CONTENTS OF SHORT NOTES CASES OF THIS PART

REPORTS OF CASES : 1—16 Page

SUBJECT INDEX TO SHORT NOTES CASES REPORTED IN THIS PART

Business expenditure—Disallowance—Payments liable to deduction of tax at source—Placement fees under contract between assessee and cable operators—Not commission or royalty—No disallowance could be made—Income-tax Act, 1961, s. 40(a)(ia)—Star India P. Ltd. *v.* Asst. CIT (Mumbai) . . . 8

——Leave and licence for running premises—Reimbursement of property tax paid for rental premises— Whether reimbursement of property tax partakes of character of rent only—Whether to aggregate amount of rent plus reimbursements compares well with earlier years payment—Duty of assessee to justify payment—Assessing Officer to decide afresh—Income-tax Act, 1961, s. 37—Star India P. Ltd. *v.* Asst. CIT (Mumbai) . . . 8

Business income—Income from house property—Repairs and maintenance—Rental income from 100 square feet out of 10,000 square feet let out for five months taxed as income from house property—Corresponding deduction at 30 per cent. towards repairs given only for five months—Assessee entitled to proportionate deduction for remaining period of seven months of repairs and maintenance—Income-tax Act, 1961, s. 38(2)—Wilhelmsen Ship Management India Pvt. Ltd. *v.* Deputy CIT (Mumbai) . . . 14

Capital gains—Exemption—Sale of property and purchasing new residential house—Conditions precedent—Assessee depositing gains in Capital Gains Accounts

Scheme before due date for filing return under section 139(4) and purchasing new house within two years of transfer—Assessee explaining reasons for delay in depositing amount in Capital Gains Accounts Scheme—Substantial compliance—Failure to deposit sum within time specified in section 139(1)—Mere non-compliance with procedural requirement under section 54(2)—Not a reason for denying exemption—Income-tax Act, 1961, s. 54—ITO *v.* SMT. REKHA SHETTY (Chennai) . . . 1

Cash credits—Confirmations and ledger account of creditors prima facie showing that balances came from earlier years—If credits in books of account pertain to earlier year addition could not be made in instant year—Balance-sheet for preceding year and earlier years not on record—Assessing Officer to re-decide issue in light of material brought on record—Income-tax Act, 1961, s. 68—VIRENDRA VERMA *v.* ITO (Delhi) . . . 16

Charitable purpose—Changes in objects clause—Section 12A(1)(ab) providing for reason of amendment of objects clause of trust should be verified clarificatory in nature—Assessee requesting Commissioner to take amended objects on record after proper verification but no communication from Commissioner—Commissioner to take into account amended object examine its genuineness and its compliance with respect to section 2(15)—Income-tax Act, 1961, s. 12A(1)(ab)—HCL FOUNDATION *v.* CIT (EXEMPTIONS) (Delhi) . . . 7

——Exemption—Non-profit organisation—Activities of assessee not existing for purpose of making profits and distribution of such profits to its members—Nothing suggesting assessee's activities involved in nature of trade, commerce or business or activity of rendering any service in relation to any trade, commerce or business and in consideration of which cess or fee received by assessee—Entitled to exemption—Income-tax Act, 1961, s. 11—CONFEDERATION OF INDIAN TEXTILE INDUSTRY *v.* ITO (EXEMPTION) (Mumbai) . . . 12

Depreciation—Satellite television channels—Brand licence fees—Payments including amount approved by competent authority that specifically considered value of brand licence—No disallowance on account of depreciation on payment of brand licence fees—Entitled to depreciation—Income-tax Act, 1961, s. 32—STAR INDIA P. LTD. *v.* ASST. CIT (Mumbai) . . . 8

——Software expenditure—Expenditure incurred towards software treated as capital in nature—Assessing Officer directed to grant depreciation on software expenditure incurred during year in addition to depreciation on opening written down value of computer and computer software—Income-tax Act, 1961, s. 32—STAR INDIA P. LTD. *v.* ASST. CIT (Mumbai) . . . 8

Income from house property—Income from other sources—Lease—Demised premises mentioned as workstation in building in lease agreement—Prime objective exploitation of asset and not building or any part thereof—Use of easement and common areas by lessee incidental to lease of exploitation of workstation—Workstation in the form of plant and machinery inseparable from building and for exploitation or use of workstation, use of building incidental—Assessable as income from other sources—Income-tax Act, 1961, ss. 24(a), 56(2)(iii)—TELEKON MEDIA INDIA P. LTD. *v.* ITO (Delhi) . . . 3

Infrastructure development—Generation of electricity—Special deduction—Computation of profits of eligible business—Initial assessment year—Embargo placed under section 80-IA(5) for quantification of deduction of profits and gains of eligible business applicable from assessment years immediately succeeding initial assessment years only—Assessee not required to notionally reduce losses arising from eligible business in earlier years already set off against other business of assessee in terms of sections 70, 71 and 72 prior to exercise of option of initial assessment year—Losses arising in eligible business subsequent to earmarking of initial assessment year to be governed by embargo placed in section 80-IA(5)—Income-tax Act, 1961, s. 80-IA(4)—Circular No. 1 of 2016 dated 15-2-2016—Deputy CIT *v.* Chhotabhai Jethabhai Patel and Co.

(Ahmedabad) . . . 5

International transactions—Transfer pricing—Arm's length price—Manning service fee—Tribunal in assessee's case finding manning service fee at arm's length in earlier years—No change in facts—Manning service fee at arm's length—Income-tax Act, 1961—Wilhelmsen Ship Management India Pvt. Ltd. *v.* Deputy CIT

(Mumbai) . . . 14

CASES JUDICIALLY NOTICED IN THIS PART

All India Rubber Industries Association *v.* Addl. DIT (Exemptions) [2018] 173 ITD 615 (Mumbai) **followed** in Confederation of Indian Textile Industry *v.* ITO (Exemption) [2020] 81 ITR (Trib) (S. N.) 12 (Mumbai)

Commissioner of Income-tax *v.* Times Global Broadcasting Co. Ltd. (I. T. A. No. 399 of 2016 dated August 14, 2018) **relied on** in Star India P. Ltd. *v.* Asst. CIT [2020] 81 ITR (Trib) (S. N.) 8 (Mumbai)

CIT *v.* UTV Entertainment Television Ltd. [2017] 399 ITR 443 (Bom) **relied on** in Star India P. Ltd. *v.* Asst. CIT [2020] 81 ITR (Trib) (S. N.) 8 (Mumbai)

Star India P. Ltd. *v.* Addl. CIT (I. T. A. Nos. 4818 and 4675/Mum/2010 dated April 1, 2016) **followed** in Star India P. Ltd. *v.* Asst. CIT [2020] 81 ITR (Trib) (S. N.) 8 (Mumbai)

Star India P. Ltd. *v.* Asst. CIT (I. T. A. Nos. 1901/Mum/2016 and 1048/Mum/2017 dated August 1, 2019) **followed** in Star India P. Ltd. *v.* Asst. CIT [2020] 81 ITR (Trib) (S. N.) 8 (Mumbai)

Venkata Dilip Kumar *v.* CIT [2019] 419 ITR 298 (Mad) **relied on** in ITO *v.* Smt. Rekha Shetty [2020] 81 ITR (Trib) (S. N.) 1 (Chennai)

CONTENTS OF THIS PART

REPORTS OF CASES : 1—112 PAGE

SUBJECT INDEX TO CASES REPORTED IN THIS PART

——Notice—Assessee carrying on mining business —Opinion of commission appointed by Central Government that there had been underinvoicing of exports—Assessing Officer must apply his own mind and make his own assessment of facts before he issues any notice—Reopening merely on basis of report—Not justified—Income-tax Act, 1961, ss. 147, 148—ASHAPURA MINECHEM LTD. *v.* DEPUTY CIT (Mumbai) ... 111

——Notice after four years—Condition precedent—Freezer security deposits—Taxability considered and addition to income by Assessing Officer—Assessing Officer not establishing failure on part of assessee to disclose truly and fully all material facts—Lapsed liability taxed in original assessment on proportionate basis over four years from date of receipt—Reassessment to tax it on basis that liability to repay ceased—Change of opinion—Tribunal finding in earlier year that amount taxable only in year of termination—Reassessment not valid—Income-tax Act, 1961, ss. 147, 148—ASST. CIT *v.* JOJO FROZEN FOODS P. LTD. (Cochin) ... 90

Rectification of mistakes—Mistake apparent from record—Commissioner (Appeals) granting deduction on basis of decision of High Court—Decision subsequently reversed by Full Bench—Commissioner rectifying earlier order and disallowing deduction—Justified—Income-tax Act, 1961, s. 154—THE CHOMBAL SERVICE CO-OPERATIVE BANK LTD. *v.* ITO (Cochin) ... 13

SECTIONWISE INDEX TO CASES REPORTED IN THIS PART

Income-tax Act, 1961 :

S. 11—Exemption—Charitable purpose—Micro finance activity—Not charitable in nature—Not entitled to exemption—SHALOM CHARITABLE MINISTRIES OF INDIA *v.* ASST. CIT (Cochin) ... 20

S. 14A—Income—Expenditure incurred in relation to earning exempt income—Strategic investment—Not disallowable—Own funds of assessee more than investments—No disallowance—Disallowance to be in relation to income which does not form part of total income—ASST. CIT *v.* PADMA LOGISTICS AND KHANIJ PVT. LTD. (Kolkata) ... 61

S. 37—Business expenditure—Rent expenses—Copies of rental agreement and evidence of payment—Fact not controverted—Allowable—ASST. CIT *v.* PADMA LOGISTICS AND KHANIJ PVT. LTD. (Kolkata) ... 61

S. 80P(2)—Co-operative society—Special deduction—Interest income—Assessing Officer to conduct inquiry into factual situation as to activities of assessee to determine eligibility for deduction—Assessing Officer shall examine activities of assessee and determine whether activities in compliance with activities of co-operative society functioning under Kerala Co-operative Societies Act, 1969—THE CHOMBAL SERVICE CO-OPERATIVE BANK LTD. *v.* ITO (Cochin) ... 13

S. 115JB—Company—Book profits—Exclusions—Sick industrial company—Assessee discharged by Board for Industrial and Financial Reconstruction and its net worth turning positive by virtue of implementation of revival scheme—No relief under section 115JB—Authorities not specifically dealing with issues of adjustment in computing book profits under section 115JB—Commissioner (Appeals) to readjudicate issue by speaking order—WINDSOR MACHINES LTD. *v.* DEPUTY CIT (Mumbai) . . . 41

S. 147—Reassessment—Income escaping assessment—Sale of property by mischief and forgery—Assessee neither disclosing sale transaction nor offering capital gains on transaction—Documents to which assessee a party constituting tangible material to form belief that income assessable to tax escaped assessment—Inordinate appreciation of value from date from date of purchase and till date of sale—Addition justified—SURESH KUMAR SHARMA *v.* ITO (Jaipur) . . . 1

——Reassessment—Notice—Assessee carrying on mining business —Opinion of commission appointed by Central Government that there had been underinvoicing of exports—Assessing Officer must apply his own mind and make his own assessment of facts before he issues any notice—Reopening merely on basis of report—Not justified—ASHAPURA MINECHEM LTD. *v.* DEPUTY CIT (Mumbai) . . . 111

——Reassessment—Notice after four years—Condition precedent—Freezer security deposits—Taxability considered and addition to income by Assessing Officer—Assessing Officer not establishing failure on part of assessee to disclose truly and fully all material facts—Lapsed liability taxed in original assessment on proportionate basis over four years from date of receipt—Reassessment to tax it on basis that liability to repay ceased—Change of opinion—Tribunal finding in earlier year that amount taxable only in year of termination—Reassessment not valid—ASST. CIT *v.* JOJO FROZEN FOODS P. LTD. (Cochin) . . . 90

