of the Assessing Officer, the assessee preferred an appeal before the learned Commissioner of Income-tax (Appeals) but had not put appearance on several dates, therefore the learned Commissioner of Income-tax (Appeals) dismissed the appeal filed by the assessee on the merits. The operative portion of the order of the learned Commissioner of Income-tax (Appeals) is contained in paragraph No. 5.1 of his order which is reproduced hereunder :

"5.1. *Decision* : I have persued the assessment order of the Assessing Officer and the statement of facts filed by the appellant carefully. The Assessing Officer has given substantial opportunities of being heard as per ratio laid down in the case of *Rakesh C. Rastogi* v. *Appropriate Authority* [2002] 253 ITR 94 (SC). However, the appellant could not or was not in a position to avail of such opportunity to explain the investments in question. In fact the Assessing Officer has noted that the appellant has expressed his inability to explain the impugned investment of Rs. 21,14,476. Notwithstanding the recording by the Assessing Officer a number of opportunities were given by this office from February 2, 2015 onwards but to no avail. No new evidence were filed under rule 46A, therefore, no remand report was called from the Assessing Officer. The Assessing Officer has computed addition under section 69B in para 4.4 of the assessment order as under :

Sl. No.	*Name*	*Amount (Rs.)*
1.	Baldevbhai Patel	71,000
2.	B. G. Chauidh	88,000
3.	Dahyalal Lavajibhai	3,000
4.	Indubhai Vasoya	5,000
5.	Jehan Bomi Sarkari	2,75,000
6.	Nandi Enterprise	14,35,000
7.	Prakash	10,000

8.	R. D.Mobile World	61,000
9.	S. K. Traders	49,900
10.	Star Enterprise	1,74,830
11.	ZCG Lenc Care	50,946
	Grand total	21,44,476

I have carefully examined the above list of creditors. In my opinion, small creditors such as Sr. Nos. 2, 3, 4 and 7 may not be co-operative with the appellant. The principle of equity is kept in mind. Therefore, I decide to not confirm the amount of Rs. 26,800 so as to defray natural justice. However, I confirm the addition under section 69B of Rs. 21,17,676. The ground of appeal is party allowed."

8 Although in the present appeal, the assessee has raised four grounds but all the four grounds raised by the assessee are interconnected, inter-related and relates to challenging the order of the learned Commissioner of Income-tax (Appeals) in confirming the additions made by the Assessing Officer on account of unexplained investments under section 69B of the Act.

9 After having gone through the facts of the present case, we find that the assessee miserably failed to explain the impugned assessment before the Assessing Officer as well the Commissioner of Income-tax (Appeals). Therefore, the Assessing Officer as well as the Commissioner of Income-tax (Appeals) decided the orders against the assessee while making additions. Even before us, no new facts or circumstances have been placed on record and the orders passed by the Revenue authorities have also gone unrebutted, therefore, we find no reason to interfere into or to deviate from such findings of the authorities below and we uphold the findings of the learned Commissioner of Income-tax (Appeals) and reject the ground raised by the assessee.

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

Order pronounced in the court on March 5, 2020 at Ahmedabad

[2020] 80 ITR (Trib) 372 (Delhi)

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

SUNIL MALHOTRA

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

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

April 30, 2020.

SS ▸ ITA 1961, ss 54, 54F
AY ▸ 2012-13
HF ▸ Assessee

CAPITAL GAINS—EXEMPTION—SALE OF CAPITAL ASSET AND INVESTMENT IN RESIDENTIAL HOUSE—AS ON DATE OF TRANSFER OF ORIGINAL ASSET ASSESSEE NOT OWNING MORE THAN ONE RESIDENTIAL HOUSE—CAPITAL GAINS DULY DEPOSITED IN CAPITAL GAINS SAVINGS ACCOUNT—COMPLETION OF CONSTRUCTION WITHIN TWO YEARS FROM DATE OF SALE OF ORIGINAL ASSET—ASSESSEE ENTITLED TO EXEMPTION—INCOME-TAX ACT, 1961, SS. 54, 54F.

On the date of transfer of the original asset on April 28, 2011, the assessee did not own more than one residential house. The capital gains were not utilised for purchase of a flat on September 13, 2011. The capital gains were duly deposited in the capital gains savings account. The same amounts from the capital gains savings account were utilised for the payment of various expenses incurred for the construction of house at D. The remaining expenditure incurred for the construction of the house were met from the joint account maintained with the bank. The occupancy certificate revealed that the completion of the construction was within two years from the date of sale of the original asset (April 28, 2011-February 1, 2013). The Assessing Officer held that the assessee was not eligible under section 54F of the Income-tax Act, 1961 as the assessee had already purchased the residential flat out of the sale proceeds. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal :

Held, *that the authorities had misled themselves on the basis of wrong facts in holding that the purchase of the flat was out of the sale proceeds of the original asset. The capital gains had been utilised for construction of the house at Delhi and according to the provisions of the Act, the assessee did not have more than one house which was chargeable to tax under the head*

"Income from house property" other than the residential house owned on the date of sale of the original asset. Hence, the addition made by the authorities was unwarranted.

I. T. A. No. 4743/Delhi/2016 (assessment year 2012-13).

N. S. Bhatnagar, Advocate, for the assessee.

Dr. Anjula Jain, Senior Departmental representative, for the Department.

ORDER

The order of the Bench was pronounced by 1

DR. B. R.R. KUMAR ***(Accountant Member)***.—The present appeal has been filed by the assessee against the order of the learned Commissioner of Income-tax (Appeals)-18, New Delhi dated July 4, 2016.

The following grounds have been raised by the assessee : 2

"1. That the learned Income-tax Officer erred in law in denying the benefit admissible under section 54 of the Income-tax Act, 1961 by wrongly relying upon clause (2)(a) of section 54F of the Income-tax Act, 1961 which on the facts of the case is not applicable.

2. That the learned Commissioner of Income-tax (Appeals) erred in law in upholding the assessment on wrong facts and maintaining the disallowance and additions of the long-term capital gain at Rs. 1,76,95,024.

3. That the orders of the authorities below are against the facts and pleading before the authorities below in respect of the construction on the property at D-279, Defence Colony, New Delhi in respect of which the deductions under section 54F was claimed. There is no dispute with regard to the amount of investment in the construction of the house at D-279, Defence Colony, New Delhi claimed at Rs. 1,76,95,024 which was provided out of the capital gains account scheme provided permissible under the law."

During the year under consideration, the assessee has sold immovable property at Plot No. T-2/2, DLF City, Phase III, Gurgaon, on February 28, 2011 and claimed deduction under section 54F of the Income-tax Act, 1961 on account of construction of house at D-279, Defence Colony, New Delhi. The calculation of long-term capital gain as per the computation of income was as under : 3

Long-term capital gains flat	Rs.	Rs.
Full value of consideration		2,77,00,000
Less : Index cost of acquisition	58,49,352	

Less : Index cost of improvement	1,85,967	60,35,319
Less : Exempt under section 54		1,76,95,024
Total Long-term capital gains		39,69,657
Total Capital gains		39,69,657

4 The Assessing Officer found from the submission of the assessee that the assessee has also purchased a residential flat at Rajendra Nagar on September 7, 2011 and since the assessee has already having another house as on completion of construction of D279, Defence Colony, New Delhi, the Assessing Officer held that the assessee is not eligible under section 54F as the assessee has already purchased the residential flat at Rajendra Nagar out of the sale proceeds. The learned Commissioner of Income-tax (Appeals) confirmed the order of the Assessing Officer.

5 We have heard the arguments of both the parties and perused the material on record.

6 The following undisputed facts emanate from the records :

1.	28-4-2011	Sale of the house in DLF
2.	1-8-2011	Sanction of building plan
3.	7-8-2011 to 17-9-2011	Demolition of old house D-279
4.	13-9-2011	Purchase of Rajendra Nagar flat
5.	1-2-2013	Occupancy certificate of D-279

7 The due date of filing of the return for the relevant assessment year was August 31, 2012. The assessee has duly deposited the capital gains in the capital gains savings account number 0913208100066 in accordance with the provisions of the Act.

8 The details of the withdrawal for construction from the above capital gain savings account of house at D-279, Defence Colony, New Delhi (on demolition of the ancestral house) is as under :

		(Rs.)
1.	Oriental Bank of Commerce (Capital Gain A/c) – A/c No. 0913208100066	
	From 13-8-2012 to 13-5-2013	63,29,745
2.	Induslnd Bank – A/c No. 100011312441	
	From 1-8-2011 to 24-7-2012 – Total	1,57,39,401
	½ = 7,86,97,00	78,69,700
	(Joint with brother Anil)	
3.	Induslnd Bank – A/c No. 100003514235	
	From 4-6-2011 to 31-7-2012	

	(Joint with wife Reema) Rs. 34,73,934	
Total		1,76,73,379

The provisions of sections 54 and 54F are as under : 9

"54. Subject to the provisions of sub-section (2), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of a long-term capital asset, being buildings or lands appurtenant thereto, and being a residential house, the income of which is chargeable under the head 'Income from house property' (hereafter in this section referred to as the original asset), and the assessee has within a period of one year before or two years after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, one residential house in India, then, instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section, that is to say,—

(i) if the amount of the capital gain is greater than the cost of the residential house so purchased or constructed (hereafter in this section referred to as the new asset), the difference between the amount of the capital gain and the cost of the new asset shall be charged under section 45 as the income of the previous year ; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be nil ; or

(ii) if the amount of the capital gain is equal to or less than the cost of the new asset, the capital gain shall not be charged under section 45 ; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be reduced by the amount of the capital gain.

The following provisos shall be inserted after clause (ii) of sub-section (1) of section 54 by the Finance Act, 2019, with effect from April 1, 2020 :

Provided that where the amount of the capital gain does not exceed two crore rupees, the assessee may, at his option, purchase or construct two residential houses in India, and where such option has been exercised,—

(a) the provisions of this sub-section shall have effect as if for the words 'one residential house in India', the words 'two residential houses in India' had been substituted ;

(b) any reference in this sub-section and sub-section (2) to 'new asset' shall be construed as a reference to the two residential houses in India :

Provided further that where during any assessment year, the assessee has exercised the option referred to in the first proviso, he shall not be subsequently entitled to exercise the option for the same or any other assessment year.

(2) The amount of the capital gain which is not appropriated by the assessee towards the purchase of the new asset made within one year before the date on which the transfer of the original asset took place, or which is not utilised by him for the purchase or construction of the new asset before the date of furnishing the return of income under section 139, shall be deposited by him before furnishing such return such deposit being made in any case not later than the due date applicable in the case of the assessee for furnishing the return of income under sub-section (1) of section 139 in an account in any such bank or institution as may be specified in, and utilised in accordance with, any scheme which the Central Government may, by notification in the Official Gazette, frame in this behalf and such return shall be accompanied by proof of such deposit ; and, for the purposes of sub-section (1), the amount, if any, already utilised by the assessee for the purchase or construction of the new asset together with the amount so deposited shall be deemed to be the cost of the new asset :

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

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

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

Explanation.—Omitted by the Finance Act, 1992, with effect from April 1, 1993.

54F. (1) Subject to the provisions of sub-section (4), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of any long-term capital asset,

not being a residential house (hereafter in this section referred to as the original asset), and the assessee has, within a period of one year before or two years after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, one residential house in India (hereafter in this section referred to as the new asset), the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say,—

(a) if the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of such capital gain shall not be charged under section 45 ;

(b) if the cost of the new asset is less than the net consideration in respect of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of the new asset bears to the net consideration, shall not be charged under section 45 :

Provided that nothing contained in this sub-section shall apply where—

(a) the assessee,—

(i) owns more than one residential house, other than the new asset, on the date of transfer of the original asset ; or

(ii) purchases any residential house, other than the new asset, within a period of one year after the date of transfer of the original asset ; or

(iii) constructs any residential house, other than the new asset, within a period of three years after the date of transfer of the original asset ; and

(b) the income from such residential house, other than the one residential house owned on the date of transfer of the original asset, is chargeable under the head 'Income from house property'.

Explanation.—For the purposes of this section,—

'net consideration', in relation to the transfer of a capital asset, means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.

(2) Where the assessee purchases, within the period of two years after the date of the transfer of the original asset, or constructs, within the period of three years after such date, any residential house, the

income from which is chargeable under the head 'Income from house property', other than the new asset, the amount of capital gain arising from the transfer of the original asset not charged under section 45 on the basis of the cost of such new asset as provided in clause (a), or, as the case may be, clause (b), of sub-section (1), shall be deemed to be income chargeable under the head 'Capital gains' relating to long-term capital assets of the previous year in which such residential house is purchased or constructed.

(3) Where the new asset is transferred within a period of three years from the date of its purchase or, as the case may be, its construction, the amount of capital gain arising from the transfer of the original asset not charged under section 45 on the basis of the cost of such new asset as provided in clause (a) or, as the case may be, clause (b), of sub-section (1) shall be deemed to be income chargeable under the head 'Capital gains' relating to long-term capital assets of the previous year in which such new asset is transferred.

(4) The amount of the net consideration which is not appropriated by the assessee towards the purchase of the new asset made within one year be fore the date on which the transfer of the original asset took place, or which is not utilised by him for the purchase or construction of the new asset be fore the date of furnishing the return of income under section 139, shall be deposited by him before furnishing such return such deposit being made in any case not later than the due date applicable in the case of the assessee for furnishing the return of income under sub-section (1) of section 139 in an account in any such bank or institution as may be specified in, and utilised in accordance with, any scheme which the Central Government may, by notification in the Official Gazette, frame in this behalf and such return shall be accompanied by proof of such deposit ; and, for the purposes of sub-section (1), the amount, if any, already utilised by the assessee for the purchase or construction of the new asset together with the amount so deposited shall be deemed to be the cost of the new asset :

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

(i) the amount by which—

(a) the amount of capital gain arising from the transfer of the original asset not charged under section 45 on the basis of the cost of

the new asset as provided in clause (a) or, as the case may be, clause (b) of sub-section (1), exceeds

(b) the amount that would not have been so charged had the amount actually utilised by the assessee for the purchase or construction of the new asset within the period specified in sub-section (1) been the cost of the new asset,

shall be charged under section 45 as income of the previous year in which the period of three years from the date of the transfer of the original asset expires ; and

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

Explanation.—Omitted by the Finance Act, 1992, with effect from April 1, 1993."

On going through the facts of the case and the provisions of the Act, the following scenario emerges : **10**

• As on the date of transfer of the original asset on April 28, 2011, the assessee does not own more than one residential house.

• The capital gains were not utilised for the Rajendra Nagar flat purchase on September 13, 2011.

• The capital gains have been duly deposited in the capital gains savings account.

• The same amounts from the capital gains savings account have been utilised for the payment of various expenses incurred for the construction of house at D-279, Defence Colony, New Delhi which can be verified from the bank statement.

• The remaining expenditure incurred for the construction of the house have been met from the joint account maintained with IndusInd Bank.

• The occupancy certificate reveals that the completion of the construction was within 2 years from the date of sale of the original asset (April 28, 2011-February 1, 2013).

Thus, from the perusal of the facts, we hold that the Revenue authorities have mislead themselves on holding that the purchase of the Rajendra Nagar flat out of the sale proceeds of the original asset was on the basis of wrong facts. Hence, keeping in view the facts of the case that the capital gains have been utilised for construction of house at D-279, Defence Colony, New Delhi and as per the provisions of the Act, the assessee does not have more than one house which is chargeable to tax under the head "income from house property" other than the one residential house owned **11**

on the date of sale of original asset, we hereby hold that the addition made by the Revenue authorities is unwarranted.

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

Order pronounced in the open court on April 30, 2020.

[2020] 80 ITR (Trib) 380 (Delhi)

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

MARIAM EDUCATION SOCIETY

v.

COMMISSIONER OF INCOME-TAX (EXEMPTION)

BHAVNESH SAINI *(Judicial Member)* and
O. P. KANT *(Accountant Member)*

May 1, 2020.

SS ▸ ITA 1961, s 12AA
AY ▸ 2017-18
HF ▸ Assessee

CHARITABLE PURPOSE—REGISTRATION—ASSESSEE REQUIRED TO PROVIDE ALL DETAILS REGARDING CONSTITUTION OF ITS MEMBERS, FUNDS RECEIVED AND UTILISED TOWARDS CHARITABLE ACTIVITIES SINCE INCEPTION—ASSESSEE NOT PROVIDING ANY DETAILS OF ACTIVITIES FOR PERIOD FROM ITS ESTABLISHMENT TILL DATE OF APPLICATION FOR REGISTRATION—COMMISSIONER TO DECIDE AFRESH ON VERIFICATION OF OBJECTS AND GENUINENESS OF ACTIVITIES IN ACCORDANCE WITH LAW IN LIGHT OF DOCUMENTS WHICH ASSESSEE IS REQUIRED TO SUBMIT BEFORE HIM—INCOME-TAX ACT, 1961, S. 12AA.

The Commissioner rejected the application for registration of the assessee under section 12AA of the Income-tax Act, 1961. On appeal :

Held, *that the assessee claimed that it was in the process of establishing educational institution for commencing its charitable activity and thus activity not being commenced, and therefore, the Commissioner was not required to examine the activities and reject the registration. But the registration of the assessee before the Registrar of Societies showed that it was registered prior to the financial year 2009. The assessee had not provided any details of the activities for the period from its establishment till the date of applying for registration. The assessee was required to provide all details regarding constitution of its members, funds received and utilised towards charitable activities, since inception of the society. Since all the details had not been*

examined by the Commissioner, the order of the Commissioner was set aside with the direction to decide afresh on verification of the objects and the genuineness of the activities in accordance with the law in the light of the documents which the assessee is required to submit before him.

HARDAYAL CHARITABLE AND EDUCATIONAL TRUST *v.* CIT [2013] 355 ITR 534 (All) (paras 6, 8) *referred to*.

I. T. A. No. 5796/Delhi/2017 (assessment year 2017-18).

J. P. Jain, Chartered Accountant, for the assessee.

Ms. Rakhi Vimal, Senior Departmental representative, and *Manoj Kumar*, Commissioner of Income-tax-Departmental representative, for the Department,

ORDER

The order of the Bench was pronounced by

O. P. KANT ***(Accountant Member)***.—This appeal by the assessee is **1** directed against the order dated August 22, 2017 passed by the learned Commissioner of Income-tax (Exemption), Lucknow (in short, "the CIT"), rejecting the registration of the assessee under section 12AA of the Income-tax Act, 1961 (in short, "the Act"). The assessee has raised the following grounds in the appeal :

> "1. The learned Commissioner of Income-tax (Exemption) is unjustified, illegal and wrong for passing the order under section 12AA(1)(b)(ii) of the Income-tax Act for rejection of the application to grant registration of the society under section 12AA of the Income-tax Act, 1961.
>
> 2. The findings of the learned Commissioner of Income-tax (Exemption) that the society is not carrying out any charitable activities is not correct since exemption under section 12AA can be granted on future activities.
>
> 3. The findings of the learned Commissioner of Income-tax (Exemption) that the members are pooling their professional receipts so as to get exemption and manipulate their income is not correct.
>
> 4. The claim of the learned Commissioner of Income-tax (Exemption) that the assessee has failed to answer how it actually provide charity to people is not correct since the written action plan was submitted during hearing.
>
> 5. The finding of the learned Commissioner of Income-tax (Exemption) regarding earning of profit from the medical services is not correct.

6. The assessee craves leave to add, alter, modify or change any ground of appeal, at the time of hearing in the interest of natural justice.

2 Briefly stated the facts of the case are that the assessee-society is registered under the Societies of the Registrar, Uttar Pradesh and the said registration was renewed for a period of five years from April 25, 2009 to April 25, 2014 by way of renewal certificate issued dated January 27, 2016. As per the information filed before the Registrar of Firms and Societies, Meerut, Uttar Pradesh, the society constituted of the following office bearers :

क्र. सं.	नाम	पिता/पति का नाम	पूरा पता	पद	व्यवसाय
1.	लूकमान अली	श्री शैर मोहम्मद	डी/सी 17 इस्ट एण्ड असंल ट्रोनिका सिटी लोनी (गा.बाद)	अध्यक्ष	व्यापार
2.	डा. एस एम टंडन	बी.एस. टंडन	49 एच आई जी ब्रिज विहार (गा. बाद)	उपाध्यक्ष	डॉक्टर
3.	डा. निशा चौधरी	लूकमान अली	डी/सी 17 इस्ट एण्ड असंल ट्रोनिका सिटी लोनी (गा.बाद)	मन्त्री	डॉक्टर
4.	डा. अनिल सक्सेना	एस पी सक्सेना	लव कुश अस्पताल करावल नगर दिल्ली	कोषाध्यक्ष	डॉक्टर
5.	सुनिल सक्सेना	एस पी सक्सेना	ए–14 सुर्य नगर गाजियाबाद	सदस्य	व्यापार
6.	संतोष सक्सेना	एस के सक्सेना	298 एल आई जी फ्लेट दिलशाद गार्डन दिल्ली	सदस्य	व्यापार
7.	आमिर खान	शैर मौहम्मद	डी सी 17 सन्सल ट्रानिका सिटी लोनी गाजियाबाद	सदस्य	व्यापार
8.	शमीम	शोकत अली	जवाहर नगर दिल्ली	सदस्य	व्यापार

3 The society claimed its objects which include opening of paramedical management, computer engineering, medicine and ayurvedic science educational institution, etc., for expansion of education.

4 The society filed an application on March 29, 2017 before the Commissioner of Income-tax for registration under section 12AA of the Act and was asked to file necessary documents before him. The learned Commissioner of Income-tax after examining the documents filed by the society and after carrying out necessary inquiries, rejected the application of the assessee for registration under section 12A(1) of the Act vide the impugned order dated August 22, 2017. The learned Commissioner of Income-tax has rejected the registration mainly on the following grounds :

1. The applicant has shown opening capital balance of Rs.42,50,375 as on April 1, 2016 and thereafter introduced a huge capital investment of Rs. 52,00,000 in cash. The capital has been mainly contributed by DR Luqumn Ali (president of the society) and Dr. Nisha Choudhary (secretary of the society), who are having share of profit in the society at 50 per cent. and 20 per cent. respectively. The learned Commissioner of Income-tax is of the view that these both individuals

have pooled their individual professional receipt for their own benefit by way of the profit sharing ratio in the society.

2. The society is a commercial entity engaged in providing medical services on commercial lines and levying a huge fee for the same, without any act of charity.

3. The profit motive of the society is evident from the very basis of the formation of the society where division of the profit amounts various members has been prescribed, i. e., Luquman Ali (50 per cent.), Nisha Chaudhary (20 per cent.), SS Tondon (5 per cent.), Anil Saxena (5 per cent.), Sunil Saxena (5 per cent.), Santosh Saxsena (5 per cent.), Amir Khan (5 per cent.) and Samim (5 per cent.).

4. The assessee failed to provide list of various services offered along with the respective charges.

5 According to the learned Commissioner of Income-tax, the documents on record do not suffice to establish the genuineness of the activities of the society and provide sufficient material to corroborate the charitable nature of the objects.

6 Before us, the learned counsel for the assessee has filed paper book containing pages 1 to 120. He referred to the renewal certificate issued by the Societies of the Registrar, dated January 27, 2016 available on page 25 of the paper book. He submitted that the assessee-society was in the process of buying land and constructing medical college to achieve subject of providing education and medical facility for people of the society. In the process money contributed by the members of the society was applied for purchase of the land and further term loan of Rs. 317.5 lakhs was taken from Bank of India. The learned counsel for the assessee referred to various pages of the income and expenditure account and the statement of affairs as on March 31, 2016 and March 31, 2017. The contention of the learned counsel for the society that for granting registration only the objects of the society has to be seen and the activities being future event, the learned Commissioner of Income-tax is not required to examine that. In support of the contention he relied on the decision of the hon'ble Allahabad High Court in the case of *Hardayal Charitable and Educational Trust* v. *CIT* [2013] 355 ITR 534 (All).

7 On the contrary, the learned Departmental representative submitted that the assessee-society was constituted prior to 2009 and no activity thereafter has been shown by the assessee-society in furtherance of its objects. He submitted that only activity have been shown in the financial years 2015-16 and 2016-17, during which the assessee-society had purchased land by way of the money contributed by the members of the

society and thereafter construction by way of the loan funds from banks. According to him, the society was formed purely with the motive of distributing share of profit amount of the members, which was also predecided amount of the members. He submitted that the funds contributed by the members were also not appear to be from explained sources. According to the learned Departmental representative, the assessee is in existence for a very long period and no charitable activity has been shown and thus the assessee failed to establish the genuineness of the activities and therefore the learned Commissioner of Income-tax is justified in rejecting the registration granted under section 12A of the Act.

8 We have heard rival submissions of the parties on the issue in dispute and perused the relevant material on record. We find that on the issue of granting registration under section 12AA, the hon'ble Allahabad High Court in the case of *Hardayal Charitable and Educational Trust* (supra) after analysing various judicial precedents on the issue in dispute held that registration under section 12AA cannot be refused on the ground that the trust has not commenced the charitable or religious activity. The relevant observation of the hon'ble High Court is reproduced as under (page 543) :

> "The preponderance of the judicial opinion of all the High Courts including this court is that at the time of registration under section 12AA of the Income-tax Act, which is necessary for claiming exemption under sections 11 and 12 of the Act the Commissioner of Income-tax is not required to look into the activities, where such activities have not or are in the process of its initiation. Where a trust set up to achieve its objects of establishing educational institution, is in the process of establishing such institutions, and receives donations, the registration under section 12AA cannot be refused, on the ground that the trust has not yet commenced the charitable or religious activity. Any enquiry of the nature would amount to putting the cart before the horse. At this stage only the genuineness of the objects has to be tasted and not the activities, which have not commenced. The enquiry of the Commissioner of Income-tax at such preliminary stage should be restricted to the genuineness of the objects and not the activities unless such activities have commenced. The trust or society cannot claim exemption, unless it is registered under section 12AA of the Act and thus at that such initial stage the test of the genuineness of the activity cannot be a ground on which the registration may be refused."

9 The hon'ble High Court further held that the question of exemption of the application of the income received by way of the donation being a

separate issue might be examined in assessment proceeding of the relevant years. The relevant finding of the hon'ble High Court is reproduced as under (page 544) :

> "The question of the exemption of the application of income received by way of donation, is a separate issue and which may be required to be considered, when the return is filed by the trust and is examined by the Income-tax Officer. The question as to whether the donations by the societies was the expenditure of the trust for charitable and religious purposes will be examined at the time of examining the return."

We find that in the instant case the assessee is claiming that it was in the **10** process of establishing educational institution for commencing its charitable activity and thus activity not being commenced, and therefore, the learned Commissioner of Income-tax was not required to examine the said activities and reject the registration. But the registration of the assessee society before the Registrar of Societies shows that the society was registered prior to the financial year 2009. The assessee has not provided any detail of the activities for the period from its establishment till the date for applying registration. In our opinion, the assessee is required to provide all details regarding constitution of its members, funds received and utilised towards charitable activities et cetera detail since inception of the society. Since all the details have not been examined by the learned Commissioner of Income-tax, we set aside the order of the learned Commissioner of Income-tax with the direction to decide a fresh on verification of the objects and genuineness of the activities in accordance with the law in the light of the documents which the assessee is required to submit before him as mentioned above. The assessee shall be afforded adequate opportunity of being heard. The grounds raised by the assessee are accordingly allowed for statistical purposes.

In the result, the appeal of the assessee is allowed for statistical pur- **11** poses.

Order pronounced in the open court on May 1, 2020.

[2020] 80 ITR (Trib) 386 (Delhi)

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

DEPUTY COMMISSIONER OF INCOME-TAX

v.

TAUREG PROPERTIES AND SECURITY SERVICES LTD.

(and vice versa)

BHAVNESH SAINI *(Judicial Member)* and
N. K. BILLAIYA *(Accountant Member)*

March 4, 2020.

SS ▸ I TA 1961, ss 147, 148
AY ▸ 2000-01
HF ▸ Assessee

REASSESSMENT—NOTICE—ASSESSING OFFICER NOT SIGNING NOTICE OR MENTIONING ASSESSMENT YEAR—NOTICE ILLEGAL—REASSESSMENT PROCEEDINGS NOT VALID—INCOME-TAX ACT, 1961, SS. 147, 148.

Held, *that the notice of reassessment was unsigned and did not mention any assessment year. Since an unsigned notice had been sent to the assessee, it vitiated the entire reassessment proceedings because it was the jurisdictional notice to initiate proceedings under section 147 of the Income-tax Act, 1961. Since the notice itself was illegal and bad in law, the entire reassessment proceedings were vitiated and the Assessing Officer could not have assumed jurisdiction under section 148 to frame the assessment against the assessee.*

I. T. A. No. 733/Delhi/2016 and C. O. No. 155/Delhi/2016 (assessment year 2000-01).

Sanjay Tripathi, Senior Departmental representative, for the Department.

Rakesh Gupta, Advocate, and *Sumit Jain*, Chartered Accountant, for the assessee.

ORDER

The order of the Bench was pronounced by

1 BHAVNESH SAINI ***(Judicial Member)***.—The Departmental appeal as well as the cross-objection by the assessee are directed against the order of the learned Commissioner of Income-tax (Appeals)-3, Delhi, dated November 13, 2015, for the assessment year 2000-001.

2 We have heard the learned representative of both the parties and perused the material available on record.

The short question in the Departmental appeal is quashing of the re- 3
assessment proceedings under section 147/148 of the Income-tax Act, 1961.

The assessee on receipt of notice under section 148 of the Income-tax 4
Act, 1961, dated March 26, 2007, filed letter dated April 2, 2007 before the Assessing Officer contending that the notice under section 148 dated March 26, 2007 is neither signed nor the assessment year have been mentioned. The assessee objected to the reassessment proceedings. The objections of the assessee apart from the above reason and others were rejected by the Assessing Officer The Assessing Officer made four additions and framed the assessment dated October 31, 2007.

The assessee challenged the reopening of the assessment as well as the 5
addition on the merits before the learned Commissioner of Income-tax (Appeals). The learned Commissioner of Income-tax (Appeals) dealing with the objections of the assessee regarding reopening of the assessment found that the assessee immediately on receipt of notice under section 148 contended before the Assessing Officer that notice under section 148 dated March 26, 2007 is unsigned and did not mention the assessment year. The Assessing Officer did not rebut the submissions of the assessee. The learned Commissioner of Income-tax (Appeals) called for the folder of the assessment record and found the copy of the unsigned notice is available on record and another notice claimed by the Assessing Officer to be signed is also available on record. However, the Assessing Officer did not dispute that unsigned notice was received by the assessee. The learned Commissioner of Income-tax (Appeals) in view of the above found that since the notice under section 148 received by the assessee is unsigned, therefore, reopening of the assessment was quashed and held to be null and void. The appeal of the assessee was allowed.