S. 148—Reassessment—Income escaping assessment—Sale of property by mischief and forgery—Assessee neither disclosing sale transaction nor offering capital gains on transaction—Documents to which assessee a party constituting tangible material to form belief that income assessable to tax escaped assessment—Inordinate appreciation of value from date from date of purchase and till date of sale—Addition justified—SURESH KUMAR SHARMA *v.* ITO (Jaipur) . . . 1

——Reassessment—Notice—Assessee carrying on mining business —Opinion of commission appointed by Central Government that there had been underinvoicing of exports—Assessing Officer must apply his own mind and make his own assessment of facts before he issues any notice—Reopening merely on basis of report—Not justified—ASHAPURA MINECHEM LTD. *v.* DEPUTY CIT (Mumbai) . . . 111

——Reassessment—Notice after four years—Condition precedent—Freezer security deposits—Taxability considered and addition to income by Assessing Officer—Assessing Officer not establishing failure on part of assessee to disclose truly and fully all material facts—Lapsed liability taxed in original assessment on proportionate basis over four years from date of receipt—Reassessment to tax it on basis that liability to repay ceased—Change of opinion—Tribunal finding in earlier year that amount taxable only in year of termination—Reassessment not valid—ASST. CIT *v.* JOJO FROZEN FOODS P. LTD. (Cochin) . . . 90

S. 154—Rectification of mistakes—Mistake apparent from record—Commissioner (Appeals) granting deduction on basis of decision of High Court—Decision subsequently reversed by Full Bench—Commissioner rectifying earlier order and disallowing deduction—Justified—THE CHOMBAL SERVICE CO-OPERATIVE BANK LTD. *v.* ITO (Cochin) . . . 13

S. 246—Appeal to Commissioner (Appeals)—Maintainability of appeal—Order of Assessing Officer giving effect to order of HIgh Court not containing decision on any issue or computation of income—Not appealable—Whether interest to be levied for period reckoning from original demand till recomputation of tax as per outcome of finality of dispute—Assessing Officer to take decision—Once Assessing Officer decides period from which interest has to be calculated on outstanding demand—Appealable order—ABC EXPORTS *v.* ASST. CIT (Jaipur) . . . 99

S. 271(1)(c)—Penalty—Concealment of income—Agricultural income—Sale of casuarina plants—Assessee explaining his transactions and bringing to notice of Assessing Officer that transactions undertaken through banking channels—Assessee prima facie placing relevant materials and explaining transaction— Assessing Officer not recording satisfaction that explanation offered by assessee false—Penalty unsustainable—GURUSAMY RAMAMURTHY *v.* ITO (Chennai) . . . 9

Sick Industrial Companies (Special Provisions) Act, 1985 :

S. 17(1)—Company—Book profits—Exclusions—Sick industrial company—Assessee discharged by Board for Industrial and Financial Reconstruction and its net worth turning positive by virtue of implementation of revival scheme—No relief under section 115JB—Authorities not specifically dealing with issues of adjustment in computing book profits under section 115JB—Commissioner (Appeals) to readjudicate issue by speaking order—WINDSOR MACHINES LTD. *v.* DEPUTY CIT (Mumbai) . . . 41

Income-tax Rules, 1962 :

R. 8D—Income—Expenditure incurred in relation to earning exempt income—Strategic investment—Not disallowable—Own funds of assessee more than investments—No disallowance—Disallowance to be in relation to income which does not form part of total income—ASST. CIT *v.* PADMA LOGISTICS AND KHANIJ PVT. LTD. (Kolkata) . . . 61

CASES JUDICIALLY NOTICED IN THIS PART

Commissioner of Income-tax (Dy.) *v.* JSW Ltd. [2020] 79 ITR (Trib) 585 (Mumbai) **followed** in Windsor Machines Ltd. *v.* Deputy CIT [2020] 81 ITR (Trib) 41 (Mumbai)

CIT *v.* Tube Investments of India Ltd. [2012] 341 ITR 199 (Mad) **distinguished** in Windsor Machines Ltd. *v.* Deputy CIT [2020] 81 ITR (Trib) 41 (Mumbai)

Dalmia Power Ltd *v.* Asst. CIT [2020] 420 ITR 339 (SC) **applied** in Asst. CIT *v.* Padma Logistics and Khanij Pvt. Ltd. [2020] 81 ITR (Trib) 61 (Kolkata)

(Contd. on Cover Page 3)

THE
ITR'S TRIBUNAL TAX REPORTS
VOLUME 81 — 2020

[2020] 81 ITR (Trib) 1 (Jaipur)

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

SURESH KUMAR SHARMA

v.

INCOME-TAX OFFICER

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

March 18, 2020.

SS ▸ ITA 1961, ss 147, 148
AY ▸ 2012-13
HF ▸ Department

REASSESSMENT—INCOME ESCAPING ASSESSMENT—SALE OF PROPERTY BY MISCHIEF AND FORGERY—ASSESSEE NEITHER DISCLOSING SALE TRANSACTION NOR OFFERING CAPITAL GAINS ON TRANSACTION—DOCUMENTS TO WHICH ASSESSEE A PARTY CONSTITUTING TANGIBLE MATERIAL TO FORM BELIEF THAT INCOME ASSESSABLE TO TAX ESCAPED ASSESSMENT—INORDINATE APPRECIATION OF VALUE FROM DATE FROM DATE OF PURCHASE AND TILL DATE OF SALE—ADDITION JUSTIFIED—INCOME-TAX ACT, 1961, ss. 147, 148.

The assessee's case for the assessment year was reopened on the ground that the assessee transferred immovable property for a consideration of Rs. 38.50 lakhs and the transaction was not declared in his return. The Commissioner (Appeals) confirmed the reassessment. On appeal :

Held, *(i) that the execution of the sale agreement was not in dispute but the assessee claimed that subsequently the sale agreement was cancelled. During the assessment proceedings, nothing had been produced before the Assessing Officer in support of the claim that the agreement was cancelled subsequently. It was a case of mischief and forgery on the part of certain persons including the assessee. The plot was originally allotted to some other*

person by the housing society was subsequently transferred by J by executing the sale deed in favour of the assessee for a consideration of Rs. 4 lakhs. This matter was finally reported to Jaipur Development Authority as well as the concerned authority regarding the forged documents prepared by the persons particularly by J and the matter was then referred to the arbitrator. Therefore, when the assessee had neither disclosed the transaction nor offered any capital gains from the transaction the information received by the Assessing Officer based on these documents, to which the assessee was a party, constituted tangible material to form the belief that income assessable to tax had escaped assessment. In the reasons recorded the Assessing Officer had nowhere mentioned that the document was sent by the Assessing Officer of the person in respect of whom search was conducted after recording his satisfaction. Even otherwise, if the conditions as stipulated under section 153C read with section 153A of the Income-tax Act, 1961, were not satisfied the Assessing Officer could reassess the income under section 147. The reassessment was valid.

(ii) That the cancellation agreement was not found during the course of search and seizure action nor referred to during the course of assessment proceedings. It surfaced for the first time after the assessment order was completed by the Assessing Officer. This clearly showed that this was an afterthought and a manufactured document in support of the claim of non-receipt of sale consideration. The agreement which was found during the course of search was not in dispute and there was no scope for any inference or possibility against non-receipt of sale consideration as the agreement stated in clear terms that the entire sale consideration was received at the time of the agreement and that possession was handed over to the buyer. Accordingly, where the assessee was also a party to the illegal transaction of purchase and sale of the land the stand of the assessee of subsequent cancellation of the agreement did not inspire confidence. The assessee claimed to have purchased this property for a consideration of Rs. 4 lakhs only whereas the plot of land was sold by the assessee for a consideration of Rs. 38.50 lakhs. In the absence of any development during this intervening period of one year from the date of purchase and till the date of sale, the appreciation of value from Rs. 4 lakhs to Rs. 38.50 lakhs indicated the involvement of the parties in mischievous acts. Thus, the reassessment was valid.

NAVRATTAN KOTHARI *v.* ASST. CIT (I. T. A. No. 425/Jaipur/2017 dated December 13, 2017) (para 2) *referred to.*

I. T. A. No. 456/Jaipur/2019 (assessment year 2012-13).

P. C. Parwal, Chartered Accountant, for the assessee.

Ms. Chanchal Meena, Joint Commissioner of Income-tax-Departmental representative, for the Department.

ORDER

The order of the Bench was pronounced by

VIJAY PAL RAO ***(Judicial Member)***.—This appeal by the assessee is directed against the order of the learned Commissioner of Income-tax (Appeals), Ajmer dated February 15, 2019 for the assessment year 2012-13. The assessee has raised the following grounds : 1

"1. The learned Commissioner of Income-tax (Appeals) has erred on facts and in law in upholding the validity of the order passed by the Assessing Officer under section 147 of the Income-tax Act, 1961.

The learned Commissioner of Income-tax (Appeals) has erred on facts and in law in deciding the appeal without admitting the additional evidence filed under rule 46A.

3. The learned Commissioner of Income-tax (Appeals) has erred on facts and in law in holding that the assessee has sold the plot to Shri Narendera Choudhary for Rs. 38.50 lakhs vide sale agreement dated December 25, 2011, thereby confirming the addition of the same by :

(i) Incorrectly holding that the assessee has failed to furnish any evidence to show that the sale agreement was cancelled.

(ii) Not dealing with the condition of the assessee that the real owner of the plot is Kamal Kumar Sain and not the assessee for which the order of court was also filed.

(iii) Incorrectly holding that since the addition was made on the basis of the sale agreement signed by the assessee itself, there was no need to allow any cross-examination.

3.1 The learned Commissioner of Income-tax (Appeals) has erred on facts and in law in confirming the addition for the alleged sale amount without reducing the cost of the plot."

2.1 Ground No. 1 of the assessee is regarding the validity of reassessment order passed under section 147 of the Act. 2

2.2 The learned authorised representative of the assessee has submitted that the assessee filed his return of income under section 139(1) of the Act on September 14, 2012 for the assessment year 2012-13 declaring a total income of Rs. 1,67,470. Thereafter, the Assessing Officer reopened the assessment by issuing notice under section 148 of the Act on February 16, 2017 by recording the reason that the assessee vide agreement dated

December 25, 2011 transferred an immovable property bearing Plot No. A-425, Tara Nagar, A, Sector 15, Khatipura Road, Jaipur for a consideration of Rs. 38.50 lakhs and the said transaction has not been shown in the return of income. The learned authorised representative of the assessee further submitted that alleged agreement dated December 25, 2011 was found during the course of search and seizure action under section 132 of the Act in the case of Shri Narendra Singh. Thus the learned authorised representative of the assessee contended that the provisions of section 147/148 cannot be invoked when the agreement to sell, which is the basis of reassessment, was found during the course of search and seizure action. In support of his contentions, the learned authorised representative of the assessee relied on the decision of the co-ordinate Bench of this Tribunal in the case of *Navrattan Kothari* v. *Asst. CIT* (I. T. A. No. 425/Jaipur/2017 dated December 13, 2017). Thus the learned authorised representative of the assessee submitted that reassessment of a person other than searched person based on seized material can be made under section 153C read with section 153A of the Act. Therefore, the initiation of proceedings under section 147/148 of the Act vitiates the entire proceedings.

2.3 On the other hand, the learned Departmental representative has submitted that when the Assessing Officer has received the information about the transaction of an immovable property in question by the assessee through agreement dated December 25, 2011 and the said transaction was not declared nor disclosed in the return of income then the said information along with agreement dated December 25, 2011constitute the tangible material to form the belief that income assessable to tax has escaped assessment. The learned Departmental representative further submitted that during the course of search and seizure action in the case of Shri Narendra Singh, only photo copy of the agreement was found. Hence, the Assessing Officer has rightly invoked the provisions of section 147/148 of the Act instead of section 153C of the Act as the conditions precedent to invoke the provisions of section 153C were not satisfied. Thus the learned Departmental representative relied on the orders of the authorities below :

2.4 We have considered the rival submissions as well as the relevant materials available on record. The assessee has not disputed this fact that the alleged transaction of transfer of immovable property bearing Plot No. A-425, Tara Nagar, A, Sector 15, Khatipura Road, Jaipur was not disclosed in the return of income. The Assessing Officer has recorded the reasons for reopening of the assessment as reproduced in para 2 of the assessment order as under :

"'2. Reason for reopening the assessment was as under :

On the basis of information available with this office for the year under consideration, the assessee has sold an immovable property having address Plot No. A-425, Tara Nagar A, Sector-15, Khatipura Road, Jaipur vide an valid agreement dated December 25, 2011 for a consideration of Rs. 38,50,000.