After considering the rival submissions, we do not find any merit in the 6
Departmental appeal. Copy of the notice under section 148 dated March 26, 2007 is available at page 1 of the paper book. It is unsigned as well as did not mention any assessment year. Since the unsigned notice have been sent to the assessee, therefore, it vitiate the entire reassessment proceedings because it was the jurisdictional notice to initiate proceedings under section 147 of the Income-tax Act, 1961. Since the notice itself was illegal and bad in law, therefore, the entire reassessment proceedings have been vitiated and as such the Assessing Officer could not have assume the jurisdiction under section 148 of the Income-tax Act, 1961 to frame the assessment against the assessee. The learned Commissioner of Income-tax (Appeals) was justified in holding the assessment order to be null and void. The Departmental appeal has no merit and the same is accordingly dismissed.

7 The assessee in the cross-objection has raised other grounds as well as challenging the reopening of the assessment which have not been decided by the learned Commissioner of Income-tax (Appeals). Since we have dismissed the Departmental appeal and there is no finding by the learned Commissioner of Income-tax (Appeals) on the other grounds raised by the assessee in the cross objections, therefore, the cross-objection is left with academic discussion and is infructuous.

8 In the result, the cross-objection of the assessee dismissed.

9 To sum up, the appeal of the Department and the cross-objection of the assessee are dismissed.

Order pronounced in the open court.

[2020] 80 ITR (Trib) 388 (Delhi)

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

GREEN VALLEY INFRACITY P. LTD.

v.

INCOME-TAX OFFICER

H. S. SIDHU *(Judicial Member)*

March 2, 2020.

SS ▸ ITA 1961, ss 251(2)
AY ▸ 2012-13
HF ▸ Assessee

APPEAL TO COMMISSIONER (APPEALS)—ENHANCEMENT OF INCOME—REMAND BY TRIBUNAL—INSPECTOR OF INCOME-TAX NOT COMPETENT TO ISSUE ENHANCEMENT NOTICE—FAILURE BY COMMISSIONER (APPEALS) TO ISSUE FRESH NOTICE FOR ENHANCEMENT—ORDER ENHANCING INCOME NOT SUSTAINABLE—INCOME-TAX ACT, 1961, S. 251(2).

The assessee was engaged in the business of real estate development. It returned a loss at Rs. (-) 4,94,001 for the assessment year 2012-13. In the scrutiny assessment the Assessing Officer made additions of Rs. 10,94,204 and assessed the total income at Rs. 6,00,200. Against the assessment order, the assessee preferred an appeal before the Commissioner (Appeals) and during the course of appellate proceedings, the assessee was in receipt of a show-cause notice issued under section 251(2) read with section 251(1)(a) of the Income-tax Act, 1961 signed by the Inspector of Income-tax, regarding enhancement of assessment, directing the assessee to furnish a reply to the notice before him being the Inspector of Income-tax. In compliance with the

show-cause notice the assessee filed a reply and gave his explanation with documentary evidence but the Commissioner (Appeals) was dissatisfied with the explanation and documentary evidence and enhanced the income of the assessee by Rs. 4,94,001 under section 69C, by Rs. 12,75,00,000 under section 68 and by Rs. 20,49,08,002 under section 69 and finally computed the income at Rs. 33,35,52,203. The Tribunal set aside the issues to the Commissioner (Appeals) to decide the issues afresh, after considering all the evidence filed by the assessee and giving adequate opportunity of being heard to the assessee for substantiating its claim. The assessee was directed to submit all documents and evidence before the Commissioner (Appeals) in order to substantiate its claim and did not take any unnecessary adjournment and fully co-operate with the Commissioner (Appeals) in the proceedings for speedy disposal of the matter. The Commissioner (Appeals) determined the income of the assessee at Rs. 33,35,52,203. On appeal :

Held, *that the order was passed by the Commissioner (Appeals) without applying his mind and without complying with the directions of the Tribunal. He should have issued a fresh notice under section 251(2) to the assessee for substantiating its claim in order to prove the documentary evidence and to answer the query raised by him for the enhancement notice, but he did not do this which was contrary to law and facts and hence the order was not sustainable in the eyes of law. Further, the notice issued by the Inspector of Income-tax with the approval of the Commissioner (Appeals) showed the predetermined mind of the Inspector and non-application of mind of the authorities and even the Inspector of Income-tax was not competent to issue such notice. Even otherwise, the Assessing Officer had examined all the issues with supporting evidence filed by the assessee which was a matter of record. The Commissioner (Appeals) did not bother to examine the materials which were already on record as certified by the assessee. The order was passed by the Commissioner (Appeals) in contravention of the directions of the Tribunal. Therefore, the enhancement notice was not sustainable in the eyes of law and resultantly the enhancement made by the Commissioner (Appeals) was not tenable.*

GREEN VALLEY INFRACITY PVT. LTD. *v.* ITO (I. T. A. No. 6272/Delhi/2016 dated May 31, 2018) (para 5) *referred to.*

I. T. A. No. 2110/Delhi/2019 (assessment year 2012-13).

Sunil Kumar Tyagi, Chartered Accountant, for the assessee.

Pradeep Singh Gautam, Senior Departmental representative, for the Department.

ORDER

1 H. S. SIDHU ***(Judicial Member)***.—This appeal filed by the assessee is directed against the order passed by the learned Commissioner of Income-tax (Appeals), Noida, on October 29, 2019 in relation to the assessment year 2012-13.

2 The brief facts of the case are that the assessee filed its return income for the assessment year 2012-13 declaring an income at Rs. nil on March 31, 2014. Later on, the case of the assessee was selected for scrutiny and accordingly, notice under section 143(2) of the Income-tax Act, 1961 (in short, "the Act") dated September 3, 2014 was issued and served upon the assessee. Thereafter queries, notices under section 142(1) of the Act were issued and served. In response to the same, the authorised representative of the assessee appeared and produced the books of account, balance-sheet and its schedule, profit and loss account, other details and explanation and the same was test checked.

2.1 The assessee-company is a private limited company engaged in the business of real estate development. During the course of assessment proceedings, the assessee could not produce the confirmation of balances from the four creditors in the balance-sheet as on March 31, 2012 amounting to Rs. 6,21,454, i. e., in respect of (i) M/s. Megicle India Tour Rs. 1,33,704, (ii) M/s. Gromor Food Nursery Rs. 2,16,600, (iii) M/s. TZ Enterprises Rs. 1,40,000, and (iv) M/s. Wing Travels Rs. 1,31,150. The assessee submitted certain account statement in support of the sundry creditors but could not produce supporting bills amounting to Rs. 23,45,750, i. e., in respect of (i) Neutral Publication Home Limited Rs. 1,34,750, and (ii) Sahara India Mass Communication Rs. 1,00,000. During the assessment year the assessee has shown the addition on account of generator set amounting to Rs. 2,38,000 and the same was reflected under the head "plant and machinery". The assessee was unable to produce the bill of such addition and in the absence of the documentary evidence of this addition amounting to Rs. 2.38 lakhs, the Assessing Officer added the same to the income of the assessee, after considering all the details and documents filed by the assessee. The Assessing Officer finally computed the total income of the assessee amounting to Rs. 6,00,200 by disallowing the sundry creditors as discussed in paras 2 to 4 of the assessment order and completed the assessment under section 143(3) of the Act vide order dated March 27, 2015. Aggrieved with the assessment order, the assessee filed the appeal before the learned Commissioner of Income-tax (Appeals), who vide his earlier order dated September 27, 2016 enhanced the income of the assessee by Rs. 4,94,001 under section 69C of the Income-tax Act, 1961 ;

by Rs. 12,75,00,000 under section 68 of the Act and by Rs. 20,49,08002 under section 69 of the Income-tax Act, 1961 and computed the total income of Rs. 33,35,52,203 and directed the Assessing Officer to issue the necessary demand and penalty notice as per law. Aggrieved by the learned Commissioner of Income-tax (Appeals)'s earlier order dated September 27, 2016, the assessee appealed before the Tribunal and the Tribunal vide its order dated May 31, 2018 passed in I. T. A. No. 6272/Delhi/2016, after hearing both the parties, set aside the issues in dispute to the learned Commissioner of Income-tax (Appeals) to decide the same in dispute afresh, after considering the evidence filed by the assessee as discussed in the Tribunal's order dated May 31, 2018, i. e., the assessee's paper book containing pages 1-518 and provide adequate opportunity of being heard to the assessee for substantiating its claim. The Bench also directed the assessee to submit all the documentary evidence before the learned Commissioner of Income-tax (Appeals) in order to substantiate its claim.

2.2 In compliance with the Tribunal's order dated May 31, 2018 passed by the Income-tax Appellate Tribunal, Delhi Bench, SMC, New Delhi, as aforesaid, the learned Commissioner of Income-tax (Appeals) passed the impugned order dated October 29, 2018 by stating that the income of the assessee was earlier determined by this office at Rs. 33,35,52,203 in accordance with the provisions of section 251(1)(a) of the Income-tax Act, 1961 and disposed of the appeal of the assessee by passing the impugned order dated October 29, 2018. Now the assessee is aggrieved against the impugned order dated October 29, 2018 passed by the learned Commissioner of Income-tax (Appeals), Noida and filed the present appeal before the Tribunal.

At the time of hearing, the learned counsel for the assessee stated that **3** he is filing his written submissions in which he has attached all the facts and circumstances of the case and the case law and this may be treated as arguments and the case of the assessee may be decided accordingly. He also stated in support of his written arguments, he has also filed the paper book supporting the arguments advanced by the learned counsel for the assessee containing page Nos. 1-518 in which he has attached the various documentary evidence for nullifying the impugned order passed by the learned Commissioner of Income-tax (Appeals) and he requested that the appeal filed by the assessee may be accepted and the impugned order dated October 29, 2018 of the learned Commissioner of Income-tax (Appeals) wherein he has enhanced the addition may be cancelled. For the sake of convenience, the synopsis filed by the learned counsel for the assessee before me is reproduced as under :

"1. The appellant is a corporate assessee engaged in the business of real estate development. The returned income declaring loss at (-) 4,94,001 under section 139 was filed. The case was selected for scrutiny and the learned Assessing Officer made additions of Rs. 10,94,204 and thus assessed the total income at Rs. 6,00,200.

2. The assessee preferred an appeal under section 246A before the learned Commissioner of Income-tax (Appeals), Noida, against the assessment order. During the course of appellate proceedings, the assessee was in receipt of a show-cause notice dated May 16, 2016, issued under section 251(2), read with section 251(1)(a), signed by the Inspector of Income-tax, regarding the enhancement of assessment, directing the assessee to furnish reply to the said notice before the undersigned being the Inspector of Income-tax. The copy of the said show-cause notice is placed at page 508 of paper book. The said show-cause notice comprised as under :

'1. The learned Assessing Officer has computed your total income Rs. 6,00,200 and contesting that you have preferred an appeal against the order of the learned Assessing Officer and the same is pending is adjudication before this office

2. On examining your balance-sheet, it is found that you have shown reserve and surplus of Rs. (-) 4,94,001, but reserve and surplus cannot be negative. In this regard, you are required to explain the same.

3. You have taken an "unsecured loans" of Rs. 12,75,50,000. In this regard, you are required to prove the genuineness and credit-worthiness of this transaction.

4. You have shown "work-in-progress" of Rs. 20,49,08,002. In this regard, you are required to explain why this amount should not be transferred to your profit and loss account.

5. Hence, you are therefore in person or through a representative duly authorised required to show cause why an enhancement of your income by Rs. 33,29,52,003, (i. e., Rs. 20,49,08,002 + Rs. 12,75,50,000 + Rs. 4,94,001 should not be made. In this regard, I am directed to request you to furnish the reply of this notice within 2 weeks of the receipt of this notice before the undersigned.

Sd.
(Himanshu Soni)
Inspector
For Commissioner of Income-tax (A)-I.
Noida.

3. Following the aforesaid show-cause notice dated May 16, 2016 issued by the Inspector of Income-tax, the learned Commissioner of Income-tax (Appeals) passed the appellate order dated September 27, 2016 making aggregate enhancement as mentioned in the above show-cause notice.

4. The aforesaid order of the learned Commissioner of Income-tax (Appeals) was set aside by the hon'ble SMC Bench of the Income-tax Appellate Tribunal, Delhi vide judgment dated May 31, 2018, in I.T.A. No. 6272/Delhi/2016, remitting the matter back to the learned Commissioner of Income-tax (Appeals) to decide the issue in dispute afresh after considering all the evidences on records.

5. The learned Commissioner of Income-tax (Appeals), without issuing a fresh show-cause notice of enhancement (which he ought to have given if he intended to enhance the assessment in the second round of appeal since the hon'ble Income-tax Appellate Tribunal had set aside his earlier order dated September 27, 2016 directing to decide issue in dispute afresh, restored his earlier order with the same enhancement aggregating to Rs. 33,29,52,003 and passed the impugned order dated October 29, 2018, which is null and void since the same is passed without issuing any fresh notice of enhancement under section 251(2) of the Income-tax Act, 1961 and thus the impugned enhancement so made in the said order is without jurisdiction.

6. As your honour will kindly appreciate from the show-cause notice dated May 16, 2016, the same is illegal, arbitrary and legally untenable, as under :

(i) The said show-cause notice was issued by the Inspector of Income-tax, directing the assessee to furnish reply thereof before him being the undersigned, having no authority in law to make any enhancement in appellate proceedings and thus he illegally assumed the function of the Commissioner of Income-tax (Appeals), which is bad in law and thus the said show-cause notice is null and void ab initio.

(ii) The said show-cause notice was absolutely unfounded as no iota of any enquiries or findings were made by office of the learned Commissioner of Income-tax (Appeals) nor any iota of any circumstances exist warranting issue of such notice and thus the same is absolutely arbitrary, bald, unwarranted and without any basis and thus bad and untenable in law, because the issue of the said show-cause notice is not merely a ritual, but it is very vital and essential

being pre-requisite to assume the jurisdiction for enhancement of assessment and, therefore, such impugned and purported enhancement is without lawful assumption of jurisdiction and is liable to be quashed.

(iii) The said show-cause notice was issued in a most mechanical manner seemingly with a prejudiced view, without pointing out any discrepancy in any of the documents/evidence available on records, which are fully verifiable and accepted by the learned Assessing Officer after making all enquiries and thus the assessee discharged its onus in terms of section 68, proving the genuineness, identity and creditworthiness in relation to such transactions and thus no iota of any circumstances existed to warrant issue of any such show-cause notice.

(iv) The other basis of the show-cause notice are also absolutely unwarranted and preposterous as the same were wholly misconceived as the said show-cause notice says that 'the balance of reserve and surplus cannot be negative' and that why the balance of 'work-in-progress' should not be transferred to the profit and loss account ; which having no basis or relevancy for any enhancement as per law.

7. Without prejudice to the above legal position, the assessee furnished all requisite and cogent documentary evidence on records and has fully discharged its burden in accordance with law by furnishing all requisite documents before the learned Assessing Officer, which are neither disproved nor controverted by the learned Commissioner of Income-tax (Appeals).

8. The learned Commissioner of Income-tax (Appeals) made the following enhancement in his order, for which the assessee hereby submits as under :

(i) Rs. (-) 4,94,001 made under section 69C relating to the negative balance of reserve and surplus as per the audited balance-sheet.

Para 23 of the learned Commissioner of Income-tax (Appeals) order dated September 27, 2016, starting at page 6 thereof.

The very premise of the learned Commissioner of Income-tax (Appeals) that the balance in reserve and surplus cannot be in negative, is preposterous and frivolous because the negative reserves and surplus represents losses suffered by the assessee, which are fully evident from the profit and loss account as well as from the returned income of the assessee declaring the said loss, which was examined, verified and accepted by the learned Assessing Officer and was made a basis of total income in the assessment order.

Since the aforesaid negative balance of reserve and surplus, representing loss for the year, stood fully accounted for in the books of account, as appearing in the audited balance-sheet under the head 'Shareholder' funds' and thus the source thereof is fully verifiable and explained and the same was also verified by the learned Assessing Officer and accepted as such and thus the same does not warrant to make any additions/enhancement under any circumstances and by no stretch of imagination, section 69C has any applicability to the same and, therefore, the same is liable to be deleted.

(ii) Rs. 12,75,00,000 made under section 68 relating to 'short-term borrowings' as appearing in the audited balance-sheet :

Para 24 of the learned Commissioner of Income-tax (Appeals) order dated September 27, 2016, starting at page 7 thereof.

The learned Commissioner of Income-tax (Appeals) made the aforesaid impugned enhancement in most arbitrary and mechanical manner without any basis, grossly ignoring all requisite and cogent documentary evidence furnished on records to prove the identity, the genuineness of transactions and creditworthiness of the lender, as under :

(a) Written confirmation—Page 17 of the paper book.

(b) Ledger statement—Pages 18-19 of the paper book.

(c) Income-tax PAN card—Page 20 of the paper book.

(d) Income-tax returns—Pages 21-22 of the paper book.

(e) Bank statements—Pages 23-53 of the paper book.

(f) Partnership deed—Pages 494-498 of the paper book.

All such documents were fully examined and verified by the learned Assessing Officer. The said short-term borrowings were availed of by the assessee from a partnership firm, namely, Green Field Estates, having income-tax PAN AAIFG6397A. The assessee also furnished on records the bank statements of the said party and transactions appearing therein are fully verifiable. The learned Assessing Officer also made an independent enquiry by taking recourse of section 133(6), which was duly complied with by the lender and after all such examination and verification, the learned Assessing Officer being satisfied with the explanation given by the assessee, accepted the same. The learned Commissioner of Income-tax (Appeals) did not make any iota of any enquiries at his end nor he took any recourse of section 133(6) or 131 and, therefore, he did not have any iota of any basis or findings to make such enhancement.

The fact remains that the assessee has fully discharged its onus in accordance with law, duly supported with requisite cogent documentary evidence placed on records, which are neither disproved nor controverted by the learned Commissioner of Income-tax (Appeals). The learned Commissioner of Income-tax (Appeals) abruptly and baldly made the said impugned enhancement, which is made in a mechanical manner by taking the balance appearing in the balance-sheet as on March 31, 2012, which also comprised the opening balance of Rs. 7,01,00,000, as evident from the ledger statement placed at page 18 of the paper book, supported with transactions in bank statements, placed at pages 25-28 of the paper book, which at any rate without prejudice, cannot be made a subject matter of any additions in this year. The fact remains that the assessee has furnished on records bona fide, legitimate and verifiable explanation about the nature and source of the said borrowings duly supported with cogent documentary evidence and, therefore, it is wrong to suggest at the part of the learned Commissioner of Income-tax (Appeals) that the explanation of the assessee is allegedly not satisfactory and the said supported premise of the learned Commissioner of Income-tax (Appeals) is contrary to the documentary evidence on records, which proves that the assessee has been successfully able to discharge its onus as per law and has shifted the onus to the Revenue to prove contrary if any. The learned Commissioner of Income-tax (Appeals) did not have any iota of any findings to the contrary and thus the facts and circumstances of the case do not warrant to invoke the provisions of section 68 of the Income-tax Act, 1961 and thus the impugned enhancement made by the learned Commissioner of Income-tax (Appeals) is arbitrary, unwarranted, baseless, unlawful, legally untenable and, therefore, in most humble submissions of the assessee, the same is liable to be deleted/quashed.

(iii) Rs. 20,49,08,002 made under section 69 relating to 'work-in-progress' as appearing under 'current assets' in the audited balance-sheet :

Para 25 of the learned Commissioner of Income-tax (Appeals) order dated September 27, 2016, starting at page 7 thereof.

The learned Commissioner of Income-tax (Appeals) made the aforesaid impugned enhancement in most arbitrary, unlawful and mechanical manner under section 69, which has no applicability to the same as the assessee has duly accounted for and recorded the

'work-in-progress' in its books of account ; as fully evident from the audited balance-sheet.

For ready reference, section 69 of the income-tax Act, 1961 is reproduced as under :

'69. *Unexplained investments*.—Where in the financial year immediately preceding the assessment year, the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in opinion of the Assessing Officer satisfactory, the value of the investments may be deemed to be the income of the assessee for such financial year.' (emphasis supplied).

The perusal of the above section clearly provides that the provisions thereof are applicable only in case of investments which are not recorded in books of account being the transactions outside the books of account. In this case, the balance of 'work-in-progress' of Rs. 20,49,08,002 is duly appearing in the audited balance-sheet under the head 'current assets', relevant page 11 of the paper book, and therefore the same stood duly recorded in the books of account, as also admitted by the learned Commissioner of Income-tax (Appeals), who himself picked this figure from the balance-sheet itself and, therefore, by no stretch of imagination, the said balance of 'work-in-progress' can be made any basis of any addition/enhancement under section 69.

Without prejudice to the above, it is also pertinent to point out that para 4 of the show-cause notice to the said effect comprised as under :

You have shown 'work-in-progress' of Rs. 20,49,08,002. In this regard, you are required to explain why this amount should not transferred to your profit and loss account. It may therefore, abundantly clear that the show-cause notice was only to recategorise the said amount so as to transfer the same to the profit and loss account, which is nothing but a compilation of the books of account and there was no whisper about invoking the provisions of section 69 nor about any part of such expenses being outside the books of account and therefore at any rate without prejudice the said enhancement is beyond the scope of show-cause notice and therefore, is legally untenable on this count too.

Without prejudice to the all above, it is categorically submitted that the assessee furnished on records the nature and source of the said

'work-in-progress' duly verified by the learned Assessing Officer, supported with all cogent and documentary evidence placed on records, copies at pages 54-498 of the paper book, comprising the following documents :

I. Break-up of 'work-in-progress' and title deed of land. Pages 56-96 of the paper book.

II. Ledger and vouchers pertaining to expenses incurred towards 'work-in-progress'. Pages 99-487 of the paper book.

III. Location map and approved map of the project. Pages 488-491 of the paper book.

It is, therefore, submitted that the nature and source of the same stood fully explained and substantiated by the assessee by way of documentary evidence. The learned Commissioner of Income-tax (Appeals) misconceived the fact that the land was supposed to appear under 'fixed asset schedule' of balance-sheet whereas in the case of a builder, the land cannot be categorised under fixed asset and therefore such misconceived presumption of the learned Commissioner of Income-tax (Appeals) propelled himself in wrong direction making the impugned unlawful addition/enhancement, which is not legally tenable and is liable to quashed/deleted."

4 On the contrary, the learned Departmental representative relied upon the order of the learned first appellate authority and stated that the assessee remain non-co-operative before the Assessing Officer as well as the learned Commissioner of Income-tax (Appeals) and the learned Commissioner of Income-tax (Appeals) has decided the issues in dispute against the assessee, as per law, after giving adequate opportunity of being heard to the assessee, which has not been availed of by the assessee. Therefore, he requested that the impugned order passed by the learned Commissioner of Income-tax (Appeals) is as per law, hence, no interference is called for in the well reasoned order passed by the learned Commissioner of Income-tax (Appeals) and the same may be upheld and the appeal of the assessee may be dismissed.

5 I have heard both the parties and carefully considered the rival submissions and perused the orders of the authorities below along with the paper book containing pages 1-518 along with the written synopsis filed by the learned counsel for the assessee. I note that the assessee is engaged in the business of real estate development. The returned income declaring loss at Rs. (-) 4,94,001 under section 139 of the Act was filed by it. The case of the assessee was selected for scrutiny and the Assessing Officer made the additions of Rs. 10,94,204 and thus assessed the total income at Rs. 6,00,200.

Against the assessment order, the assessee preferred an appeal before the learned Commissioner of Income-tax (Appeals), Noida and during the course of the appellate proceedings, the assessee was in receipt of a show-cause notice dated May 16, 2016, issued under section 251(2), read with section 251(1)(a), signed by the Inspector of Income-tax, regarding the enhancement of assessment, directing the assessee to furnish reply to the said notice before him being the Inspector of Income-tax.

5.1 In compliance with the show-cause notice dated May 16, 2016 issued by the Inspector, the assessee filed a reply and given his explanation with the documentary evidence, but the learned Commissioner of Income-tax (Appeals) feeling dissatisfied with the explanation and documentary evidence and vide his order dated September 27, 2016 enhanced the income of the assessee by Rs. 4,94,001 under section 69C of the Income-tax Act, 1961 ; by Rs. 12,75,00,000 under section 68 of the Act and by Rs. 20,49,08,002 under section 69 of the Act and finally computed the income at Rs. 33,35,52,203 directing the Assessing Officer to issue necessary demand notice, as per law. Aggrieved with the order dated September 27, 2016, the assessee filed the appeal before the Tribunal which came up for hearing before the SMC Income-tax Appellate Tribunal, Bench, New Delhi in *Green Valley Infracity Pvt. Ltd.* v. *ITO* I. T. A. No. 6272/Delhi/2016 and the Tribunal vide its order dated May 31, 2018 has set aside the issues in dispute to the learned Commissioner of Income-tax (Appeals) to decide the same afresh, after considering all the evidence as discussed in the paper book filed by the assessee and give adequate opportunity of being heard to the assessee for substantiating its claim. The assessee was also directed to submit all documents/evidence before the learned Commissioner of Income-tax (Appeals) in order to substantiate its claim and did not take any unnecessary adjournment and fully co-operate with the learned Commissioner of Income-tax (Appeals) in the proceedings for speedy disposal of the matter.

5.2 In compliance with the Tribunal's order dated May 31, 2018, the learned Commissioner of Income-tax (Appeals) fixed the hearing on August 20, 2018 by issuing notice dated August 3, 2018. In response to the same, the authorised representative of the assessee appeared and requested for adjournment on the ground that the assessee requested that his counsel is down with fever and requested adjournment in the first week of October, 2018. But the learned Commissioner of Income-tax (Appeals) has discussed the adjournment on various technical issues, viz., vakalatnama was undated and as that was on a non-judicial stamp paper of Rs. 100 which was sold by a registered stamp vendor on August 18, 2018 ;

the appellant could not attend the hearing on the appointed date of hearing on August 17, 2018 and the counsel can make a statement on behalf of its client, converse is not permitted in law and a client cannot make a statement on behalf of its counsel. That would amount to putting the cart before the horse. Further, the vakalatnama mentioned two counsels being Sh. Naresh Bhardwaj, fellow chartered accountant and Sh. Pravind Chand, fellow chartered accountant and both the counsels had accepted and executed the vakalatnama. The letter of the appellant stated only one counsel being down with fever. Therefore, the other counsel was very well in a position to attend the case of the appellant. This is without prejudice to the fact that the appellant did not enclose any corroborative evidence to prove its contention that the said counsel was down with fever and therefore, was unable to attend the proceedings. The learned first appellate authority not convinced with the reasons for adjournment being counsel of the assessee is done with fever and one more opportunity was provided to the appellant and by notice dated September 26, 2018 the case was fixed for hearing for October 4, 2018. The said notice was returned back with the postal remarks that there was no such person on the address written on the envelope in which the notice was sent by the office of the learned Commissioner of Income-tax (Appeals). Again notice was issued for October 29, 2018 which was received by the assessee and on September 26, 2018 another letter was received from the appellant on the letter head of the appellant itself and signed by the director stating that counsel for the appellant had requested the adjournment preferably hearing in the second week of November, 2018, but again the learned Commissioner of Income-tax (Appeals) not satisfied with the reasons mentioned by the assessee and the learned Commissioner of Income-tax (Appeals) has determined the income of the assessee on already determined income at Rs. 33,35,52,203 vide the impugned order dated October 29, 2018.

5.3 I have perused the impugned order dated October 29, 2018 passed by the learned Commissioner of Income-tax (Appeals), Noida, as well as the Tribunal's order dated May 31, 2018 wherein the Tribunal has set aside the issues in dispute to the learned Commissioner of Income-tax (Appeals) with the specific directions to decide the same afresh, after considering all the evidences as discussed in the Tribunal's order dated May 31, 2018, i. e., paper book containing pages 1-518 in which the assessee has attached the copy of income-tax return and computation ; balance-sheet and profit and loss account letter dated January 23, 2015 filed before the Assessing Officer giving details of work-in-progress and the submission of evidence for unsecured loan of Rs. 12.75 crores along with confirmation and bank

statement Greenfield Estate ; letter dated February 13, 2015 filed before the Assessing Officer giving break up of work-in-progress and title deed of land of the project under work-in-progress ; letter dated February 20, 2015 filed before the Assessing Officer submitted all the ledgers and vouchers pertaining to work-in-progress ; letter dated February 26, 2015 filed before Assessing Officer submitted location map, brochure and approved map of the project ; letter dated March 20, 2015 filed before the Assessing Officer submitted a copy of the partnership deed of Greenfield Estate lender of unsecured loan of Rs. 12.75 crores of loan ; letter dated March 25, 2015 filed before the Assessing Officer informing the Assessing Officer that M/s. Greenfield Estate has sent confirmation through speed post after which the Assessing Officer completed the assessment ; order-sheet of the Assessing Officer evidencing that the Assessing Officer had raised queries for loan of Rs. 12.75 crores and work-in-progress and examined and verified the documents submitted ; notice of enhancement dated May 16, 2015 issued by the learned Commissioner of Income-tax (Appeals) ; reply of the assessee dated May 26, 2016 informing the learned Commissioner of Income-tax (Appeals) about intention of the assessee to avail of the benefit of the Direct Tax Dispute Resolution Scheme, 2016 ; the submission of the assessee dated June 20, 2016 reiterating the intention to avail of the benefit of the Direct Tax Dispute Resolution Scheme, 2016 ; copy of the order-sheet maintained by the learned Commissioner of Income-tax (Appeals) evidencing that before issuing notice of enhancement dated May 16, 2016 assessment records were called for and seen and the Direct Tax Dispute Resolution Scheme, 2016. The Bench in its order dated May 31, 2018 has also written that the learned counsel for the assessee has certified that all the aforesaid documentary evidences which is a matter of record and the assessee has filed before the learned Commissioner of Income-tax (Appeals) as well as before the Assessing Officer but the learned Commissioner of Income-tax (Appeals) has not considered the same in a proper manner which are very essential to be considered and needs to be examined by the learned Commissioner of Income-tax (Appeals) afresh.

5.4 Keeping in view of the facts and circumstances of the case, I find that the Tribunal vide its order dated May 31, 2018 remitted back the issues in dispute to the file of the learned Commissioner of Income-tax (Appeals) to decide as afresh, after considering the documents as discussed above. But I have perused the impugned order dated October 29, 2018 passed by the learned Commissioner of Income-tax (Appeals) and I am of the view that the learned Commissioner of Income-tax (Appeals) has passed 10 paragraphs of the impugned order in para No. 1 the learned Commissioner

of Income-tax (Appeals) has written about the Income-tax Appellate Tribunal order and in paras 2 and 3 written about the issue of notice to the assessee which was received by the assessee and requested for adjournment. The adjournment of the assessee has been rejected on technical grounds as discussed above and finally refused the adjournment sought by the learned counsel for the assessee, which is contrary to the principles of natural justice. In my view the learned Commissioner of Income-tax (Appeals) starts its proceedings, vide notice dated August 3, 2018 and disposed of the appeal of the assessee by passing the impugned order dated October 29, 2018 which is very short period in passing the impugned order which shows that the same is passed in a haste manner without compliance with the specific directions of the Income-tax Appellate Tribunal given vide its order dated May 31, 2018 to the learned Commissioner of Income-tax (Appeals) to decide the issues in dispute afresh, after considering the documentary evidence which the assessee has filed before the Tribunal in the shape of paper book containing pages 1-518 as discussed above. But the learned Commissioner of Income-tax (Appeals) did not bother to examine the same which was already on record as certified by the learned counsel for the assessee. The impugned order has been passed by the learned Commissioner of Income-tax (Appeals) in contravention of the directions of the Tribunal given vide order dated May 31, 2018.