On a perusal of return of income, it is observed that the assessee has not shown the above transaction in the AIR Schedule of his return of income. Further, the assessee has not shown capital gain under the head capital gain on sale of Plot No. A-425 situated at Tara Nagar A, Sector 15, Khatipura Road, Jaipur which was sold through an agreement dated December 25, 2011 for a consideration of Rs. 38,50,000 in his ROI."

It is clear from the reasons recorded that the Assessing Officer has received the information regarding sale of the immovable property in question vide agreement dated December 25, 2011 for a consideration of Rs.38.50 lakhs. The assessee has not disputed the execution of the said agreement dated December 25, 2011. However, subsequently, the assessee has claimed that the said agreement was cancelled, though during the assessment proceedings, nothing has been produced before the Assessing Officer in support of the claim that agreement was cancelled subsequently. It is pertinent to note that it is a case of mischief and forgery on the part of certain persons including the assessee whereby the plot in question was originally allotted to one Smt. Madhu Bala Jain by the Mutual Housing Co-operative Society Ltd. was subsequently transferred by one Shri Jabbar Singh Rathore by executing the sale deed dated October 29, 2010 in favour of the assessee for a consideration of Rs. 4 lakhs. This matter was finally reported to Jaipur Development Authority (for short, "the JDA") as well as the concerned authority regarding the forged documents prepared by these persons particularly by Shri Jabbar Singh Rathore and the matter was then referred to the arbitrator. The documents of sale deed dated October 29, 2010 and the execution of agreement dated December 25, 2011 are not in dispute. Therefore, in these facts of the case, when the assessee has neither disclosed the transaction in question nor offered any capital gain from the said transaction then the information received by the Assessing Officer based on these documents, to which the assessee is a party, constitutes the tangible material to form the belief that income assessable to tax has escaped assessment. As regards the objection of the learned authorised representative of the assessee that reassessment ought to have been made under section 153C of the Act as against under section 147 of the Act, we

find in the reasons recorded by the Assessing Officer nowhere it is mentioned that the said document was sent by the Assessing Officer of the searched person after recording his satisfaction. Even otherwise, if the conditions as stipulated under section 153C read with section 153A of the Act are not satisfied then the Assessing Officer can invoke the provisions of section 147/148 of the Act. Hence the decision relied on by the learned authorised representative of the assessee in the case of *Navrattan Kothari v. Asst. CIT* (supra) cannot be applied in the facts of the present case. In the said case, the Assessing Officer has stated in the reasons recorded that the documents were seized and forwarded by the Assessing Officer of the searched person. Accordingly, in the facts and circumstances of the case, we do not find any error or illegality in the initiation of proceedings under section 147/148 of the Act. Thus ground No. 1 of the assessee is dismissed.

3 Ground Nos. 2 and 3 of the assessee are regarding the addition of Rs.38.50 lakhs on account of the amount received for transfer of an immovable property.

3.2 The learned authorised representative of the assessee has submitted that the agreement dated December 25, 2011 in question is not a legal agreement as the same is not enforceable in law. The property was under dispute as per the Jaipur Development Authority record. The property stands in the name of one Shri Kamal Kumar Sain. The learned authorised representative has further contended that the amount mentioned in the agreement was never received by the assessee and there was a subsequent cancellation of agreement dated December 25, 2011. The learned Commissioner of Income-tax (Appeals) did not admit the additional evidence filed by the assessee by holding that the case of the assessee is not covered by any of the circumstances given in clauses (a) to (d) of rule 46A(1) of the Income-tax Rules, 1962. However, the assessee was ready to produce the witnesses of the sale agreement as well as the cancellation agreement and the statements of those witnesses were recorded by the Assessing Officer during remand proceedings wherein the Assessing Officer has not asked any question about the consideration amount in the agreement. Thus the learned authorised representative of the assessee contended that when the Assessing Officer has recorded the statement of one Shri Laxman Yadav during remand proceedings then the additional evidence produced by the assessee ought to have been admitted, in support of his claim that the alleged agreement dated December 25, 2011 was cancelled subsequently on January 25, 2012 and there was no exchange of sale consideration.

3.3 On the other hand, the learned Departmental representative has submitted that the agreement dated December 25, 2011 states that the assessee received full consideration of Rs. 38.50 lakhs at the time of signing of the said agreement. Therefore, the subsequent stand of the assessee that he has not received the consideration and consequently the agreement was cancelled is nothing but a self-serving document prepared to avoid the tax liability. The learned Departmental representative has further contended that alleged cancellation agreement is a self-serving document of the assessee as well as other party in whose hands also the addition of the said amount was made on account of unexplained investment. The learned Departmental representative has contended that the alleged cancellation agreement was neither found during search and seizure action nor was produced before the Assessing Officer. Even the assessee never claimed before the Assessing Officer that the agreement dated December 25, 2011 was subsequently cancelled. The learned Departmental representative further contended that once the assessee has received the sale consideration of Rs. 38.50 lakhs then it is irrelevant whether the assessee was legal owner of the property in question. The remand report was called for by the learned Commissioner of Income-tax (Appeals) to examine the veracity of the documents proposed to be produced by the assessee. Hence, the cancellation agreement is an afterthought documents prepared by these parties. Thus the learned Departmental representative relied on the orders of the authorities below.

3.4 We have considered the rival submissions as well as the relevant materials available on record. The Assessing Officer has reproduced the agreement dated December 25, 2011 in the assessment order at pages 6 and 7. The said agreement was written in hand by the assessee and has been signed by the assessee as well as Shri Narendera Singh. The assessee has not disputed the execution of the said agreement dated December 25, 2011. The language of the said agreement is clear and unambiguous regarding the details of the property as well as consideration of Rs. 38.50 lakhs which was received by the assessee. It is specifically stated in the agreement dated December 25, 2011 that the entire sale consideration of Rs. 38.50 lakhs was received by the assessee and the possession of the property was handed over to the buyer. It is also stated in the agreement that due to Government holiday on December 25, 2011 the registration of the said document could not be done. During the assessment proceeding, the assessee never took the stand that the said agreement was cancelled due to non-payment of the consideration. Only before the learned Commissioner of Income-tax (Appeals), the assessee sought to produce the

additional evidence in the shape of cancellation agreement dated January 25, 2012. The learned Commissioner of Income-tax (Appeals) called for remand report from the Assessing Officer on the additional evidence produced by the assessee. The Assessing Officer submitted his remand report dated September 11, 2018. The Assessing Officer has referred to the statement of one Shri Laxman Yadav recorded on September 10, 2018 wherein he stated that at the time of signing the agreement, except the assessee and Shri Narendera Choudhary, at the residence of the assessee, no other persons were present. Even otherwise, we find that the alleged cancellation agreement was not found during the course of search and seizure action or even not referred during the course of assessment proceeding and it is surfaced first time after the assessment order was completed by the Assessing Officer. This clearly shows that this is an afterthought manufactured document in support of the claim of non-receipt of sale consideration. The agreement which was found during the course of search is not in dispute and leaves no scope of any inference or possibility against non-receipt of sale consideration as the said agreement states in clear terms that entire sale consideration was received at the time of agreement and the possession was handed over to the buyer. Accordingly, in the facts of the case, where the assessee is also a party to the illegal transaction of purchase and sale of the land in question then the alleged stand of the assessee of subsequent cancellation of the agreement does not inspire confidence. It is pertinent to note that the assessee claimed to have purchased this property in question vide sale deed dated October 29, 2010 for a consideration of Rs. 4 lakhs only whereas the said plot of land was sold by the assessee vide agreement dated December 25, 2011 for a consideration of Rs. 38.50 lakhs. In the absence of any development during this intervening period of one year from the date of purchase and till the date of sale, the appreciation of value from Rs. 4 lakhs to Rs. 38.50 lakhs indicates the involvement of the parties in mischievous acts the minimum amount of purchase consideration by the assessee in comparison to the sale consideration shown in the sale agreement. Accordingly, in the facts and circumstances of the case, we do not find any substance or merit in the appeal of the assessee. Thus ground Nos. 2 and 3 of the assessee are dismissed.

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

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

[2020] 81 ITR (Trib) 9 (Chennai)

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

GURUSAMY RAMAMURTHY

v.

INCOME-TAX OFFICER

GEORGE MATHAN *(Judicial Member)* and
S. JAYARAMAN *(Accountant Member)*

March 4, 2020.

SS ▸ ITA 1961, s 271(1)(c)
AY ▸ 2016-17
HF ▸ Assessee

PENALTY—CONCEALMENT OF INCOME—AGRICULTURAL INCOME—SALE OF CASUARINA PLANTS—ASSESSEE EXPLAINING HIS TRANSACTIONS AND BRINGING TO NOTICE OF ASSESSING OFFICER THAT TRANSACTIONS UNDERTAKEN THROUGH BANKING CHANNELS—ASSESSEE PRIMA FACIE PLACING RELEVANT MATERIALS AND EXPLAINING TRANSACTION—ASSESSING OFFICER NOT RECORDING SATISFACTION THAT EXPLANATION OFFERED BY ASSESSEE FALSE—PENALTY UNSUSTAINABLE—INCOME-TAX ACT, 1961, S. 271(1)(c).

The Assessing Officer restricted the assessee's agricultural income to the extent of Rs. 10 lakhs for want of details and evidence and completed the assessment, which the assessee accepted. Subsequently, the Assessing Officer issued notice under section 247 read with section 271(1)(c) of the Income-tax Act, 1961 and after considering the assessee's reply, levied penalty under section 271(1)(c). The Commissioner (Appeals) confirmed both the addition and penalty. On appeal :

Held, *(i) that the assessee voluntarily admitted Rs. 10 lakhs income out of his agricultural income. Therefore, the assessment made by the Assessing Officer and sustained by the Commissioner (Appeals) was justified.*

(ii) That the assessee had furnished confirmation letters from the purchasers of casuarina and necessary certificates from the Village Administrative Officer to prove that he was the owner of the land and he had grown casuarina trees. The assessee had explained that the transactions were undertaken through his bank accounts and receipts were through banking channels. Thus, the assessee had clearly explained that he was in receipt of the sum from the sale of casuarina trees. The Assessing Officer issued summons to the purchaser and levied penalty for non-compliance with the summons and

compelled the assessee to appear under section 131. Therefore, the assessee agreed to admit additional income on condition that penalty proceedings should not be initiated. However, when the Assessing Officer initiated penalty proceedings and sought for explanation, the assessee explained his transactions and brought to the notice of the Assessing Officer that the transactions were undertaken through banking channels. Therefore, the assessee prima facie placed relevant materials and explained the transaction. The penalty proceedings being a separate proceeding, if at all, the Assessing Officer intended to levy penalty, he is bound to record satisfaction that the explanation offered by the assessee is false. Since the Assessing Officer had not recorded such findings, the penalty levied was unsustainable and liable to be deleted.

I. T. A. Nos. 2348 and 2349/Chennai/2019 (assessment year 2016-17).

G. Baskar, Advocate, for the assessee.

Ms. R. Anita, Joint Commissioner of Income-tax, for the Department.

ORDER

The order of the Bench was pronounced by

1 S. JAYARAMAN ***(Accountant Member)***.—The assessee filed these appeals against the orders of the Commissioner of Income-tax (Appeals)-Puducherry, in I. T. A. Nos. 109 and 112/CIT(A)-PDY/2018-19 dated June 26, 2019 for the assessment year 2016-17, respectively.