5.5 Keeping in view of the facts and circumstances of the present case and the evidences filed by the assessee before the learned Commissioner of Income-tax (Appeals) and the Assessing Officer and also before this Bench in the shape of paper book containing pages 1-518, as discussed above, I am of the considered view that the learned Commissioner of Income-tax (Appeals) did not bother to consider the documentary evidence filed by the assessee before him. But in the interest of justice, I am considering, perusing and appreciating the said evidence filed in the shape of paper book containing pages 1-518 as discussed above as well as synopsis filed by the learned counsel for the assessee in the foregoing paragraphs.

5.6 It is noted that the learned Commissioner of Income-tax (Appeals), without issuing fresh show-cause notice of enhancement, restored his earlier order with the same enhancement aggregating to Rs. 33,29,52,003 and passed the impugned order dated October 29, 2018, which is null and void since the same is passed without issuing any fresh notice of enhancement under section 251(2) of the Income-tax Act, 1961 and thus the impugned enhancement so made in the said order is without jurisdiction and therefore, the same deserve to be cancelled.

5.7 It is also noted that the show-cause notice dated May 16, 2016 issued by the Inspector of Income-tax is illegal and untenable because the said show-cause notice was issued by the Inspector of Income-tax, directing the assessee to furnish reply thereof before him, having no authority in law to make any enhancement in the appellate proceedings and thus he illegally assumed the function of the learned Commissioner of Income-tax (Appeals), which is bad in law and thus the said show-cause notice is null and void ab initio. The said show-cause notice was absolutely unfounded as no enquiries or findings were made by the learned Commissioner of Income-tax (Appeals) nor any circumstances exist warranting issue of such notice and thus the same is absolutely arbitrary, unwarranted and without any basis and thus bad and untenable in law. It is an admitted fact that issue of said show-cause notice is very vital and essential being pre-requisite to assume jurisdiction for enhancement of assessment and therefore such impugned enhancement is without lawful assumption of jurisdiction and is liable to be quashed. It is also noted that the said show-cause notice was issued in most mechanical manner seemingly with a prejudiced view, without pointing out any discrepancy in any of the documents/evidence available on records, which are fully verifiable and accepted by the Assessing Officer after making all enquiries and thus the assessee discharged its onus in terms of section 68 of the Act proving the genuineness, identity and creditworthiness in relation to such transactions and thus no iota of any circumstances existed to warrant issue of any such show-cause notice. The other basis of the show-cause notice are also absolutely unwarranted as the said show cause notice says that "the balance of reserve and surplus cannot be negative" and that why the balance of "work-in-progress" should not be transferred to the profit and loss account ; which having no basis or relevancy for any enhancement as per law. The assessee has furnished all requisite documentary evidence on records and has fully discharged its burden in accordance with law by furnishing all requisite documents before the Assessing Officer, which are neither disproved nor controverted by the learned Commissioner of Income-tax (Appeals).

5.8 I have also perused page No. 513 of the paper book which is a copy of the order-sheet dated May 16, 2016 of the Inspector of Income-tax, Sh. Himanshu Soni and the approval dated May 17, 2016 of the learned Commissioner of Income-tax (Appeals) and the copy of the show-cause notice issued by the Inspector of Income-tax at page 508 of the paper book. For the sake of clarity the relevant portion of the order-sheet dated May 16, 2016 of the Inspector of Income-tax and the approval of the letter for issue of show-cause notice dated May 16, 2016 and the show-cause notice letter

dated May 16, 2016 issued by the Inspector of Income-tax are reproduced as under :

"16-5-2016

Perusal to the oral directions of the learned Commissioner of Income-tax (Appeals), Noida. It is proposed to issue enhancement notice under section 251(2) read with section 251(1)(a) for showing cause, why an enhancement should not be made. The draft letter to the appellant is enclosed for necessary approval.

(Sd.)
(Himanshu Soni),
Inspector,
CIT(A)-I.

As proposed.
(Sd.)
17-05-2016.
ITO/OS.

Contents of the show-cause notice dated May 16, 2016 issued by the Inspector of income-tax read as under :

'1. The learned Assessing Officer has computed your total income Rs. 600,200 and contesting that you have preferred an appeal against the order of the learned Assessing Officer and the same is pending is adjudication before this office

2. On examining your balance-sheet, it is found that you have shown reserve and surplus of Rs. (–) 4,94,001, but reserve and surplus cannot be negative. In this regard, you are required to explain the same.

3. You have taken an "unsecured loans" of Rs. 12,75,50,000. In this regard, you are required to prove the genuineness and credit-worthiness of this transaction.

4. You have shown "work-in-progress" of Rs. 20,49,08,0021. In this regard, you are required to explain why this amount should not transferred to your profit and loss account.

5. Hence, you are therefore in person or through are presentative duly authorised required to show cause why an enhancement of your income by Rs. 33,29,52,003, (i. e., Rs. 20,49,08,002 + Rs. 12,75,50,000 + Rs. 4,94,001 (–) should not be made. In this regard, I am directed to

request you to furnish the reply of this notice within two weeks of the receipt of this notice before the undersigned.

(Sd.)
(Himanshu Soni)
Inspector.
For Commissioner of Income-tax (A)-I
Noida.'

5.8.1 After perusing the aforesaid contents of the order-sheet, it is crystal clear that the order-sheet dated is May 16, 2016 and the show-cause notice is also of dated May 16, 2016, however, the approval granted by the learned Commissioner of Income-tax (Appeals)-I, Noida is of dated May 17, 2016, which shows that approval was granted by the learned Commissioner of Income-tax (Appeals), Noida on May 17, 2016 and the notice was issued on May 16, 2016, i. e., one day before the approval granted by the learned Commissioner of Income-tax (Appeals), which is contrary to law and facts of the case, meaning thereby that the Inspector is pre-determined to issue the notice without application of mind. Even otherwise, the Inspector is not competent to issue the notice, hence, the notice dated May 16, 2016 issued by the Inspector of Income-tax on which the enhancement was made by the learned Commissioner of Income-tax (Appeals), is invalid and void ab initio and deserve to be cancelled.

5.9 As regards, the merits of the case, the learned Commissioner of Income-tax (Appeals) made following enhancement in his order :

(i) Rs. (–) 4,94,001 made under section 69C relating to negative balance of reserve and surplus as per the audited balance-sheet.

Para 23 of the learned Commissioner of Income-tax (Appeals) order dated September 27, 2016, starting at page 6 thereof.

The very premise of the learned Commissioner of Income-tax (Appeals) that the balance in reserve and surplus cannot be in the negative, is preposterous and frivolous because the negative reserves and surplus represents losses suffered by the assessee, which are fully evident from the profit and loss account as well as from the returned income of the assessee declaring the said loss, which was examined, verified and accepted by the learned Assessing Officer and was made a basis of total income in the assessment order.

Since the aforesaid negative balance of reserve and surplus, representing loss for the year, stood fully accounted for in the books of account, as appearing in the audited balance-sheet under the head "shareholders' funds" and thus the source thereof is fully verifiable

and explained and the same was also verified by the learned Assessing Officer and accepted as such and thus the same does not warrant to make any additions/enhancement under any circumstances and by no stretch of imagination, section 69C has any applicability to the same and therefore the same is liable to be deleted.

(ii) Rs. 12,75,00,000 made under section 68 relating to 'short-term borrowings' as appearing in the audited balance-sheet :

Para 24 of the learned Commissioner of Income-tax (Appeals) order dated September 27, 2016, starting at page 7 thereof

The learned Commissioner of Income-tax (Appeals) made the aforesaid impugned enhancement in most arbitrary and mechanical manner without any basis, grossly ignoring all requisite and cogent documentary evidence furnished on records to prove the identity, the genuineness of transactions and creditworthiness of the lender, as under :

(a) Written confirmation—Page 17 of the paper book.

(b) Ledger statement—Pages 18-19 of the paper book.

(c) Income-tax PAN card—Page 20 of the paper book.

(d) Income-tax returns—Pages 21-22 of the paper book.

(e) Bank statements—Pages 23-53 of the paper book.

(f) Partnership deed—Pages 494-498 of the paper book.

All such documents were fully examined and verified by the Assessing Officer. The said short-term borrowings were availed of by the assessee from a partnership firm, namely, Green Field Estates, having income-tax PANAAIFG6397A. The assessee also furnished on records the bank statements of the said party and transactions appearing therein are fully verifiable. The Assessing Officer also made an independent enquiry by taking recourse of section 133(6) of the Act which was duly complied with by the lender and after all such examination and verification, the Assessing Officer being satisfied with the explanation given by the assessee, accepted the same. The learned Commissioner of Income-tax (Appeals) did not make any enquiry at his end nor he took any recourse of section 133(6) of the Act or under section 131 of the Act and therefore he did not have any iota of any basis or findings to make such enhancement. The fact remains that the assessee has fully discharged its onus in accordance with law, duly supported with requisite cogent documentary evidence placed on records, which are neither disproved nor controverted by the learned Commissioner of Income-tax (Appeals). The learned

Commissioner of Income-tax (Appeals) abruptly made the said impugned enhancement, which is made in a mechanical manner by taking the balance appearing in the balance-sheet as on March 31, 2012, which also comprised opening balance of Rs. 701,00,000, as evident from the ledger statement placed at page 18 of the paper book, supported with transactions in the bank statements, placed at pages 25-28 of the paper book, which at any rate without prejudice, cannot be made a subject matter of any additions in this year. The fact remains that the assessee has furnished on records bona fide, legitimate and verifiable explanation about the nature and source of the said borrowings duly supported with cogent documentary evidence and therefore it is wrong to suggest at the part of the learned Commissioner of Income-tax (Appeals) that the explanation of the assessee is allegedly not satisfactory and the said purported premise of the learned Commissioner of Income-tax (Appeals) is contrary to the documentary evidence on records, which proves that the assessee has been successfully able to discharge its onus as per law and has shifted the onus to the Revenue to prove contrary if any. The learned Commissioner of Income-tax (Appeals) did not have any findings to the contrary and thus the facts and circumstances of the case do not warrant to invoke the provisions of section 68 of the Income-tax Act, 1961 and thus the impugned enhancement made by the learned Commissioner of Income-tax (Appeals) is arbitrary and baseless and deserve to be deleted.

(iii) Rs. 20,49,08,002 under section 69 of the Act relating to work-in-progress as appearing under the current assets in the audited balance-sheet :

Para 25 of the learned Commissioner of Income-tax (Appeals) order dated September 27, 2016, starting at page 7 thereof.

The learned Commissioner of Income-tax (Appeals) made the aforesaid impugned enhancement in most arbitrary, unlawful and mechanical manner under section 69, which has no applicability to the same as the assessee has duly accounted for and recorded the 'work-in-progress' in its books of account ; as fully evident from the audited balance-sheet.

For the sake of convenience, section 69 of the Income-tax Act 1961 is reproduced as under :

'69. *Unexplained investments*.—Where in the financial year immediately preceding the assessment year, the assessee has made investments which are not recorded in the books of account, if any,

maintained by him for any source of income and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the Assessing Officer satisfactory, the value of the investments may be deemed to be the income of the assessee for such financial year.'

The perusal of the above section clearly stipulates that the provisions thereof are applicable only in the case of investments which are not recorded in the books of account being the transactions outside the books of account. In this case, the balance of 'work-in-progress' of Rs. 20,49,08,002 is duly appearing in the audited balance-sheet under the head 'current assets', relevant page 11 of the paper book, and therefore the same stood duly recorded in books of account, as also admitted by the learned Commissioner of Income-tax (Appeals), who himself picked this figure from the balance-sheet itself and therefore by no stretch of imagination, the said balance of 'work-in-progress' can be made any basis of any addition/enhancement under section 69.

It is noted that para 4 of the show-cause notice to the said effect comprised as under :

You have shown 'work-in-progress' of Rs. 20,49,08,002. In this regard, you are required to explain why this amount should not be transferred to your profit and loss account. It may therefore abundantly clear that the show-cause notice was only to recategorise the said amount so as to transfer the same to profit and loss account which is nothing but a compilation of the books of account and there was no whisper about invoking the provisions of section 69 nor about any part of such expenses being outside the books of account and therefore at any rate without prejudice the said enhancement is beyond the scope of the show-cause notice and therefore is legally untenable on this count too.

The assessee furnished on records the nature and source of the said 'work-in-progress' duly verified by the learned Assessing Officer, supported with all cogent and documentary evidences placed on records, copies at pages 54-498 of the paper book, comprising the following documents :

I. Break-up of 'work-in-progress' and title deed of land. Pages 56-96 of paper book.

II. Ledger and vouchers pertaining to expenses incurred towards 'work-in-progress'. Pages 99-487 of paper book.

III. Location map and approved map of the project. Pages 488-491 of the paper book.

In view of the above, the nature and source of the same stood fully explained and substantiated by the assessee by way of documentary evidence. The learned Commissioner of Income-tax (Appeals) misconceived the fact that the land was supposed to appear under 'fixed asset schedule' of the balance-sheet ; whereas in the case of a builder, the land cannot be categorised under fixed asset and therefore such misconceived presumption of the learned Commissioner of Income-tax (Appeals) propelled himself in wrong direction making the impugned unlawful addition/enhancement, which is not legally tenable and is liable to be deleted."

6 Keeping in view of the facts and circumstances of the case as explained above in the preceding paragraphs, I am of the considered view that the impugned order has been passed by the learned Commissioner of Income-tax (Appeals) without applying his mind and without complying with the directions of the Tribunal given vide its order dated May 31, 2018. In my view the learned Commissioner of Income-tax (Appeals) should have issued afresh notice under section 251(2) to the assessee for substantiating its claim in order to prove the documentary evidence and to answer the query raised by the learned Commissioner of Income-tax (Appeals) for the enhancement notice, but the same has not been done by the learned Commissioner of Income-tax (Appeals), which is contrary to law and facts on the file and hence, the impugned order is not sustainable in the eyes of law. Further, the notice dated May 16, 2016 issued by the Inspector of Income-tax where the approval of the learned Commissioner of Income-tax (Appeals), Noida was of dated May 17, 2018, which shows the predetermined mind of the Inspector and non-application of mind of the authorities below and even the Inspector of Income-tax is not competent to issue such notice. Even otherwise, on perusing the documentary evidence filed by the learned counsel for the assessee in the shape of paper book on the issues in dispute which I have discussed in the preceding paragraphs, I am of the view that the Assessing Officer has examined all the issues with supporting evidence filed by the assessee which is a matter of record. Therefore, the enhancement notice is not sustainable in the eyes of law and resultantly the enhancement made by the learned Commissioner of Income-tax (Appeals) is not tenable, therefore, I cancel the impugned order dated October 29, 2018 by accepting the appeal filed by the assessee.

7 In the result, the appeal filed by the assessee stands allowed.

Order pronounced on March 2, 2020.

[2020] 80 ITR (Trib) 410 (Mumbai)

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

AFCONS INFRASTRUCTURE LTD.

v.

PRINCIPAL COMMISSIONER OF INCOME-TAX

SAKTIJIT DEY *(Judicial Member)* and
MANOJ KUMAR AGGARWAL *(Accountant Member)*

March 17, 2020.

SS ▸ ITA 1961, s 263
AY ▸ 2014-15
HF ▸ Assessee

REVISION—ERRONEOUS AND PREJUDICIAL TO REVENUE—GENERAL PRINCIPLES—ARBITRATION AWARD—INTEREST ON ARBITRATION AWARD REDUCED WHILE COMPUTING TAXABLE INCOME—ASSESSEE CONSISTENTLY OFFERING INTEREST INCOME ON ARBITRATION AWARDS TO TAX ONLY IN YEAR OF ACTUAL RECEIPT—RECOGNITION OF REVENUE ACCEPTED BY DEPARTMENT IN EARLIER YEARS—ASSESSING OFFICER TAKING POSSIBLE VIEW AFTER PROPER APPLICATION OF MIND—ASSESSMENT ORDER NOT ERRONEOUS OR PREJUDICIAL TO INTERESTS OF REVENUE—REVISION NOT SUSTAINABLE IN EYES OF LAW—INCOME-TAX ACT, 1961, S. 263.

Under section 263 of the Income-tax Act, 1961, the Principal Commissioner or the Commissioner is vested with supervisory powers of suo motu revision of any order passed by the Assessing Officer. For the purpose, he may call for and examine the record of any proceedings under the Act and may proceed to revise the order provided two conditions are satisfied : (i) the order of the Assessing Officer sought to be revised is erroneous ; and (ii) it is prejudicial to the interests of the Revenue. If one of the conditions is absent, i. e., if the order of the Assessing Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but it is prejudicial to the Revenue, recourse cannot be had to section 263 of the Act.

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. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue ; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law.

If an Income-tax Officer acting in accordance with law makes a certain assessment, his order cannot be branded "erroneous" by the Commissioner simply because, according to him, the order should have been written differently or more elaborately. The section does not visualise the substitution of the judgment of the Commissioner for that of the Income-tax Officer who passed the order unless the decision is not in accordance with law. Any and every erroneous order cannot be the subject matter of revision because the second requirement also must be fulfilled. There must be material on record to show that tax which was lawfully leviable has not been imposed.

The Commissioner's exercise of revisional jurisdiction under the provisions of section 263 cannot be based on whims or caprice. There must be material to justify the Commissioner's finding that the order of the assessment was erroneous in so far as it was prejudicial to the interests of the Revenue.

There is a fine though subtle distinction between "lack of inquiry" and "inadequate inquiry". It is only in cases of "lack of inquiry" that the Commissioner is empowered to exercise his revisional powers by calling for and examining the records of any proceedings under the Act and passing orders thereon.

Explanation 2 *was inserted by the Finance Act, 2015 in section 263 with effect from June 1, 2015 to declare that an order shall be deemed to be erroneous in so far as it is prejudicial to the interests of the Revenue, if in the opinion of appropriate authority (1) the order was passed without making inquiries or verifications which should have been made ; (ii) the order is passed allowing any relief without inquiring into the claim ; (iii) the order is not in accordance with any direction or instructions, etc., issued by the Board under section 119 ; or (iv) the order was not in accordance with binding judicial precedent.*

The assessee was engaged in the business of civil construction. The Assessing Officer disallowed the professional fees of Rs. 4.57 crores paid by the assessee for arbitration since the corresponding arbitration award income was not offered for taxation. Subsequently, the Principal Commissioner noted that the Assessing Officer failed to assess income of Rs. 36.22 crores on account of interest on the arbitration award, and set aside the order to be passed afresh according to law after conducting necessary enquiries and investigations. On appeal :

Held, *allowing the appeal, (i) that the Assessing Officer had duly considered the documents since a specific disallowance had been made, being conscious of the fact that certain arbitration income was not offered to taxation by the assessee. The assessment orders for earlier years were specifically called*

for by notice under section 142(1) and these were furnished by the assessee. Upon perusal thereof, the Assessing Officer specifically took note of the fact that similar disallowance was made in earlier years and, therefore, he chose to make similar disallowance during the year under consideration. The computation of income filed by the assessee clearly demonstrated that the arbitration awards received during the year were offered to tax whereas interest on the arbitration award was reduced while computing the taxable income. The revenue recognition policy followed by the assessee to recognise the interest income was fully disclosed in the notes to the account. The position taken by the assessee to recognise the interest income was accepted by the Assessing Officer who was well conscious of the fact that certain arbitration income was not offered to tax. Hence, there was application of mind by the Assessing Officer on the issue of interest on arbitration award and he chose not to make any addition thereof.

(ii) That the accounting methodology followed by the assessee to recognise the interest income as revenue, was accepted by the Department in earlier years and similar deduction claimed in earlier years was not disturbed. The notes to the accounts, prima facie, established that the assessee was following a consistent method of accounting for recognition of interest income and there was no change in accounting policy in this regard. The assessee had offered interest income on arbitration awards to tax only in the year of actual receipt thereof. Therefore, the principle of rule of consistency favoured the assessee, on the issue raised by the Principal Commissioner.

(iii) That the view was taken in the matter by the Assessing Officer could not be said to be contrary to law, perverse or unsustainable in law, in any manner and was a possible view keeping in mind the rule of consistency. Hence, the assessment order could not be termed erroneous or prejudicial to the interests of the Revenue under section 263 as held by the Principal Commissioner. The action of the Assessing Officer was in consonance with the position accepted by the Revenue in earlier years and, therefore, it could not be said that the order was not in accordance with law. In such a case, the action of the Principal Commissioner in invoking jurisdiction under section 263 could not be sustained in the eyes of law.

Cases referred to :

CIT *v*. Abdul Mannan Shah Mohammed [2001] 248 ITR 614 (Bom) (para 5)

CIT *v*. Amitabh Bachchan [2016] 384 ITR 200 (SC) (para 1)

CIT *v*. Design and Automation Engineers (Bombay) (P.) Ltd. [2010] 323 ITR 632 (Bom) (para 2)

CIT *v.* Excel Industries Ltd. [2013] 358 ITR 295 (SC) (para 2)

CIT *v.* Gabriel India Ltd. [1993] 203 ITR 108 (Bom) (para 1)

CIT *v.* Hindustan Housing and Land Development Trust Ltd. [1986] 161 ITR 524 (SC) (para 5)

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

CIT *v.* Seksaria Biswan Sugar Factory Pvt. Ltd. [1992] 195 ITR 778 (Bom) (para 5)

CIT *v.* Sharda Sugar Industries Ltd. [1999] 239 ITR 393 (Bom) (para 5)

CIT *v.* Shoorji Vallabhdas and Co. [1962] 46 ITR 144 (SC) (para 2)

CIT *v.* Vikas Polymers [2012] 341 ITR 537 (Delhi) (para 1)

CIT *v.* Vimla D. Sonwane (Smt.) [1995] 212 ITR 489 (Bom) (para 5)

Dawjee Dadabhoy and Co. *v.* S. P. Jain [1957] 31 ITR 872 (Cal) (para 1)

Godhra Electricity Co. Ltd. *v.* CIT [1997] 225 ITR 746 (SC) (para 5)

Grasim Industries Ltd. *v.* CIT [2010] 321 ITR 92 (Bom) (para 1)

Hindustan Construction Co. Ltd. *v.* Union of India (W. P. C. No. 1074 of 2019, dated November 27, 2019) (para 4)

Malabar Industrial Co. Ltd. *v.* CIT [2000] 243 ITR 83 (SC) (para 1)

MOIL Ltd. *v.* CIT [2017] 396 ITR 244 (Bom) (para 1)

Parashuram Pottery Works Co. Ltd. *v.* ITO [1977] 106 ITR 1 (SC) (para 1)

Radhasoami Satsang *v.* CIT [1992] 193 ITR 321 (SC) (para 2)

I. T A. No. 3159/Mum/2019 (assessment year 2014-15).

J. D. Mistry and *Nitesh Joshi*, Authorised Representatives for the assessee.

Anadi Varma, Commissioner of Income-tax, Departmental Representative for the Department.

ORDER

The order of the Bench was pronounced by

MANOJ KUMAR AGGARWAL ***(Accountant Member)***.—As per the provisions of section 263 of the Income-tax Act, 1961, the Revenue authorities, namely, the Principal Commissioner of Income-tax/Commissioner of Income-tax is vested with the supervisory powers of suo motu revision of any order passed by the Assessing Officer (AO). For the said purpose, the appropriate authority may call for and examine the record of any proceedings under the Act and may proceed to revise the same provided two conditions are satisfied—(i) the order of the Assessing Officer sought to be revised is erroneous ; and (ii) it is prejudicial to the interests of the 1

Revenue. If one of the condition is absent, i.e., if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but it is prejudicial to the Revenue—recourse cannot be had to section 263 of the Act as held by the hon'ble Supreme Court in *Malabar Industrial Co. Ltd.* v. *CIT* [2000] 243 ITR 83 (SC), and noted by the hon'ble Delhi High Court in *CIT* v. *Vikas Polymers* [2012] 341 ITR 537 (Delhi) ; [2010] 194 Taxman 57 (Delhi). The hon'ble Supreme Court in *Malabar Industrial Co. Ltd.* v. *CIT* (supra) has held that the phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. 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. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue ; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law. The said principle has been reiterated by the hon'ble court in its subsequent judgment titled as *CIT* v. *Max India Ltd.* [2007] 295 ITR 282 (SC). Similar principle has been followed by the jurisdictional High Court in *Grasim Industries Ltd.* v. *CIT* [2010] 321 ITR 92 (Bom).

1.2 The hon'ble Delhi High Court in *CIT* v. *Vikas Polymers* (supra), further observed that as regards the scope and ambit of the expression "erroneous", the hon'ble Bombay High Court in *CIT* v. *Gabriel India Ltd.* [1993] 203 ITR 108 (Bom), held with reference to *Black's Law Dictionary* that an "erroneous judgment" means "one rendered according to course and practice of court, but contrary to law, upon mistaken view of law ; or upon erroneous application of legal principles" and thus it is clear that an order cannot be termed as "erroneous" unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as "erroneous" by the Commissioner simply because, according to him, the order should have been written differently or more elaborately. The section does not visualise the substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is not in accordance with law.

1.3 Further, any and every erroneous order cannot be the subject matter of revision because the second requirement also must be fulfilled. There must be material on record to show that tax which was lawfully leviable has not been imposed as held in *Gabriel India Ltd.* However, the

expression "prejudicial to the interests of the Revenue", as held by the Supreme Court in the *Malabar Industrial Co. Ltd's* case, is not an expression of art and is not defined in the Act and, therefore, must be understood in its ordinary meaning. It is of wide import and is not confined to the loss of tax as held in various judicial pronouncements. At the same time, the words "prejudicial to the interests of the Revenue", as observed in *Dawjee Dadabhoy and Co.* v. *S. P. Jain* [1957] 31 ITR 872 (Cal), can only mean that "the orders of assessment challenged are such as are not in accordance with law, in consequence whereof the lawful revenue due to the State has not been realised or cannot be realised". Thus, the Commissioner's exercise of revisional jurisdiction under the provisions of section 263 cannot be based on whims or caprice. It is trite law that it is a quasi-judicial power hedged in with limitation and not an unbridled and unchartered arbitrary power. The exercise of the power is limited to cases where the Commissioner on examining the records comes to the conclusion that the earlier finding of the Income-tax Officer was erroneous and prejudicial to the interests of the Revenue and that fresh determination of the case is warranted. There must be material to justify the Commissioner's finding that the order of the assessment was erroneous in so far as it was prejudicial to the interests of the Revenue.

1.4 The hon'ble Delhi High Court, in the cited decision, further observed that there is a fine though subtle distinction between "lack of inquiry" and "inadequate inquiry". It is only in cases of "lack of inquiry" that the Commissioner is empowered to exercise his revisional powers by calling for and examining the records of any proceedings under the Act and passing orders thereon. In *Gabriel India Ltd.* (supra), it was expressly observed (page 114 of 203 ITR) :

> "The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. (See *Parashuram Pottery Works Co. Ltd.* v. *ITO* [1977] 106 ITR 1 (SC))."

It was further observed as under (page 114 of 203 ITR) :

> "From the aforesaid definitions as it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain

assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion . . . There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed."

1.5 The hon'ble Supreme Court in *CIT* v. *Amitabh Bachchan* [2016] 384 ITR 200 (SC) ; [2016] 69 taxmann.com 170, May 11, 2016, held that the power of appeal and revision is contained in Chapter XX of the Act which includes section 263 that confers suo motu power of revision in the Commissioner. The different shades of power conferred on different authorities under the Act has to be exercised within the areas specifically delineated by the Act and the exercise of power under one provision cannot trench upon the powers available under another provision of the Act. In this regard, it must be specifically noticed that against an order of the assessment, so far as the Revenue is concerned, the power conferred under the Act is to reopen the concluded assessment under section 147 and/or to revise the assessment order under section 263. The scope of the power/jurisdiction under the different provisions of the Act would naturally be different. The power and jurisdiction of the Revenue to deal with a concluded assessment, therefore, must be understood in the context of the provisions of the relevant sections. While doing so, it must also be borne in mind that the

Legislature had not vested in the Revenue any specific power to question an order of the assessment by means of an appeal. Regarding applicability of section 263, what has to be seen is that a satisfaction that an order passed by the authority under the Act is erroneous and prejudicial to the interests of the Revenue is the basic pre-condition for exercise of jurisdiction under section 263. Both are twin conditions that have to be conjointly present. Once such satisfaction is reached, jurisdiction to exercise the power would be available subject to observance of the principles of natural justice which is implicit in the requirement cast by the section to give the assessee an opportunity of being heard. Further, there could be no doubt that so long as the view taken by the Assessing Officer is a possible view, the same ought not to be interfered with by the Commissioner under section 263 merely on the ground that there is another possible view of the matter. Permitting exercise of revisional power in a situation where two views are possible would really amount to conferring some kind of an appellate power in the revisional authority. This is a course of action that must be desisted from.

1.6 The hon'ble Bombay High Court in *MOIL Ltd.* v. *CIT* [2017] 396 ITR 244 (Bom) ; [2017] 81 taxmann.com 420 (Bom), observed that if a query is raised during the assessment proceedings which was responded to by the assessee, the mere fact that the query was not dealt with in the assessment order then it would not lead to a conclusion that no mind has been applied to it and the Assessing Officer is not expected to raise more queries, if he was satisfied about the admissibility of claim on the basis of the material and the details supplied.

1.7 *Explanation 2* has been inserted by the Finance Act, 2015 in section 263 with effect from June 1, 2015 to declare that order shall be deemed to be erroneous in so far as it is prejudicial to the interests of the Revenue, if in the opinion of appropriate authority—(1) the order was passed without making inquiries or verifications which should have been made ; (ii) the order is passed allowing any relief without inquiring into the claim ; (iii) the order is not in accordance with any direction or instructions, etc., issued by the Board under section 119 ; or (iv) the order was not in accordance with binding judicial precedent.

Keeping in mind aforesaid principle, we find that the assessee before **2**
us, is under appeal challenging the validity of revisional jurisdiction as exercised by the learned Principal Commissioner of Income-tax-9, Mumbai for the assessment year 2014-15 vide the order dated March 29, 2019. The grounds raised by the assessee read as under :

"1. Re: Validity of order under section 263

1.1. The learned Commissioner of Income-tax has erred in passing an order under section 263 of the Income-tax Act, 1961 based on surmises and conjectures without appreciating the facts and judicial precedents in the matter. Hence, such order is bad in law and ought to be quashed.