2 M/s. Gurusamy Ramamurthy, the assessee, a Hindu undivided family filed its return for the assessment years 2016-17 on July 25, 2016 admitting the total income at Rs. 2,66,650. While making the assessment, the Assessing Officer rejected the assessee's agricultural income claim to the extent of Rs. 10 lakhs for want of details/evidence and completed the assessment, which the assessee itself accepted by its letter dated December 4, 2018. Subsequently, the Assessing Officer issued notice under section 247 read with section 271(1)(c) of the Act and after considering the assessee's reply, levied penalty under section 271(1)(c) of the Act. Aggrieved, the assessee filed appeals against both the orders before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals) dismissed the appeals. Aggrieved against those orders, the above appeals were filed by the assessee.

3 On the quantum appeal, the learned authorised representative submitted that the learned Commissioner of Income-tax (Appeals) erred in confirming the addition made by the Assessing Officer without adverting the

evidence furnished by the assessee from Shri Chandrakesavan, by way of confirmation letters dated October 29, 2015 (2 Nos.) and January 5, 2016, the certificates issued by the Village Administrative Officer evidencing the ownership of agricultural land and the availability of casuarina in those lands, etc. Therefore, he prayed that the addition made by the Assessing Officer, sustained by the learned Commissioner of Income-tax (Appeals) may be deleted. Per contra, the learned Departmental representative inviting our attention to the copy of the assessee's letter dated December 4, 2018, placed in the paper book filed by the assessee submitted that the assessee has clearly stated that I could not produce purchaser of casuarina and I am willing to offer Rs. 10 lakhs to the income returned. Therefore, the learned Departmental representative submitted that the addition made by the Assessing Officer and sustained by the learned Commissioner of Income-tax (Appeals) does not require and disturbances.

We heard the rival submissions and gone through the relevant material. **4**
It is clear from the above that the assessee voluntarily admitted Rs. 10 lakhs income out of his agricultural income. Therefore, the assessment made by the Assessing Officer and sustained by the learned Commissioner of Income-tax (Appeals) is on sound footing and hence the corresponding grounds of the assessee's appeal are dismissed.

With regard to the appeal on the penalty proceedings, the learned **5**
authorised representative submitted that in the letter dated December 4, 2018, the assessee has submitted that on account of his admission penalty proceedings should not be initiated. Further, when the Assessing Officer required the assessee to show cause for the levy of penalty, the assessee submitted that in order to co-operate with the Department, the assessee voluntarily offered additional income on the condition that no penalty proceedings would be initiated. Further, the assessee submitted that he has furnished the confirmation letters from the purchaser of casuarina has given the bank details in which the sale proceeds are deposited, all the receipts are through cheque only and therefore, the assessee pleaded that penalty proceedings should be dropped. In spite of it, the Assessing Officer levied the penalty and the learned Commissioner of Income-tax (Appeals) without appreciating the facts and circumstances of the case sustained the penalty. In this regard, the learned authorised representative submitted that the penalty proceedings are separate from the assessment proceedings. During the penalty proceedings, when the assessee has submitted the confirmation letters, certificates from the Village Administrative Officer and bank particulars and explained the transaction, the levy of penalty cannot be made without recording a finding that the explanation offered by the

assessee is false. Therefore, the learned authorised representative pleaded to delete the impugned penalty. Per contra, the learned Departmental representative supported the orders of the lower authorities.

6 We heard the rival submissions and gone through the relevant material. It is clear from the above that the assessee has furnished confirmation letters from the purchasers of casuarina and necessary certificates from the Village Administrative Officer to prove that the assessee is the owner of the land and he has grown a casuarina plant, etc. The assessee has also explained that the transactions were undertaken through his bank accounts and receipts are through banking channels. Thus, the assessee has clearly explained that he was in receipt of the impugned sum from the sale of casuarina plant. It is also seen from the orders of the lower authorities that the Assessing Officer issued summons to the purchaser, Shri Chandrakesavan and levied penalty for non-compliance with the summons and compelled the assessee to appear under section 131. Therefore, the assessee agreed to admit additional income on a condition that penalty proceedings should not be initiated. However, when the Assessing Officer has initiated penalty proceedings and sought for explanation, the assessee explained his transactions and brought to the notice of the Assessing Officer that the impugned transactions were undertaken through banking channel. Therefore, the assessee prima facie, placed relevant materials and explained the transaction. The penalty proceedings being a separate proceeding, if at all, the Assessing Officer intends to levy penalty, then the Assessing Officer is bound to record the satisfaction that the explanation offered by the assessee is false. In this case, since the Assessing Officer has not recorded such findings, we are of the opinion that the penalty levied is unsustainable and hence it is deleted. The corresponding grounds of the assessee are allowed.

7 In the result, the assessee's appeal in I. T. A. No. 2348/Chennai/2019 is dismissed and its appeal in I. T. A. No. 2349/Chennai/2019 is allowed.

Order pronounced on Wednesday, March 4, 2020 at Chennai.

[2020] 81 ITR (Trib) 13 (Cochin)

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

THE CHOMBAL SERVICE CO-OPERATIVE BANK LTD.

v.

INCOME-TAX OFFICER

CHANDRA POOJARI *(Accountant Member)* and
GEORGE GEORGE K. *(Judicial Member)*

March 4, 2020.

SS ▸ ITA 1961, ss 80P(2), 154
AY ▸ 2010-11
HF ▸ Assessee

CO-OPERATIVE SOCIETY—SPECIAL DEDUCTION—INTEREST INCOME—ASSESSING OFFICER TO CONDUCT INQUIRY INTO FACTUAL SITUATION AS TO ACTIVITIES OF ASSESSEE TO DETERMINE ELIGIBILITY FOR DEDUCTION—ASSESSING OFFICER SHALL EXAMINE ACTIVITIES OF ASSESSEE AND DETERMINE WHETHER ACTIVITIES IN COMPLIANCE WITH ACTIVITIES OF CO-OPERATIVE SOCIETY FUNCTIONING UNDER KERALA CO-OPERATIVE SOCIETIES ACT, 1969—INCOME-TAX ACT, 1961, s. 80P(2).

RECTIFICATION OF MISTAKES—MISTAKE APPARENT FROM RECORD—COMMISSIONER (APPEALS) GRANTING DEDUCTION ON BASIS OF DECISION OF HIGH COURT—DECISION SUBSEQUENTLY REVERSED BY FULL BENCH—COMMISSIONER RECTIFYING EARLIER ORDER AND DISALLOWING DEDUCTION—JUSTIFIED—INCOME-TAX ACT, 1961, s. 154.

BUSINESS INCOME—OTHER SOURCES—INTEREST EARNED FROM TREASURIES AND BANKS—PART OF BANKING ACTIVITY OF CO-OPERATIVE SOCIETY—ASSESSABLE AS INCOME FROM BUSINESS—INCOME-TAX ACT, 1961.

The assessee was a co-operative society registered under the Kerala Co-operative Societies Act, 1969. For the assessment year 2010-11, the return of income was filed after claiming deduction under section 80P of the Income-tax Act, 1961. The Assessing Officer passed an order, disallowing the deduction under section 80P on the ground that the assessee was doing the business of banking, and therefore, in view of insertion of section 80P(4) with effect from April 1, 2007, the assessee was not entitled to the deduction under section 80P(2). The Commissioner (Appeals) held the assessee eligible for the deduction under section 80P. The interest income received from other banks and treasury also was allowed as deduction under section 80P(2)(a)(i). Subsequently he disallowed the claim under section 154 in view of the Full Bench decision. On appeal :

Held, *(i) that when the Commissioner (Appeals) had decided on the basis of a decision of the High Court which was subsequently reversed by the Full Bench, there would be a rectifiable mistake coming within section 154. The Full Bench held that the activities of the assessee had to be examined to determine whether the assessee was a co-operative society or a co-operative bank. Thus the Commissioner (Appeals) had rightly recalled his earlier order granting deduction under section 80P(2). However he ought not to have rejected the claim of deduction under section 80P(2) without examining the activities of the assessee. The issue of deduction under section 80P(2) was remitted to the Assessing Officer. The Assessing Officer shall examine the activities of the assessee and determine whether the activities were in compliance with the activities of a co-operative society functioning under the Kerala Co-operative Societies Act, 1969 and accordingly grant deduction under section 80P(2).*

MAVILAYI SERVICE CO-OPERATIVE BANK LTD. *v.* CIT [2019] 414 ITR 67 (Ker) [FB] *followed*.[1]

(ii) That interest earned from investments with treasuries and banks was part of the banking activity of the assessee, and was eligible to be assessed as income from business instead of income from other sources.

KIZHATHADIYOOR SERVICE CO-OPERATIVE BANK LTD. *v.* ITO (I. T. A. No. 525/Cochin/2014 dated July 20, 2016) *followed*.

Cases referred to :

Antony Pattukulangara *v.* E. N. Appukuttan Nair [2012] (3) KHC 726 (para 7)

Balaram (T. S.), ITO *v.* Volkart Brothers [1971] 82 ITR 50 (SC) (para 5)

Chirakkal Service Co-operative Bank Ltd. *v.* CIT [2016] 384 ITR 490 (Ker) (paras 3, 7)

CIT (Dy.) *v.* Ace Multi Axes Systems Ltd. [2018] 400 ITR 141 (SC) (para 7)

Kil Kotagiri Tea and Coffee Estates Co. Ltd. *v.* ITAT [1988] 174 ITR 579 (Ker) (paras 5, 7)

Kizhathadiyoor Service Co-operative Bank Ltd. *v.* ITO (I. T. A. No. 525/Cochin/2014 dated July 20, 2016) (para 7)

Mavilayi Service Co-operative Bank Ltd. *v.* CIT [2019] 414 ITR 67 (Ker) [FB] (paras 4, 7)

Mepco Industries Ltd. *v.* CIT [2009] 319 ITR 208 (SC) (para 5)

Perinthalmanna Service Co-operative Bank Ltd. *v.* ITO [2014] 363 ITR 268 (Ker) (para 7)

1. The Supreme Court *granted* special leave petition against this judgment [2019] 418 ITR (St.) 12.

The Citizen Co-operative Society Ltd. *v.* Asst. CIT [2017] 397 ITR 1 (SC) (para 7)

I. T. A. No. 89/Cochin/2020 (assessment year 2010-11).

None appeared for the assessee.

Sudhanshu Shekhar Jha for the Department.

ORDER

The order of the Bench was pronounced by

GEORGE GEORGE K. ***(Judicial Member)***.—This appeal at the instance of the assessee is directed against the order of the Commissioner of Income-tax (Appeals), dated November 21, 2019 passed under section 154 read with section 250 of the Income-tax Act. The relevant assessment year is 2010-11. 1

The brief facts of the case are as follow : 2

The assessee is a co-operative society registered under the Kerala Co-operative Societies Act, 1969. For the assessment year under consideration, the return of income was filed after claiming deduction under section 80P of the Income-tax Act. The Assessing Officer passed order, disallowing the claim of deduction under section 80P of the Income-tax Act. The reasoning of the Assessing Officer to disallow the claim of deduction under section 80P(2) of the Income-tax Act was that the assessee was doing the business of banking, and, therefore, in view of the insertion of section 80P(4) of the Income-tax Act with effect from April 1, 2007, the assessee will not be entitled to the deduction under section 80P(2) of the Income-tax Act.