1.2. The learned Commissioner of Income-tax has erred in holding that the assessment order dated December 30, 2016 passed by the Assessing Officer is erroneous in so far as the same is prejudicial to the interests of the Revenue.

1.3. The learned Commissioner of Income-tax failed to appreciate that the conditions specified under *Explanation 2* to section 263 are not satisfied in the appellant's case. Accordingly, the appellant prays that the impugned order passed by the learned Commissioner of Income-tax is ultra vires, invalid and ought to be struck down.

1.4. The learned Commissioner of Income-tax has erred in holding that the Assessing Officer failed to conduct adequate enquiries during the course of the assessment proceedings in spite of the fact that the Assessing Officer had recorded the deduction claimed by the appellant in the assessment order and has specifically disallowed the professional fees paid in connection with arbitration awards.

1.5. The learned Commissioner of Income-tax failed to appreciate that there is due application of mind by the learned Assessing Officer during assessment proceedings and setting aside of the impugned order is erroneous, in excess of jurisdiction and bad in law.

1.6. The learned Commissioner of Income-tax ought to have followed the decision of the jurisdictional Bombay High Court in *CIT* v. *Design and Automation Engineers (Bombay) (P.) Ltd.* [2010] 323 ITR 632 (Bom), which has been rendered in the context of section 263 of the Act.

1.7. The learned Commissioner of Income-tax erred in holding that the view taken by the appellant is unsustainable in law and hence change of opinion is permissible to invoke revision proceedings under section 263 of the Act.

1.8. The learned Commissioner of Income-tax ought to have appreciated that where the learned Assessing Officer adopted one view out of the two possible views, the provisions of section 263 of the Act cannot be invoked merely because the Commissioner/Principal Commissioner proposes to take another view.

Without prejudice to the aforesaid :

2. Re : Addition in respect of interest on arbitration awards granted to the appellant

2.1. The learned Commissioner of Income-tax erred in not following the principle of consistency applied by the Supreme Court in the case of *Radhasoami Satsang* v. *CIT* [1992] 193 ITR 321 (SC), in respect of the position adopted by the hon'ble Dispute Resolution Panel and the learned Assessing Officers in the previous assessment years.

2.2. The learned Commissioner of Income-tax erred in holding that the amount of Rs. 36,22,59,000 ought to be taxed in the year under consideration even though the matter has not reached finality and no right has accrued to the appellant to receive such interest on arbitration award.

2.3. The learned Commissioner of Income-tax erred in holding that recording of entries in the books of account under mercantile system of accounting are determinative for taxability of income under the provisions of the Act.

2.4. The learned Commissioner of Income-tax erred in relying on the Arbitration and Conciliation (Amendment) Act, 2015 and the judicial pronouncement on enforceability of award under new statute to conclude that enforceability and finality of award are synonymous.

2.5. The learned Commissioner of Income-tax erred in relying on the decision of the Supreme Court in the case of *BCCI* v. *Kochi Cricket Pvt. Ltd.*, which has been rendered under the Arbitration and Conciliation Act, 1996 and Arbitration and Conciliation (Amendment) Act, 2015 which deals with the issue of enforceability of the arbitration award. Thus, the same cannot be followed for proposing taxation of income of Rs. 36,22,59,000 in the current assessment year.

2.6. The learned Commissioner of Income-tax erred in disregarding the judicial precedents relied upon by the appellant under the Income-tax Act, 1961 to contend that arbitration awards and interest thereon should be taxable only once the matter has reached finality.

2.7. The learned Commissioner of Income-tax erred in relying on judicial precedents rendered under the Income-tax Act, 1961 which are distinguishable on facts as compared to facts in the appellant's case.

2.8. The learned Commissioner of Income-tax ought to have appreciated the appellant's submission that there is no permanent

exclusion of the interest on arbitration awards from being taxed in the hands of appellant. The appellant offers the said income to tax in the year in which the arbitration awards reaches finality."

As evident, the assessee has contested the validity of order passed under section 263 besides contesting the proposed addition on the merits in respect of interest on arbitration awards granted in favour of the assessee.

2.2 The regular assessment for year under consideration was framed by the learned Assessing Officer on December 30, 2016 wherein the income, under normal provisions, was determined at Rs. 37.44 crores after sole disallowance of professional fees for arbitration award for Rs. 4.57 crores. However, book profits of Rs. 103.62 crores, as computed by the assessee under section 115JB in its third revised return filed on March 28, 2016, were accepted without making any further adjustment. The assessee being resident corporate assessee was stated to be engaged in the business of civil construction like roads, bridges, pile foundation and marine works. The professional fees of Rs. 4.57 crores stated to be paid by the assessee for arbitration was disallowed while computing income under normal provisions since the assessee had not offered corresponding arbitration award income for taxation. Similar disallowance made in earlier years was deleted by the learned first appellate authority, against which the Revenue's appeal was stated to be pending before the Tribunal. Keeping in line with the stand taken in earlier years, similar disallowance was made in year under consideration. So far as the assessment order is concerned, there is no other material discussion except for this disallowance.

2.3 Subsequently, the learned Principal Commissioner of Income-tax, after perusal of case records, noted that the learned Assessing Officer failed to assess income of Rs. 36.22 crores on account of interest on arbitration award, which led to issuance of show-cause notice under section 263 dated March 18, 2019, the substantive portion of which has already been extracted in the impugned order. It was noted that although the assessee, as per computation of income submitted during the course of assessment proceedings, offered income of Rs. 36.22 crores as per the Companies Act, 2013 on account of interest on arbitration award while arriving at the book profits under section 115JB. However, the said amount was reduced from the computation of income. It was stated that the learned Assessing Officer allowed the said expenditure without considering the said fact and erred in treating the amount of Rs. 36.22 crores as allowable expenditure which made the assessment order erroneous and prejudicial to the interests of the Revenue within the meaning of section 263. The assessee assailed the

proposed revisional jurisdiction vide submissions dated March 25, 2019, a copy of which has been placed on record. The attention was drawn to the fact that during the course of assessment proceedings, the learned Assessing Officer had specifically show caused the assessee as to why interest on arbitration awards of Rs. 36.22 crores was reduced in the computations, against which detailed submissions were furnished by the assessee to the learned Assessing Officer. The copies of awards received during the year, stay petition filed by the clients before the High Courts and journal entries passed in the books of account were also furnished. It was submitted that since the learned Assessing Officer had called for the requisite details of arbitration awards and even made disallowance for professional fees debited in the profit and loss account in relation to arbitration awards, he had applied his mind to the issue and concluded that interest on arbitration awards was not to be taxed during the year under consideration.

2.4 On the merits also, it was submitted that the assessee, following mercantile system of accounting was maintaining books as prescribed under the Companies Act, 2013. Accordingly, the assessee credited the interest on arbitration awards received during the current year as well as received in earlier years to the profit and loss account but the said interest was not actually received and the awards were challenged by the clients before the High Courts. The matter had not attained finality and there was no actual receipt of funds and the interest was merely a book entry. The details of interest component would reveal that amount of Rs. 32.17 crores pertained to awards received during the year whereas the balance interest of Rs. 4.05 crores pertained to interest on awards received in earlier years. It was submitted that the awards given in earlier years were challenged by the clients before the High Courts and the matters had not reached finality. The assessee accounted for such interest income in the books to keep the claims alive. Such interest income shall accrue to the assessee only when the matter reached finality in the assessee's favour. Thus, the said interest could not be said to have accrued in terms of section 5 of the Act. The assessee was offering such awards for tax in the years in which the matter reaches finality. The arbitration awards were stated to be covered under the Arbitration and Conciliation Act, 1996 wherein further appeal would put an automatic stay on the execution of the award. Since the awards were further appealed by the clients, the assessee had no absolute ownership of the awards and hence the same would not be taxable unless actually received.

2.5 The attention was also drawn to the fact that the Lok Sabha passed a Bill which clarified that the amended Arbitration and Conciliation

Act, 2015 shall apply retrospectively, i.e., from October 23, 2015 onwards. The Amendment Bill, 2018 clarifies that awards passed under the earlier Arbitration Act and appeals filed pursuant to such orders shall continue to be governed by the erstwhile Arbitration and Conciliation Act, 1996. The assessee placed reliance on the decision of the hon'ble apex court rendered in *CIT* v. *Shoorji Vallabhdas and Co.* [1962] 46 ITR 144 (SC) and also on the decision of *CIT* v. *Excel Industries Ltd.* [2013] 358 ITR 295 (SC), for the submissions that tax was to be levied only on real income. The interest on awards was hypothetical income and assessee did not have any right over such income and, therefore, no real income accrued to the assessee on grant of arbitration award in favour of the assessee. The income would be offered to tax only when the matter reaches finality.

2.6 It was further submitted that the assessee offered the arbitration awards to tax in the year of actual receipt once the matter reached finality which was evident from the fact that the assessee offered to tax arbitration award of Rs. 18.82 crores received during the year. Thus, there would only be timing difference in offering the said income to tax depending on when matter reaches finality.

2.7 The assessee also raised a plea of rule of consistency by submitting that similar submissions were made before the learned Dispute Resolution Panel for the assessment year 2009-10 wherein the learned Dispute Resolution Panel, after considering the same, did not issue any directions for enhancement of the proposed income of the assessee. Therefore, following the rule of consistency in terms of decision of the hon'ble apex court in *Radhasoami Satsang* v. *CIT* [1992] 193 ITR 321 (SC), no addition was to be made on account of interest on arbitration awards.

2.8 In the above background, the assessee, relying upon various judicial pronouncements, assailed the exercise of revisional jurisdiction under section 263 and submitted that the order was neither erroneous nor prejudicial to the interests of the Revenue which would require any interference under section 263.

2.9 However, the said submissions could not find favour with the learned Principal Commissioner of Income-tax, who opined that the interest income would accrue to the assessee in the year in which the award was issued. Once award was granted, it is realisable with reasonable certainty even though the final award may vary after the High Court orders. Therefore, interest income was to be offered in the year in which the award was granted. The plea that a stand was already taken by the learned Assessing Officer during regular assessment proceedings was also rejected by observing that the learned Assessing Officer had failed to conduct

adequate inquiries. A mere collection of documents could not be held as conducting inquiry and it would be equivalent to no inquiry by the officer. This was clear case of non-application of mind by the learned Assessing Officer and, therefore, no opinion could be said to have been formed by the learned Assessing Officer. Finally, relying upon various judicial pronouncements, the order was termed as erroneous as well as prejudicial to the interests of the Revenue. Therefore, the order was set aside to be passed afresh as per law after conducting necessary enquiries and investigations.

Aggrieved, the assessee is under further appeal before us.

3 The learned senior counsel, advanced arguments, assailing the revisional jurisdiction on legal grounds as well as on the merits. The learned senior counsel fortified the submissions with various case law on the subjects, the copies of which have been placed on record. Subsequently, written submissions have also been filed summarising the arguments put forward by the learned senior counsel.

4 Au contraire, the learned Commissioner of Income-tax—Departmental Representative vehemently opposed any interference in the directions of the learned Principal Commissioner of Income-tax by submitting that the assessment was framed without considering the issues raised by the learned Principal Commissioner of Income-tax and mere collection of information without application of mind would make the order liable for revision under section 263. The learned Commissioner of Income-tax—Departmental Representative also relied upon various case law to fortify its submissions. The written submissions have also been filed in due course which we have duly considered. Subsequent to conclusion of hearing, the matter was put up for clarification in view of the subsequent decision rendered by the hon'ble apex court in the case of *Hindustan Construction Co. Ltd.* v. *Union of India* (W. P. (C) No. 1074 of 2019 dated November 27, 2019), which was in the context of the Arbitration and Conciliation Act, 1996. The assessee filed written submissions against the same also, which has duly been considered.

5 We have carefully considered the factual matrix as well as arguments advanced by both representatives. Our adjudication to the issue, in the light of settled legal position as enumerated in opening paragraphs, would be as given in succeeding paragraphs.

5.2 From the perusal of documents on record, we find that during regular proceedings, notice under section 142(1) was issued to the assessee on May 31, 2016 wherein the assessee was directed to file the copy of return of income, financial statements and copy of assessment orders for

last 3 years. The notice was duly complied with by the assessee vide submissions dated June 8, 2016 wherein the assessee, inter alia, filed its annual report, statement of total income and assessment orders for the assessment years 2011-12 and 2012-13. In the computation of income, the assessee has offered to tax money received on arbitration award for Rs. 18.82 crores and at the same time, claimed deduction of interest on arbitration award for Rs. 36.22 crores. Thereafter, the assessee has filed another submission vide letter No. PG/26138 which is stated to be as per oral inquiry raised by the learned Assessing Officer during the course of hearing. In this submission, the assessee has elaborately dealt with the issue as to why the arbitration award and interest on arbitration awards were reduced from computation of income. The assessee filed project-wise details of deduction so claimed and submitted that interest would not be liable to tax since the same was disputed by the clients and the matter had not reached finality. No right was stated to have accrued to the assessee to receive any amount towards arbitration awards including interest on arbitration award as these awards were disputed by the clients before the hon'ble High Courts. For the said submissions, reliance was placed, inter alia, on the decision of the hon'ble apex court in *CIT* v. *Hindustan Housing and Land Development Trust Ltd.* [1986] 161 ITR 524 (SC), *Godhra Electricity Co. Ltd.* v. *CIT* [1997] 225 ITR 746 (SC), the decision of the hon'ble Bombay High Court in *CIT* v. *Seksaria Biswan Sugar Factory Pvt. Ltd.* [1992] 195 ITR 778 (Bom), *CIT* v. *Vimla D. Sonwane* [1995] 212 ITR 489 (Bom), *CIT* v. *Sharda Sugar Industries Ltd.* [1999] 239 ITR 393 (Bom) and *CIT* v. *Abdul Mannan Shah Mohammed* [2001] 248 ITR 614 (Bom), besides various other decision of the hon'ble High Courts. In the stated background, it was submitted that right to receive the interest was conditional and would entirely depend upon the final outcome of the decision of the hon'ble courts. The assessee would receive right on such interest only in the year in which the dispute was finally settled. The copies of the relevant arbitration award along with details of petitions filed by the clients before the hon'ble High Court contesting the terms of the award was also placed on record along with the submissions.

5.3 Another submission was that accounting entries would not be determinative of taxability of income. The attention was drawn to the fact, that arbitration awards including interest, as actually received during the year, was already offered to tax. The copies of arbitration awards and the petition filed against the same before the hon'ble High Courts was also placed on record. The aforesaid facts were reiterated by the assessee in paragraph 5 of its submissions dated March 25, 2019 to the learned Principal

Commissioner of Income-tax while opposing the revision proceedings under section 263.

5.4 Thereafter, an assessment has been framed under section 143(3) on December 30, 2016 wherein, the learned Assessing Officer has chosen to make disallowance of Rs. 4.57 crores, being professional fees for arbitration since corresponding arbitration award income was not offered for taxation. It was noted that similar disallowance was made in earlier years and the same was deleted by the learned first appellate authority and consequently, the Department was in appeal before the Tribunal on the stated issue. However, to keep the issue alive, the said disallowance was made for the year under consideration.

5.5 First of all, we deal with the arguments advanced by the learned Commissioner of Income-tax—Departmental representative that the submissions made by the assessee during the course of regular proceedings with respect to taxability of interest on arbitration awards were not called for by the learned Assessing Officer in notice under section 142(1) and the submissions were purely suo motu voluntary submissions which would clearly demonstrate that the learned Assessing Officer did not apply his mind to this aspect while framing the assessment. We find that the assessee has duly certified the paper book containing the said submission that the aforesaid submissions vide letter No. PG/26138 as well as supporting documents were duly submitted to the learned Assessing Officer during the course of regular hearing. The factum of making said submission during the course of regular assessment proceedings was reiterated by the assessee in paragraph 5 of its submissions dated March 25, 2019 to the learned Principal Commissioner of Income-tax while opposing the revision proceedings under section 263. Even the learned Commissioner of Income-tax—Departmental representative has not disputed the fact that the said documents were not, at all, available before the learned Assessing Officer during the course of regular assessment proceedings. The argument advanced is that the said documents were not called for by the learned Assessing Officer and the same were not considered by the learned Assessing Officer while framing the assessment.

5.6 However, in the background of factual matrix as enumerated by us, it is difficult to accept the fact that the said documents were not appreciated/considered by the learned Assessing Officer since a specific disallowance has been made, being conscious of the fact that certain arbitration income was not offered to taxation by the assessee. The assessment orders for earlier years were specifically called for vide notice under section 142(1) and the same were also furnished by the assessee. Upon perusal of

the same, the learned Assessing Officer specifically took note of the fact that similar disallowance was made in earlier years and, therefore, he chose to make similar disallowance during the year under consideration. The computation of income filed by the assessee clearly demonstrated that arbitration awards received during the year were offered to tax whereas interest on arbitration award was reduced while computing the taxable income. The revenue recognition policy being followed by the assessee to recognise the interest income was fully disclosed in notes to the account. In the light of all these facts, it could safely be concluded that the position taken by the assessee to recognise the interest income was accepted by the learned Assessing Officer who was well conscious of the fact that certain arbitration income was not offered to tax. Hence, it could not be said that there was non-application of mind by the learned Assessing Officer on the stated issue. This being the case, a logical assumption would arise that the learned Assessing Officer has duly applied his mind to the issue of interest on arbitration award and chose not to make any addition thereof. Therefore, it could not be said that there was non-application of mind and no view was taken by the learned Assessing Officer on the stated matter.

5.7 Another logical deduction would be that the accounting methodology being followed by the assessee to recognise the interest income as revenue, was accepted by the Revenue in earlier years and similar deduction claimed in earlier years was not disturbed. The notes to the accounts would, prima facie, establish that the assessee was following consistent method of accounting for recognition of interest income and there was no change in accounting policy in this regard. This is in consonance with plea of rule of consistency as raised by the learned senior counsel, who has submitted that there was no change in the accounting methodology being followed by the assessee for recognising the interest income on arbitration awards. This is further evidenced by the submissions made by the assessee during the course of assessment proceedings with respect to taxability of interest income on arbitration awards during the assessment proceedings for the assessment years 2009-10 to 2013-14 wherein similar pleas has been raised. The perusal of these submissions would reveal that the assessee has offered interest income on arbitration awards to tax only in the year of actual receipt thereof. Therefore, the principle of rule of consistency favour the assessee, on the issue raised by the learned Principal Commissioner of Income-tax.

5.8 Therefore, in the given facts and circumstances, we find that the subject matter of proposed revision was already deliberated upon by the learned Assessing Officer and a possible view was taken in the matter. That

view could not be said to be contrary to law, perverse or unsustainable in law, in any manner and the same would be a possible view keeping in mind the rule of consistency. This being the case, the assessment order could not be termed as erroneous or prejudicial to the interests of the Revenue under section 263 as held by the learned Principal Commissioner of Income-tax. The action of the learned Assessing Officer, in our opinion, was in consonance with the position accepted by the Revenue in earlier years and, therefore, it could not be said that the order was not in accordance with law. In such a case, the action of the learned Principal Commissioner of Income-tax in invoking jurisdiction under section 263 could not be sustained in the eyes of law. Therefore, we quash the same in terms of settled legal position as enumerated by us in opening paragraphs.

5.9 Having said so, keeping in view of the fact that in the present appeal we are merely concerned with determining the validity of revisional jurisdiction under section 263, the argument that whether the action of the assessee in recognising the interest income, in such a manner, was in consonance with the provisions of the Arbitration and Conciliation Act, 1996 or not, is left open. The other arguments also, on merits, not delved into and left open. The appeal stands allowed to the extent indicated in the order.

Order pronounced in the open court on March 17, 2020. 6

[2020] 80 ITR (Trib) 427 (Delhi)

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

RAJIV MADHOK

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

BHAVNESH SAINI ***(Judicial Member)*** and
O. P. KANT ***(Accountant Member)***

May 29, 2020.

SS ▸ ITA 1961, s 54F
AY ▸ 2012-13
HF ▸ Assessee

CAPITAL GAINS—LONG-TERM CAPITAL GAINS—SALE OF CAPITAL ASSET AND INVESTMENT IN RESIDENTIAL HOUSE—RESIDENTIAL HOUSE PURCHASED WITHIN TWO YEARS FROM THE DATE OF TRANSFER OF ORIGINAL ASSET—ASSESSEE ENTITLED TO EXEMPTION—INCOME-TAX ACT, 1961, S. 54F.

The assessee declared a total income of Rs. 1,70,06,340 for the year 2012-13, including long-term capital gains of Rs. 2,18,91,720 on sale of the shares but claimed exemption in terms of section 54F of the Income-tax Act, 1961 in view of the investment in purchase of property. He claimed that the property was purchased within the time provided in section 54F and thus he was entitled to exemption to the extent of investment in purchase of the residential house property. However, according to the Assessing Officer, the residential house had been purchased prior to the time period provided in section 54F and therefore the assessee was not entitled to the benefit under section 54F. The Commissioner (Appeals) upheld the addition, but reduced the addition to Rs. 2,07,62,580, i. e., the amount which was claimed as deduction under section 54F. On appeal :

Held, *that the new asset, i. e., residential house had been purchased within two years from the date of transfer of the original asset, i. e., shares, and thus, the assessee was entitled to benefit of section 54F. The finding of the Commissioner (Appeals) on the issue was accordingly set aside and the Assessing Officer was directed to allow the benefit of section 54F amounting to Rs. 2,07,62,580.*

AYUSHI PATNI *v.* DY. CIT (I. T. A. No. 1424/Pune/2016 dated January 17, 2019) *followed*.

Cases referred to :

Ayushi Patni *v.* Dy. CIT (I. T. A. No. 1424/Pune/2016 dated January 17, 2019) (para 4)

Bastimal K. Jain *v.* ITO (I. T. A. No. 2896/Mum/2014 June 8, 2016) (para 4)

CIT *v.* Beena K. Jain (Smt.) [1996] 217 ITR 363 (Bom) (para 4)

ITO (International Taxation) *v.* Shiv Sunil Khanna (I. T. A. No. 5857/Mum/2016 dated May 14, 2018) (para 4)

Ramita Mahendra Mehta (Smt.) *v.* ITO (I. T. A. No. 4535/Mum/2014 September 13, 2017) (para 4)

Ranjana R. Deshmukh (Smt.) *v.* ITO (I. T. A. No. 697/Mum/2017 dated November 9, 2018) (para 4)

I. T. A. No. 2291/Delhi/2017 (assessment year 2012-13).

Dinesh Gupta, Chartered Accountant, for the assessee.

Umesh Takyar, Senior Departmental representative, for the Department.

ORDER

The order of the Bench was pronounced by

O. P. KANT ***(Accountant Member)***.—This appeal by the assessee is directed against the order dated January 31, 2017 passed by the learned Commissioner of Income-tax (Appeals)-10, New Delhi (in short, "the learned CIT (Appeals)"), for the assessment year 2012-13 raising the following grounds : 1

> "1. That on the facts and in the circumstances of the petitioner's case, the learned Commissioner of Income-tax (Appeals)-10, New Delhi erred in law and on facts in upholding the order of the learned Assessing Officer and in sustaining the disallowance of the claim of Rs. 2,07,62,580 made in terms of the provisions contained in section 54F of the Income-tax Act, 1961.
>
> 2. That on the facts and in the circumstances of the petitioner's case, the learned Commissioner of Income-tax (Appeals)-10, New Delhi, erred in law and on facts in upholding the order of the learned Assessing Officer and in not allowing deduction under section 54F of the Act even for the amounts spent on construction of the residential house property after the date of long-term capital gain/transfer of the original asset."

Briefly stated the facts of the case are that the assessee filed a return of income on July 27, 2012 declaring a total income of Rs. 1,70,06,340. The return of income filed by the assessee was selected for scrutiny assessment and statutory notices were issued and complied with. During the year under consideration, the assessee shown long-term capital gain of Rs. 2,18,91,720 on sale of the shares on September 2, 2011, but the same was claimed as not to be charged in terms of section 54F of the Act in view of the investment in purchase/construction of property bearing No. T204/08-03 in Common Wealth Games, Village, Delhi. The assessee claimed that the property was purchased/constructed within the time period provided in the section 54F of the Act and thus, he is entitled for not charging of long-term capital gain to the extent of investment in purchase/construction of the residential house property. However, according to the Assessing Officer, the residential house has been purchased prior to the time period provided in section 54F of the Act and, therefore, the assessee is not entitled for the said benefit under section 54F of the Act. The Assessing Officer, accordingly completed the scrutiny assessment on March 27, 2015 after making addition for the long-term capital gain of Rs. 2,18,91,720. On further appeal, the learned Commissioner of Income-tax (Appeals) upheld the addition, however, reduced the addition to Rs. 2,07,62,580, i. e., the 2

amount which was claimed as deduction under section 54F of the Act. Aggrieved, the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

3 The sole issue raised in both the grounds of the appeal is sustaining disallowance of claim of Rs. 2,07,62,580 which was made under section 54F of the Act.

4 We have heard rival submissions of the parties and perused the relevant material on record. In the case the assessee sold shares and shown long-term capital gain of Rs. 2,18,91,720. Initially, in the documents filed before the Assessing Officer the assessee claimed to have sold the shares on September 2, 2011, however, based on share purchase agreement (SPA), the date of the sale was claimed as on August 17, 2011. The Assessing Officer and the learned Commissioner of Income-tax (Appeals) has accepted the date of the sale as on August 17, 2011. Thus there is no dispute as far as date of the sale of the shares in the amount of long-term capital gain of Rs. 2,18,91,720 is concerned.

4.1 On sale of a capital asset, capital gain is charged as per the provisions of section 45 of the Act. But if an assessee invest in certain new assets, the capital gain is not charged to the extent provided in the provisions of the Act. One of such provision is section 54F of the Act. In the case the dispute is regarding availing of benefit under section 54F of the Act. Under the provisions of section 54F, the long-term capital gain is not charged, if any individual or Hindu undivided family invest the entire sale consideration arising on transfer of any long-term capital asset (not being a residential house), i. e., original asset, into a purchase or construction of residential house (i. e., new asset). If the cost of the new asset is less than the net consideration in respect of the original asset, the capital gain in proportion to the cost of the new asset bears to the net consideration, is not charged under section 45 of the Act.

4.2 For availing of the benefit of section 54F, the investment in purchase/construction of residential house has to be made as under :

> "(a) Purchase of residential house within a period of one year before or two years after the date on which the transfer of the original asset took place, or
>
> (b) Construction of residential house within a period of three years from the date on which the transfer of the original assessee took place."

4.3 In the case of the assessee, the transfer of the shares has taken place on August 17, 2011 and, therefore, time period available to the assessee for purchase/construction for availing of the benefit of section 54F works out as under :

"(a) Purchase within a period of one year before the transfer of shares (i. e., period between August 17, 2010 and August 16, 2011 or purchase within two years after the date of the transfer of shares (i. e., period between August 17, 2011 and August 18, 2013) or

(b) Construction within a period of three years from the transfer of shares (i. e., period between August 17, 2011 and August 18, 2014)."

4.4 Regarding the purchase/construction of the residential house the assessee provided following information :

(i)	The assessee entered into buyers agreement for purchase of Apartment with builder/developer, i. e., Emmar MGF Construction Private Limited and paid advance of rupees 2,03,32,669 (pages 6-7 and 44 of the paper book)	29-9-2009
(ii)	Letter of intimation of possession received on demand of final amount called by the builder/developer (page 50 of the paper book)	9-4-2012
(iii)	Final amount of Rs. 13, 76, 702 paid to the builder/developer (page 51 of the paper book)	April, 2012
(iv)	Offer of possession of the flat (new asset) received by the assessee from the builder and position of the flat received. (page 52 of the paper book)	6-7-2012

4.5 The above facts related to investment in property are not in dispute. In view of the buyer's agreement dated September 29, 2009 between the assessee and builder/developer, the learned Assessing Officer/Commissioner of Income-tax (Appeals) are of the view that the flat was ready on the said date and thus transfer of the flat took place on September 29, 2009. The allotment was final on September 29, 2009 and grant of completion certificate/occupancy certificate upon which letter of intimation of possession was issued are follow up procedure to the purchase of flat. According to the learned Assessing Officer/Commissioner of Income-tax (Appeals), the substantial payment of the flat was made before September 29, 2009 and thus title of the property transferred in favour of the assessee on September 29, 2009.

4.6 In view of the above observation, according to the learned Assessing Officer, the residential house (flat) was purchased on September 29, 2009, which is beyond the period of purchase of residential house (i. e., August 17, 2010 to August 18, 2013) and thus, the assessee was not entitled for the benefit of section 54F of the Act.

4.7 The assessee, however, referred to various clauses of the buyer agreement and submitted that on the date of the buyer agreement, the developer was yet to obtain all required permits and approval for

construction, commissioning and development of the project (clause A(X)) ; the super area of the flat was tentative and was to be confirmed after construction of project (clause 1.2) ; layout plans were subject to change (clause 1.7a) ; proposed building plans, design, etc., were tentative (clause 8.2) ; if completion of the flat (project) delayed for the reasons beyond the control of developer, then the developer was to be entitled for extension of time (clause 9.4.1). In view of the clauses of the buyers agreement and possession handed over in April, 2012, the assessee contested that the flat was constructed before April, 2012 and it was within the period construction of three years after the sale of original asset (i. e. August 18, 2014). He relied on the Central Board of Direct Taxes Circular No. 471, dated October 15, 1986[1] and Circular No. 672, dated December 16, 1993[2] and submitted that in terms of scheme of the allotment and construction of the flat/house by the co-operative societies or the other institution are similar to those mentioned in para 2 of the Central Board of Direct Taxes Circular No. 471/dated October 15, 1986 and thus such cases might be treated as the construction of the flat for the purpose of sections 54 and 54F of the Act.

4.8 The learned Commissioner of Income-tax (Appeals) rejected the contention of the assessee and held as under :

> "4.2.8 Close reading of above circulars, nowhere mentioned that in order to get exemption construction could take place before the date of transfer of long-term assets. On the other hand, section 54/54F makes it clear that the construction of house must complete within 3 years of the transfer. Further, circular makes it clear that the date of payment of first instalment for the allotment of flats is to be seen as the date of obtaining the title of the property. The allottee gets title in the property on the issuance of the allotment letter and the payment of instalment is only a follow up action and taking the delivery of the possessing is only a formality."

4.9 Before us, the learned counsel of the assessee has submitted that date of possession of the flat should be treated as the date of purchase of the new asset in view of the following decisions :

(a) *Ayushi Patni* v. *Dy. CIT* (I. T. A. No. 1424/Pune/2016 dated January 17, 2019)

(b) *Smt. Ranjana R. Deshmukh* v. *ITO* (I. T. A. No. 697/Mum/2017 dated November 9, 2018)

(c) *ITO (International Taxation)* v. *Shiv Sunil Khanna* (I. T. A. No. 5857/Mum/2016 dated May 14, 2018)

1. see [1986] 162 ITR (St.) 41.
2. see [1994] 205 ITR (St.) 47.