Aggrieved by the order of assessment denying the claim of deduction under section 80P(2) of the Income-tax Act, the assessee preferred an appeal to the first appellate authority. The Commissioner of Income-tax (Appeals) allowed the appeal by holding that the assessee was eligible for deduction under section 80P of the Income-tax Act. The interest income received from other banks and treasury also was allowed as deduction under section 80P(2)(a)(i) of the Income-tax Act. In allowing the appeal of the assessee, the Commissioner of Income-tax (Appeals) followed the judgment of the hon'ble jurisdictional High Court in the case of *Chirakkal Service Co-operative Bank Ltd.* v. *CIT* [2016] 384 ITR 490 (Ker). 3

Subsequently, the Commissioner of Income-tax (Appeals) issued notice under section 154 of the Income-tax Act proposing to rectify his order passed, in view of the subsequent judgment of the Full Bench of the hon'ble jurisdictional High Court in the case of *Mavilayi Service Co-operative Bank Ltd.* v. *CIT* [2019] 414 ITR 67 (Ker) [FB] (I. T. A. No. 97 of 2016 order dated March 19, 2019). The assessee objected to the issuance of 4

notice. However, the Commissioner of Income-tax (Appeals) rejected the objections raised by the assessee and passed order under section 154 of the Income-tax Act disallowing the claim of the assessee under section 80P(2) of the Income-tax Act.

5 Aggrieved by the order of the Commissioner of Income-tax (Appeals), the assessee has filed this appeal before the Tribunal raising the following grounds :

"(1) The order of the learned Commissioner of Income tax under section 154 read with section 250 of the Income-tax Act, 1961 dated November 21, 2019 rectifying the appellate order dated May 15, 2018 for the assessment year 2014-15 is against law contrary to the facts and circumstances of the case.

(2) A decision on a debatable point of law is not a mistake apparent from record and the rectification under section 154 read with section 250 by the Commissioner of Income-tax (Appeals) is not warranted and correct.

(3) The decision of the hon'ble High Court in the case of *Mavilayi Service Co-operative Bank Ltd.* (which is disputed and pending before the apex court) which had nothing to do with and which never formed even by implication, the basis of the hon'ble Commissioner of Income-tax (Appeals) earlier order could not have any effect on previous decision of the Commissioner of Income-tax (Appeals) and could not be viewed in retrospect to fish out any error in earlier order of the Commissioner of Income-tax (Appeals) which as it stood, was perfectly justified and in order. The hon'ble Commissioner of Income-tax (Appeals) was not justified in passing rectification order for the assessment year 2014-15 under section 154 read with section 250.

(4) The reason of subsequent exposition of law by the apex court it cannot be said that earlier assessment was wrong or there was mistake apparent on the record, there is no justification to reopen the case under section 154 read with section 250.

(5) The rectification under section 154 read with section 250 by the hon'ble Commissioner of Income-tax (Appeals) is not in consonance with the hon'ble Supreme Court decision in the case of *T. S. Balaram, ITO* v. *Volkart Brothers* [1971] 82 ITR 50 (SC) and *Mepco Industries Ltd.* v. *CIT* [2009] 319 ITR 208 (SC).

(6) The decision of the hon'ble High Court of Kerala in the case of *Kilkothagiri Tea and Coffee Estate Co. Ltd.* relied upon by the hon'ble Commissioner of Income-tax (Appeals) is not applicable to your appellant's case.

(7) For the above and other grounds that may be submitted at the time of hearing it is prayed to the honourable Tribunal to cancel the order under section 154 read with section 250."

The learned authorised representative mailed a request for adjourning **6** this case, however, we proceed to dispose of this appeal after hearing the learned Departmental representative since similar cases were disposed of by this Bench.

6.1 The learned Departmental representative strongly supported the orders of the income-tax authorities.

We have heard the learned Departmental representative and perused **7** the material on record. The hon'ble Kerala High Court in the case of *Kil Kotagiri Tea and Coffee Estates Co. Ltd.* v. *ITAT* reported in [1988] 174 ITR 579 (Ker) had held that when an authority has decided on the basis of a decision of the High Court which is subsequently reversed, there would be a rectifiable mistake coming within section 154 of the Income-tax Act. The Larger Bench of the hon'ble Kerala High Court has reversed the dictum laid down by the judgment of the hon'ble Kerala High Court in the case of *Chirakkal Service Co-operative Bank Ltd.* (supra) by holding that the activities of the assessee has to be examined to determine whether the assessee is co-operative society or co-operative bank. In the light of the Larger Bench judgment of the hon'ble Kerala High Court, the earlier Commissioner of Income-tax (Appeals) order granting deduction under section 80P(2) of the Income-tax Act have been rightly recalled by the Commissioner of Income-tax (Appeals). Therefore the grounds raised by the assessee that the Commissioner of Income-tax (Appeals) has erred in passing the order under section 154 of the Income-tax Act are dismissed.

7.1 The hon'ble jurisdictional High Court in the case of *Chirakkal Service Co-operative Bank Ltd.* v. *CIT* [2016] 384 ITR 490 (Ker) had held that when a certificate has been issued to an assessee by the Registrar of Co-operative Societies characterising it as primary agricultural credit society, necessarily, the deduction under section 80P(2) of the Income-tax Act has to be granted to the assessee. However, the Full Bench of the hon'ble Kerala High Court in the case of *Mavilayi Service Co-operative Bank Ltd.* v. *CIT* (supra) had reversed the above findings of the hon'ble Kerala High Court in the case of *Chirakkal Service Co-operative Bank Ltd.* v. *CIT* (supra). The Larger Bench of the hon'ble Kerala High Court in the case of *Mavilayi Service Co-operative Bank Ltd.* v. *CIT* (supra) held that the Assessing Officer has to conduct an inquiry into the factual situation as to the activities of the assessee-society to determine the eligibility of deduction under section 80P of the Income-tax Act. It was held by the hon'ble

High Court that the Assessing Officer is not bound by the registration certificate issued by the Registrar of Kerala Co-operative Societies classifying the assessee-society as a co-operative society. The hon'ble High Court held that each assessment year is separate and eligibility shall be verified by the Assessing Officer for each of the assessment years. The finding of the Larger Bench of the hon'ble High Court reads as follows (page 120) :

"In view of the law laid down by the apex court in the *Citizen Co-operative Society Ltd.* v. *Asst. CIT* [2017] 397 ITR 1 (SC) it cannot be contended that, while considering the claim made by an assessee-society for deduction under section 80P of the Income-tax Act, after the introduction of sub-section (4) thereof, the Assessing Officer has to extend the benefits available, merely looking at the class of the society as per the certificate of registration issued under the Central or State Co-operative Societies Act and the Rules made thereunder. On such a claim for deduction under section 80P of the Income-tax Act, the Assessing Officer has to conduct an enquiry into the factual situation as to the activities of the assessee-society and arrive at a conclusion whether benefits can be extended or not in the light of the provisions under sub-section (4) of section 80P.

In *Chirakkal* [2016] 384 ITR 490 (Ker), the Division Bench held that the appellant societies having been classified as primary agricultural credit societies by the competent authority under the Kerala Co-operative Societies Act, it has necessarily to be held that the principal object of such societies is to undertake agricultural credit activities and to provide loans and advances for agricultural purposes, the rate of interest on such loans and advances to be at the rate to be fixed by the Registrar of Co-operative Societies under the Kerala Co-operative Societies Act and having its area of operation confined to a village, panchayat or a municipality and as such, they are entitled for the benefit of sub-section (4) of section 80P of the Income-tax Act to ease themselves out from the coverage of section 80P and that, the authorities under the Income-tax Act cannot probe into any issues or such matters relating to such societies and that, primary agricultural credit societies registered as such under the Kerala Co-operative Societies Act and classified, under that Act including the appellants are entitled to such exemption.

In *Chirakkal* [2016] 384 ITR 490 (Ker), the Division Bench expressed a divergent opinion, without noticing the law laid down in *Antony Pattukulangara* v. *E. N. Appukuttan Nair* [2012] (3) KHC

726 and *Perinthalmanna Service Co-operative Bank Ltd.* v. *ITO* [2014] 363 ITR 268 (Ker). Moreover, the law laid down by the Division Bench in *Chirakkal* [2016] 384 ITR 490 (Ker) is not good law, since, in view of the law laid down by the apex court in *The Citizen Co-operative Society* [2017] 397 ITR 1 (SC) on a claim for deduction under section 80P of the Income-tax Act by reason of sub-section (4) thereof, the Assessing Officer has to conduct an enquiry into the factual situation as to the activities of the assessee-society and arrive at a conclusion whether benefits can be extended or not in the light of the provisions under sub-section (4) of section 80P of the Income-tax Act. In view of the law laid down by the apex court in *The Citizen Co-operative Society* [2017] 397 ITR 1 (SC) the law laid down by the Division Bench *Perinthalmanna* v. *ITO* [2014] 363 ITR 268 (Ker) has to be affirmed and we do so.

In view of the law laid down by the apex court in *Dy. CIT* v. *Ace Multi Axes Systems* [2018] 400 ITR 141 (SC), since each assessment year is a separate unit, the intention of the Legislature is in no manner defeated by not allowing deduction under section 80P of the Income-tax Act, by reason of sub-section (4) thereof, if the assessee society ceases to be the specified class of societies for which the deduction is provided, even if it was eligible in the initial years."

7.2 The Commissioner of Income-tax (Appeals) had initially allowed the appeals of the assessee and granted deduction under section 80P(2) of the Income-tax Act. Subsequently, the Commissioner of Income-tax (Appeals) passed orders under section 154 of the Income-tax Act wherein the claim of deduction under section 80P of the Income-tax Act was denied, by relying on the judgment of the Larger Bench of the hon'ble jurisdictional High Court in the case of *Mavilayi Service Co-operative Bank Ltd.* v. *CIT* (supra). The Commissioner of Income-tax (Appeals) ought not to have rejected the claim of deduction under section 80P(2) of the Income-tax Act without examining the activities of the assessee-society. The Full Bench of the hon'ble jurisdictional High Court in the case of *Mavilayi Service Co-operative Bank Ltd. v. CIT* (supra) had held that the Assessing Officer has to conduct an inquiry into the factual situation as to the activities of the assessee-society to determine the eligibility of deduction under section 80P of the Income-tax Act. In view of the dictum laid down by the Full Bench of the hon'ble jurisdictional High Court (supra), we restore the issue of deduction under section 80P(2) to the files of the Assessing Officer. The Assessing Officer shall examine the activities of the assessee and determine whether the activities are in compliance with the

activities of a co-operative society functioning under the Kerala Co-operative Societies Act, 1969 and accordingly grant deduction under section 80P(2) of the Income-tax Act.

7.3 As regards the interest on the investments with co-operative banks and other banks, the co-ordinate Bench order of the Tribunal in the case of *Kizhathadiyoor Service Co-operative Bank Ltd.* v. *ITO* (I. T. A. No. 525/Cochin/2014 order dated July 20, 2016), had held that interest income earned from investments with treasuries and banks is part of banking activity of the assessee, and therefore, the said interest income was eligible to be assessed as "income from business" instead of "income from other sources". However, as regards the grant of deduction under section 80P of the Income-tax Act on such interest income, the Assessing Officer shall follow the law laid down by the Larger Bench of the hon'ble jurisdictional High Court in the case of *Mavilayi Service Co-operative Bank Ltd. v. CIT* (supra) and examine the activities of the assessee-society before granting deduction under section 80P of the Income-tax Act on such interest income. It is ordered accordingly.

8 In the result, the appeals filed by the assessee are allowed for statistical purposes.

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

[2020] 81 ITR (Trib) 20 (Cochin)

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

SHALOM CHARITABLE MINISTRIES OF INDIA

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

CHANDRA POOJARI *(Accountant Member)* and
GEORGE GEORGE K. *(Judicial Member)*

March 5, 2020.

SS ▶ ITA 1961, s 11
AY ▶ 2010-11, 2011-12
HF ▶ Department

EXEMPTION—CHARITABLE PURPOSE—MICRO FINANCE ACTIVITY—NOT CHARITABLE IN NATURE—NOT ENTITLED TO EXEMPTION—INCOME-TAX ACT, 1961, s. 11.

The assessee-trust claimed exemption under section 11 of the Income-tax Act, 1961. For the assessment years 2010-11 and 2011-12, the assessments were completed denying the exemption under section 11 on the ground that

the assessee was engaged in micro finance activities, wherein it was charging exorbitant interest from its beneficiaries and no charitable activities were involved in micro finance activities. Accordingly, the income claimed as exempt under section 11 was assessed as business income. This was confirmed by the Commissioner (Appeals). On appeal :

Held, *that the assessee's activities of micro finance were not charitable in nature and the assessee was not entitled to the claim of benefit under section 11.*

Shalom Charitable Ministries of India *v.* Asst. CIT (I. T. A. Nos. 79 and 80/Cochin/2017 dated April 25, 2018) *followed*.

Cases referred to :

CIT (Asst.) *v.* Jeppiar Educational Trust (I. T. A. Nos. 1333, 1334, 1591 to 1595/Mds/2010 dated June 15, 2011) (para 7)

CIT *v.* Thanthi Trust [1999] 239 ITR 502 (SC) (para 7)

Disha India Micro Credit *v.* CIT (I. T. A. No. 1374/Delhi/2010 dated January 28, 2011) (para 7)

Janalakshmi Social Services *v.* DIT (Exemptions) [2009] 33 SOT 197 (Bang) (para 7)

Shalom Charitable Ministries of India *v.* Asst. CIT (I. T. A. Nos. 79 and 80/Cochin/2017 dated April 25, 2018) (paras 5, 6, 7)

Spandana (Rural and Urban Development Organisation) *v.* Asst. CIT (I. T. A. No. 364/Vizag/2009 dated February 17, 2019) (para 7)

Sreema Mahila Samity *v.* Dy. CIT (I. T. A No. 2826/Kolkata/2013 dated October 13, 2017) (para 7)

Thiagarajar Charities *v.* Addl. CIT [1997] 225 ITR 1010 (SC) (para 7)

I. T. A. Nos. 644 and 645/Cochin/2019 and S. A. Nos. 98 and 99/Cochin/2019 (assessment years 2010-11 and 2011-12).

Shivadas Chettoor, Fellow Chartered Accountant, for the assessee.

Sudhanshu Shekhar Jha, Commissioner of Income-tax-Departmental representative, for the Department.

ORDER

The order of the Bench was pronounced by

George George ***(Judicial Member)***.—These appeals at the instance of the assessee are directed against the two orders of the Commissioner of Income-tax (Appeals), both dated August 9, 2019. The relevant assessment years are 2010-11 and 2011-12. The assessee has also filed stay applications seeking to stay the recovery of outstanding tax arrears. 1

2 Since common issue is raised in these appeals, they were heard together and are being disposed of this consolidated order.

3 The solitary issue that was argued, is whether the Commissioner of Income-tax (Appeals) is justified in confirming the Assessing Officer's action in denying the benefit of claim of deduction under section 11 of the Income-tax Act.

4 The brief facts of the case are as follows :

The assessee is a trust claiming exemption under section 11 of the Income-tax Act. For the assessment years 2010-11 and 2011-12, the assessments were completed denying the claim of exemption under section 11 of the Income-tax Act. The reasoning of the Assessing Officer to deny the claim of exemption was that the assessee was engaged in micro finance activities, wherein it was charging exorbitant interest from its beneficiaries and there was no charitable activities involved in micro finance activities. Accordingly, the income claimed as exempt under section 11 of the Income-tax Act was assessed as business income.

5 Aggrieved by the order passed by the Assessing Officer for the assessment years 2010-11 and 2011-12, the assessee preferred appeals to the first appellate authority. The Commissioner of Income-tax (Appeals) dismissed the appeals of the assessee and affirmed the view taken by the Assessing Officer. The Commissioner of Income-tax (Appeals) in doing so, noted the order of the Tribunal in the assessee's own case for the assessment years 2007-08 and 2009-10 in *Shalom Charitable Ministries of India* v. *Asst. CIT* (I. T. A. Nos. 79 and 80/Coch/2017 dated April 25, 2018).

6 Aggrieved by the orders of the Commissioner of Income-tax (Appeals), the assessee has filed these appeals before the Tribunal. The learned counsel for the assessee fairly conceded that the issue in question is covered against the assessee by the order of the Tribunal for the assessment year 2007-08 and 2009-10 (*Shalom Charitable Ministries of India* v. *Asst. CIT* (I. T. A. Nos. 79 and 80/Coch/2017 dated April 25, 2018)). The learned Departmental representative present was duly heard.

7 We have heard the rival submissions and perused the material on record. The claim of exemption under section 11 of the Income-tax Act was denied by the Tribunal in the assessee's own case for the assessment year 2007-08 and 2009-10 (*Shalom Charitable Ministries of India* v. *Asst. CIT* (I. T. A. Nos. 79 and 80/Coch/2017 order dated April 25, 2018)). The Tribunal in the above case had held that the assessee's activities of micro finance was not charitable in nature and was not entitled to the claim of benefit under section 11 of the Income-tax Act. The relevant finding of the Tribunal in the assessee's own case for the assessment years 2007-08 and

2009-10 reads as follow (*Shalom Charitable Ministries of India* v. *Asst. CIT* (I. T. A. Nos. 79 and 80/Coch/2017 dated April 25, 2018)) :

"8. We have heard the rival submissions and perused the material on record. Section 11 of the Act stipulates that the income from property held for charitable or religious purpose shall not be included in the total income of the previous year of the person in receipt of the income to be given effect in the manner as specified therein. The term 'charitable purpose' has not been defined under the statute ; but for the inclusive nature of the term as specified under section 2(15) of the Act, which as existed before the amendment is as follows :

'2. (15) "charitable purpose" includes relief of the poor, education, medical relief and the advancement of any other object of general public utility.'

As per the Finance Act, 2008, the said provision was amended adding a 'proviso' with effect from April l, 2009 as follows :

'Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business for a cess or fee or any other consideration irrespective of the nature of use or application or retention of the income from such activity.'

The Assessing Officer has taken a stand that by virtue of the amendment as above, the assessee is not entitled to exemption under section 11 of the Act.

8.1 The learned authorised representative submitted that, the idea and understanding of the Assessing Officer with regard to the scope of amendment to section 2(15) is thoroughly wrong and misconceived. There is no trade or business in the activities pursued by the assessee in running of micro finance business and will not take it outside the purview of charity and hence, that the 'proviso' added to section 2(15) of the Act is not at attracted to the case in hand. He also submitted that the statute, as it stood earlier, had clarified the charitable purpose mentioned in section 2(15) of the Act had clarified the charitable purpose mentioned in section 2(15) by the words 'not involving the carrying on of any activity for profit'. By virtue of the existence of these clarifying words, if there was any element of profit it was enough liable to be reckoned as charitable purpose right from the inception of the Act in 1961 till April 1, 1984, when the words 'not involving the carrying on of any activity for profit' were deleted. Thus

the contention is that after 1st April, 1984, there is no allergy to profit and if the profit feeds charity, it stands cleared for exemption under section 11 of the Act.

8.2 To analyse the scope and object of the amendment, we have gone through the 'Budget Speech' of the Minister for Finance in the Finance Bill, 2008, reported in 298 ITR (St.) 33 at page 65 :

'180. "charitable purpose" includes relief of the poor, education, medical relief and any other object of general public utility. These activities are tax exempt, as they should be. However, some entities carrying on regular trade, commerce or business or providing services in relation to any trade, commerce or business and earning incomes have sought to claim that their purposes would also fall under 'charitable purpose'. Obviously, this was not the intention of Parliament and hence I propose to amend the law to exclude the aforesaid cases. Genuine charitable organisations will not in any way be affected' (emphasis supplied).'

8.3 The learned counsel points out that, the amendment was brought about as a measure of rationalisation and simplification, streamlining the definition of charitable purpose and not as a measure of taxation. It is also stated that the concept of charity in India is wider, simultaneously adding that, by virtue of the amendment, the position that existed prior to February 1, 1984 has been brought back and that is all. This however will not tilt the balance in any manner in the case of the assessee so as to take the activities outside the charitable purpose, particularly in view of the fact that micro finance business will not constitute any trade or business. According to the learned authorised representative, to perform charity, income is inevitable and contended that the activities being pursued by the assessee may constitute a trade or business, if it is not applied for the purposes of charity. Contrary to this, the learned Departmental representative submitted that though the object of the assessee is to carry on charitable activities, but it does not carry those charitable activities, and it was only carrying on micro finance business in a commercial manner, which cannot be construed as charitable activity. In other words, it was contended by the learned Departmental representative that the assessee carried on activities in a business oriented manner, it will definitely come within the fourth limb of the amended section 2(15) of the Act where the prohibition of activity in the nature of trade, commerce or business for any activity of rendering service or any other consideration, irrespective of the nature of the use or

application or retention of the income of such activity is specified and hence, not entitled to any exemption.

8.4 To analyse the activities carried on by the assessee, we have to go through the nature of activities pursued by the assessee and perusal of that activities carried on by the assessee, cannot be oust the involvement of 'trade, commerce or business' or 'any service in connection with trade, commerce or business' as contemplated under the statute. Further, we note that there is substantial variation in the statutory position as it existed earlier to April 1, 2009, where the assessee has been given exemption under section 11 of the Act and the position available after the amendment to section 2(15) of the Act brought into effect from April 1, 2009. Yet another important aspect to be noted in this context is that, after the amendment by incorporating the proviso to section 2(15), the fourth limb as to the advancement of 'any other object of general public utility' will no longer remain as charitable purpose, if it involves carrying on of :

(a) any activity in the nature of trade, commerce or business,

(b) any activity of rendering any service in relation to any trade, commerce or business for a cess or a fee or any other consideration, irrespective of the nature of use or application or retention of the income from such activity.

8.5 The first limb of exclusion from charitable purpose under clause (a) will be attracted, if the activity pursued by the institution involves any trade, commerce or business. But the situation contemplated under the second limb (clause (b)) stands entirely on a different pedestal, with regard to the service in relation to the trade, commerce or business mentioned therein. To put it more clear, when the matter comes to the service in relation to the trade, commerce or business, it has to be examined whether the words 'any trade, commerce or business' as they appear in the second limb of clause (b) are in connection with the service referred to the trade, commerce or business pursued by the institutions to which the service is given by the assessee. If the said words are actually in respect of the trade, commerce or business of the assessee itself, the said clause (second limb of the stipulation under clause (b)) is rather otiose. Since the activity of the assessee involving any trade, commerce or business, is already excluded from the charitable purpose by virtue of the first limb (clause (a)) itself, there is no necessity to stipulate further, by way of clause (b), adding the words 'or any activity of rendering any service in relation to any trade, commerce or business. . .'. As it stands so, giving a purposive

interpretation to the statute, it may have to be read and understood that the second limb of exclusion under clause (b) in relation to the service rendered by the assessee, the terms 'any trade, commerce or business' refers to the trade, commerce or business pursued by the recipient to whom the service is rendered and in such circumstances, the activities carried on by the assessee cannot be considered as charitable activities.

8.6 The activities carried on by the assessee cannot be considered as activities of medical relief or education or relief of the poor. It is true that the activities carried on by the assessee take care of the poor people also. But those activities cannot be classified under any of the specific activities of relief of the poor; education or medical relief. The correct way to express the nature of the activities carried on by the assessee is to say that the assessee is carrying on 'advancement of any other object of general public utility'. When that is the case, the assessee is hit by the proviso given under section 2(15). The proviso reads that 'advancement of any other object of general public utility' shall not be a charitable purpose, if it involves carrying on any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business for consideration, irrespective of the application of the money. Therefore, the case of the assessee is hit by proviso to section 2(15) and the assessee is not entitled for the benefit of section 11 for that part of income generated in the hands of the assessee from running its micro finance business. Alternatively, one has to look into section 11(4A). Sub-section (4A) provides that exemption shall not apply in relation to any income of a trust or an institution, being profits and gains of business, unless the business is incidental to the attainment of the objectives of the assessee and separate books of account are maintained by such trust or institution in respect of such business. In the present case, there is no dispute on the fact that the assessee is carrying on the business of micro finance. The assessee is maintaining separate accounts for the above business activities. But the crucial question is whether running of micro finance is a business incidental to the attainment of the objectives of the trust or not. By any stretch of imagination, it is not possible to hold that the business of micro finance is incidental to the abovestated objectives of the assessee-trust. 'Incidental' means offshoot of the main activities ; inherent by-product of principal activities. Activities to compliment and support the main objectives are not in the nature of incidental to the business.

They are supporting activities, at the maximum. The genesis of incidental activities must be from the principal activities themselves. There cannot be one source for the principal activities and another source for incidental activities. In the present case, even if the activities of the assessee were stated to be relief of poor, it was not possible to conclude that running of business in the form of micro finance is incidental to carrying on of the main objective of the assessee-trust and it is the main business of the assessee. Therefore, the assessee is not protected by the provision stated in section 11(4A) either.

8.7 In the present case, from the details given in the assessment order, it is seen that the assessee was charging interest at 29 per cent. per annum from its clients. The assessee admitted that they were taking loan from commercial banks at an interest rate below 15 per cent. per annum for disbursing these loans. Therefore, the difference between these rates was 14 per cent. which is very substantial. As per the trust deed, the main object of the assessee is shown as providing finance to the poor. If that is the real object, they would have provided loans at interest rate below bank rates or by taking a nominal margin on the money they borrowed from banks. But it is seen that they charged interest rate of 29 per cent. per annum which is 14 per cent. above the rate at which they have borrowed from the banks. In Kerala there is a specific law which is called as 'the Kerala Money Lenders Act, 1958 (Act 35 of 1958)' to provide for the regulation and control of the business of money lenders in the State of Kerala. In this Act the maximum amount of interest which can be charged on lending money is prescribed. The rate is prescribed in section 7 of the said Act which is as under :

'7. *Interest and charges allowed to money lenders*.—No money lender shall charge interest on any loan at a rate exceeding 2 per cent. above the maximum rate of interest charged by commercial banks on loans granted by them.'

8.8 For the previous year relevant to the assessment year 2007-08 the rate of interest as per section 7 of the Kerala Money Lenders Act cannot exceed more than 18 per cent. However, in the present case the assessee was charging 29 per cent. interest which is far above the rate prescribed by the law, i. e., the Kerala Money Lenders Act. This shows that the assessee is in the business of lending at 29 per cent. per annum to the poor, which is not as envisaged in the assessee-trust's objects. By collecting interest at such a higher rate the assessee has deviated from its objective of doing charity, especially in view of

the fact that the difference of interest over deposits and disbursement in cases of banks and non-banking financial companies is less than 10 per cent. As such the micro finance activity conducted by the assessee is strictly commercial in nature and with profit motive. The assessee had even collected penal interest from their defaulter which clearly shows that the trust was not even considerate with the poor loanees and was purely acting just as any money lender. From the above the activity of the assessee is business in nature and there is no element of charity involved in the activities of the assessee and it is purely commercial. In view of this, the action of the lower authorities in denying exemption under section 11 of the Act is confirmed.

8.9 The learned authorised representative submitted that the Income-tax Officer does not have the power to sit in judgment over the decision of his superior that is the Commissioner of Income-tax who found the objects of the trust as charitable in nature. It was submitted that the Income-tax Officer did not give notice to deny the exemption under section 11 of the Act. According to the learned authorised representative the status of the assessee was fixed as 'trust' whereas there is no such status under the Income-tax Act. Further the learned authorised representative made an argument that the assessee was already granted approval under section 12AA of the Act after considering the objects clause of the assessee-trust. As such granting of exemption under section 11 is automatic and it cannot be disturbed. However, we find that the assessee was availing of loans from commercial banks below the prime lending rate and charging interest at the rate of 29 per cent. per annum to its members. In addition, the assessee was also charging penal interest from the defaulters which shows that the assessee-trust was not even considerate with the poor borrowers and the assessee-trust is nothing but doing lending business and there is no element of charity in its activities. As such we do not find any infirmity in the order of the lower authorities and the same is confirmed on this issue.

8.9.1 In the present case, contrary to the findings in the assessment order, the learned authorised representative submitted that the assessee has borrowed funds for advancing loans to the public at interest of 12 per cent. per annum from the banks. Later, the assessee lent that amount to the public at average rate of 29 per cent. It means that even there is a gap of 17 per cent. between borrowing and lending the amount to the public. The assessee claimed it as a charitable activity by placing reliance on the report of the sub-committee of the Central

Board of Directors of the Reserve Bank of India to study issues and concerns in the MFI sector (Malegam Committee Report). For the purpose of determining appropriate margin cap, the Committee examined the financials for the year ended 31st March 2010 of large MFIs and small MFIs as under :

(a) for the larger MFIs the effective interest rate calculated on the mean of the outstanding loan portfolio as at March 31, 2009 and 31st March, 2010 ranged between 31.02 per cent. and 50.53 per cent. with an average of 36.79 per cent. for the smaller MFIs the average was 28.73 per cent.

8.9.2 According to the learned authorised representative, it was recommended by the sub-committee to charge interest from the public at 24 per cent. per annum since there was administrative expenditure incurred by the micro finance institutions. Even going by the Malegam Committee Report of the Reserve Bank of India, the interest charged by the assessee is 29 per cent. which is very high. Hence, the activity carried on by the assessee cannot be considered as charitable so as to grant exemption under section 11 of the Act.

8.9.3 The learned authorised representative relied on various judgments of Tribunals and the Supreme Court. The learned authorised representative relied on the decision of the Income-tax Appellate Tribunal, Visakhapatnam in the case of *Spandana (Rural and Urban Development Organisation)* v. *Asst. CIT* (I. T. A. No. 364/Vizag/2009 dated February 17, 2019) which is related to grant of approval under section. 12AA of the Act. The Tribunal considered the micro finance activities as charitable activities as the assessee was charging interest at 15 per cent. per annum. In the judgment of the Income-tax Appellate Tribunal, Delhi Bench in the case of *Disha India Micro Credit* v. *CIT* (I. T. A. No. 1374/Delhi/2010 dated January 28, 2011), the issue was related to approval under section 12AA of the Act and not with regard to granting of exemption under section 11 of the Act while passing assessment order under section 143(3) of the Act. The learned authorised representative also relied on the decision of the Income-tax Appellate Tribunal, Bangalore Bench in the case of *Janalakshmi Social Services* v. *DIT (Exemptions)* [2009] 33 SOT 197 (Bang) which is decided against the assessee. In the judgments of the Supreme Court in the cases of *Thiagarajar Charities* v. *Addl. CIT* [1997] 225 ITR 1010 (SC) and *CIT* v. *Thanthi Trust* [1999] 239 ITR 502 (SC), the cases are not relating to micro finance activities. Similar is the position with the decision of the Income-tax Appellate Tribunal, Chennai

Bench in the case of *Asst. CIT* v. *Jeppiar Educational Trust* (I. T. A. Nos. 1333, 1334, 1591 to 1595/Mds/2010 dated June 15, 2011) and decision of the Income-tax Appellate Tribunal, Kolkata Bench in the case of *Sreema Mahila Samity* v. *Dy. CIT* (I. T. A No. 2826/Kolkata/ 2013 dated October 13, 2017). In view of this, we do not find any infirmity in the order of the Commissioner of Income-tax (Appeals) and confirm the same. Thus the above ground of appeals taken by the assessee is rejected for both the assessment years."

8 Since the co-ordinate Bench of the Tribunal in the assessee's own case held that the micro finance conducted by the assessee is not a charitable activity, for identical facts, these appeals filed by the assessee are rejected.

9 Since we have disposed of the appeals filed by the assessee, the stay applications filed by the assessee become infructuous and the same are dismissed as such.

10 In the result, the appeals as well as stay applications filed by the assessee are dismissed.

Order pronounced on this 5th day of March, 2020.

[2020] 81 ITR (Trib) 30 (Delhi)

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

ASSISTANT COMMISSIONER OF INCOME-TAX

v.

EMAAR MGF CONSTRUCTION P. LTD.

(and vice versa)

BHAVNESH SAINI *(Judicial Member)* and
PRASHANT MAHARISHI *(Accountant Member)*

May 13, 2020.

AY ▶ 2012-13
HF ▶ Assessee

INCOME—DIVERSION OF INCOME BY OVERRIDING TITLE—"REVENUE SHARING AGREEMENT" BETWEEN ASSESSEE AND ITS HOLDING COMPANY IN CONSTRUCTION PROJECTS—OBLIGATION ARISING BEFORE AN INCOME ACCRUES AND ASSESSEE UNDER COMPULSION TO DISCHARGE ITS OBLIGATION—DIVERSION OF INCOME BY OVERRIDING TITLE—EXPENDITURE INCURRED BY ASSESSEE TOWARDS SERVICES OBTAINED FROM ITS HOLDING COMPANY ALLOWABLE—INCOME-TAX ACT, 1961.

Where a superior title is created before any income accrues or arises, it would be diversion of income by overriding title but where there is no obligation attached and income is applied as per the assessee's own choice after it accrues, it will not be a case of diversion by superior title as no superior title existed. In diversion, there is no earmarking by the assessee of a particular income but a charge is created upon his property being source of income. A charge created voluntarily for own purpose cannot be claimed as diversion. If there is an obligation before an income accrues and the assessee is under compulsion to discharge the obligation, it would be a case of diversion by superior title but, where there is no compulsion and no pre-existing obligation, but it is the assessee's choice to create an obligation on himself either before the income is received, accrues or arises or thereafter, it would only be a case of application of income. A compulsion at source imposed by a third party is necessary to create a superior title. Just because diverted income is collected by the assessee himself for and on behalf of the beneficiary, it cannot be inferred that it was only an application and not diversion.

The assessee was a construction company. The assessee entered into a revenue sharing agreement with its holding company under which the holding company would provide end to end support in planning, development, construction, marketing and sale of its projects and the assessee was liable to pay 24 per cent. of the gross revenue earned by it through sale proceeds of buildings and structures proposed to be constructed. Accordingly, the revenue for the year in the books of the assessee Rs. 12.99 crores of gross revenue was shared with the holding company. The Assessing Officer disallowed the sum. The Commissioner (Appeals) deleted the addition but disallowed the expenditure incurred by the assessee towards services obtained from its holding company at 25 per cent. of the revenue. On appeals by the assessee and the Department :

Held, *(i) that the assessee was under the obligation to part with the source of income to the holding company and it was not its volition to give away the revenue that could have been otherwise accrued to it. The flats to be constructed by the assessee-company were the source of income and the holding company had created a lien over 25 per cent. for a quid pro quo and took away 25 per cent. share from the sale proceeds. It was not a case that the entire sale proceeds of flats accrued to the assessee and 25 per cent. thereof had been applied or given away by the assessee to the holding company. The assessee acted as a collector of revenue for the holding company of the receipt to the extent of 25 per cent. of the sale proceeds. The 25 per cent. belonged to the holding company by virtue of the contributions made and the agreement*

entered into. The assessee was obligated by virtue of the agreement to divert the income at source and also for the contributions made by the holding company. Thus, this was a case of diversion of income by overriding title. The Department's contention that the entire transaction was sham and aimed at diverting the income to EL was not based on the facts.

(ii) That keeping in view the contribution made by the holding company and the amounts that had been already offered for taxation in the hands of the respective entities, the expenditure was allowable in the hands of the assessee.

Cases referred to :

CIT *v.* Sitaldas Tirathdas [1961] 41 ITR 367 (SC) (para 9)

Dalmia Cement Ltd. *v.* CIT [1999] 237 ITR 617 (SC) (para 9)

Emaar MGF Construction P. Ltd. *v.* Asst. CIT [2020] 113 taxmann.com 275 (Delhi) (para 7)

Sarala Devi (K.) (Smt.) *v.* CIT [1996] 222 ITR 211 (Ker) (para 9)

I. T. A. Nos. 1735 and 928/Delhi/2016 (assessment year 2012-13).

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

IP Bansal, Vivek Bansal, Advocates and *Nitin Midha,* Chartered Accountant, for the assessee.

ORDER

The order of the Bench was pronounced by

1 PRASHANT MAHARISHI ***(Accountant Member)***.—These are the cross appeals filed by the Revenue and the assessee against the order of the learned CIT(A)-23, New Delhi dated January 25, 2016 for the assessment year 2012-13.

2 The Revenue has raised the following grounds of appeal :

"1. The order of the learned Commissioner of Income-tax (Appeals) is not correct in law and on facts.

2. On the facts and circumstances of the case, the learned Commissioner of Income-tax (Appeals) has erred in law in deleting the disallowance of Rs. 12,99,96,970 on account of sham agreement."

3 The assessee has raised the following grounds of appeal :

"Ground No. 1 :

The learned Commissioner of Income-tax (Appeals)-23, New Delhi (hereinafter referred to as 'CIT(A)') has erred on facts and in law in following the order for assessment years 2009-10, 2010-11 and 2011-12 and holding that the disbursement of income as per the

revenue sharing agreement with M/s. Emaar MGF Land Limited (hereinafter referred to 'EMLL'), was not diversion of income by over-riding the title, but application of income.

Ground No. 2 :

The learned Commissioner of Income-tax (Appeals) erred on the facts and in law in not appreciating that in essence, under the arrangement between parties, the entire project was awarded and executed on the strength of EMLL and EMLL had, in fact, paid 75 per cent. of the total consideration to the appellant.

Ground No. 3 :

The learned Commissioner of Income-tax (Appeals) erred on the facts and in law in not allowing deduction of expenditure incurred towards services obtained from EMLL, at 25 per cent. of the revenue, actually paid as per the terms agreed between the appellant and EMLL, and instead allowing deduction of cost/expenses incurred by EMLL in providing support to the appellant.

Ground No. 4 :

The learned Commissioner of Income-tax (Appeals) erred on the facts and in law in adopting its own method of computing reasonable expenditure that ought to have been incurred by the appellant in relation to services obtained from EMLL, which is not permissible in law."

4 Brief facts of the case shows that the assessee-company derived income from promotion, construction, development and sale of integrated township, residential and commercial multi-storey buildings, complexes, hotels houses and apartments. It filed its return of income for the assessment year 2012-13 on September 28, 2012 declaring loss of Rs. 25,73,37,209. The assessment under section 143(3) of the Income-tax Act, 1961 was passed by the Assistant Commissioner of Income-tax, Central Circle-2, New Delhi (the learned Assessing Officer) on January 8, 2015 making an addition of Rs. 12,99,96,970 to the total income of the assessee.

5 During the course of assessment proceedings, the Assessing Officer found that the assessee has transferred the revenue sharing of Rs. 12,99,96,970 to its holding company EMMAR MGF Land Limited (holding Co.) pursuant to an agreement dated April 7, 2008 entered into by the assessee-company and its holding company. The Assessing Officer found that the above transaction is with a related party. The assessee explained that as per agreement dated April 7, 2008 entered into by the assessee with its holding company titled as "revenue sharing agreement" pursuant to which the

holding company will provide to the assessee-company end-to-end support in planning, development, construction, marketing and sale of its project namely Commonwealth Games Village 2010. As per the terms of the arrangement the company shall be liable to pay 24 per cent. with effect from July 1, 2009 of the gross revenue earned by it through sale proceeds from building and structure proposed to be constructed in the said project except in the case of sale of flats to the Delhi Development Authority, the company is liable to pay 17 per cent. of the gross revenue derived by the company. Accordingly, the revenue for the year in the books of the assessee-company is Rs. 12,99,96,970 of gross revenue shared with the holding company. The Assessing Officer found that similar arrangement was made for the assessment years 2009-10, 2010-11 and 2011-12, in which the issue was discussed at length and after examination of the complete facts of the records, the addition with respect to the revenue sharing agreement was made. The Assessing Officer also noted that during the year except the amount of the transaction, everything else remains the same. The assessee also reiterated the same arguments, which were raised before the Assessing Officer in earlier years. The learned Assessing Officer therefore following the orders of the earlier years he disallowed the above sum. The main reasons for disallowance were :

(i) Reliance upon agreement dated April 7, 2008 is an afterthought. This document never existed and surface for the first time during present assessment proceedings.

(ii) Contents of the agreement dated May 8, 2008 mentioned in Schedule 19 of the balance-sheet are contradictory to the contents of agreement dated April 7, 2008. In spite of repeated opportunities, the assessee failed to furnish agreement dated May 8, 2008.

(iii) Holding company of the assessee-company was already paid interest cost towards deployment of funds and hence adequately compensated.

(iv) The holding company being the shareholder virtually owning the entire shareholding of the assessee company was in any case, responsible for arranging the funds required for executive the CWG Village project. Even without there being an agreement to this effect, it was the responsibility of the owners of the company to arrange for the funds. By virtue of being the owner of the assessee-company, the holding company had already assumed the inherent risk associated with the project. Therefore, such assumption of risk could not be a factor for revenue sharing between the related entities.

(v) The manner of accounting treatment of the said sum of Rs. 12,99,96,970 is also dubious inasmuch as the same has been reduced from the turnover instead of debating it separately in the profit and loss account.

(vi) No tax deduction at source has been deducted from this payment and therefore even the provisions of section 40(a)(ia) would get attracted.

(vii) The said amount has been shown as liability as on March 31, 2012 by making a book entry and there is no actual movement of funds commensurate to such transactions.

(viii) Since the transaction is between two related entities it is hit by the provisions of section 40A(2)(a). Issue of agreement dated April 7, 2018 is self-serving document and there are no real intangible services rendered by the holding company to the assessee-company for claiming this amount as its share of revenue.

(ix) The quantum of sharing revenue out of gross sales is inordinately high, which would result in transfer of the entire profit from the project to the holding company.

(x) There are several case law on the subject in favour of the Revenue where it has been held that such payment made to related party are hit by the provisions of section 40A(2)(b) and are, therefore, not allowable.

(xi) The agreement dated April 7, 2008 or for that matter May 8, 2008 are sham agreements in the nature of colourable device is executed with an intention of reducing the tax liability.

6 Above the assessment order was challenged by the assessee before the learned Commissioner of Income-tax (Appeals). The learned Commissioner of Income-tax (Appeals) following the order of his predecessor gave a similar direction to allow the claim of the assessee as per the detailed formula given therein. He further confirmed that the disbursement of income as per the revenue sharing agreement with the holding company of the assessee was not a diversion of income by overriding title but an application of income. He concurred with the view of the predecessor in earlier year's decision. He further agreed with the finding of his predecessor that the assessee is not eligible for deduction of expenditure incurred towards services obtained from its holding company at the 25 per cent. of the revenue. Thus, the expenditure claimed by the assessee was disallowed. Therefore, the Revenue as well as the assessee both are aggrieved with the order has preferred this appeal before us.

7 Coming to the appeal of the assessee, the learned authorised representative Shri I. P. Bansal, advocate submitted a detailed chart that identical

disallowance has been made in the case of the assessee for assessment year 2009-10 to assessment year 2014-15. He submitted that the Co-ordinate Bench has already decided the issue for the assessment year 2009-10 to the assessment year 2014-15 as per order dated December 26, 2019 reported in *Emaar MGF Construction P. Ltd.* v. *Asst. CIT* [2020] 113 taxmann.com 275 (Delhi-Tribunal) and therefore the appeal of the assessee as well as of the Revenue is covered by that decision.

8 The learned Departmental representative vehemently objected to the fact, it is altogether a new case made out by the learned Assessing Officer and therefore, the earlier decision of the co-ordinate Bench does not apply to the facts of the present case.

9 We have carefully considered the rival contention and perused the orders of the lower authorities. The identical issue has been decided by the co-ordinate Bench in the case of the assessee for the assessment year 2009-10 to the assessment year 2014-15 on December 26, 2019. We also perused grounds of appeal of all these years, which are identical to the appeals of the assessee as well as of the Revenue. The challenge by the Revenue is to the agreement holding that it is a sham agreement to which the revenue has been transferred to its holding company. The co-ordinate Bench as per para number 47 onwards has held as under :

> "47. We find that the assessee is under the obligation to part away with the source of income to the holding company and it was not its volition alone, to give away the revenue that could have been otherwise accrued to them. An agreement entered into by the holding company with the assessee for providing financial security cover and to part away 25 per cent. sales proceeds was clearly a case of division of source of income between the holding company and the assessee. The flats to be constructed by the assessee-company were the source of income and the holding company had created a lien over 25 per cent. for a quid pro quo thereof and therefore took away 25 per cent. shares from the sale proceeds. It is not a case that the entire sale proceeds of flats and therefore, the income therefrom would have accrued to the assessee and 25 per cent. thereof had been applied or given away by the assessee to the holding company. The assessee acts as a collector of revenue for the holding company of the receipt to the extent of 25 per cent. of the sale proceeds. The 25 per cent. belongs to the holding company by virtue of the contributions made and the agreement entered.
>
> 48. The relevant judgments relating to diversion of income by over-riding tile are as under :

'In *CIT* v. *Sitaldas Tirathdas* [1961] 41 ITR 367 (SC), the hon'ble apex court held that, an obligation to apply income in a particular way before it was received or before it was accrued or arisen to the assessee, results in diversion of income ; but where there is an obligation to apply an income which has accrued or arisen or received, it would amount to merely apportionment of income. It observed as under (page 374 of 41 ITR) :

"In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible ; but where the income 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 a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable. In our opinion, the present case is one in which the wife and children of the assessee who continued to be members of the family received a portion of the income of the assessee, after the assessee had received the income as his own. The case is one of application of a portion of the income to discharge an obligation and not a case in which by an overriding charge the assessee became only a collector of another's income."

In *Dalmia Cement Ltd.* v. *CIT* [1999] 237 ITR 617 (SC) ; [1999] 104 Taxman 97 (SC) the assessee-owner of factory had, by an agreement dated July 24, 1962, agreed to sell same to "M" and agreement, provided that profit from factories from September 30, 1962 would be for benefit of transferee on completion of sale transaction, though actual transfer of factory had taken place on September 30, 1964, income pertaining to period October 1, 1962 to September 30, 1964 could not be assessed in assessee's hands as it stood diverted by overriding title. It held that if there is an agreement before the sale transaction takes place to the effect that this transaction will go to the account of

another person and not to the account of the assessee-company, then, the income would stand diverted by an overriding title as a matter of fact, even before the accrual. The hon'ble apex court held as under (headnote) :

"*Held*, reversing the decision of the High Court, that the profits stood diverted to the purchaser in terms of and in accordance with the agreement dated July 24, 1962, read with the supplemental agreement dated November 2, 1962 and the date of actual transfer of the factory in question which, in fact, had taken place on September 30, 1964, did not alter the situation. The income stood diverted by an overriding title as a matter of fact even before the accrual. There was no question of enabling the assessee to retain the profit in its own hand, after the 'sale agreement'. The sale transaction had taken place and by reason of the event and in terms of the provisions of the agreement, the question of tracing the profit in the hands of the assessee did not and could not arise. In any event profits of a business do not accrue from day-to-day but at the end of the accounting year. Profits were ascertained on September 30, 1964, when the property was transferred and as such for the year 1965-66 the question of profit accruing to the assessee did not arise. Section 60 has its application only to a case where income accrues to the transferee but the income-earning asset or source of income remains with the transferor. In this case, the very existence of the agreement to transfer dated July 24, 1962, ruled out and totally excluded the application of section 60. There appeared to be clear inconsistency between the assessment of capital gains on the transfer of the factories on the one hand and the finding of accrual of income since the computation of capital gains were affected by treating the gross amount of consideration as the sale price. The Income-tax Officer thus by implication accepted the profits as belonging to the transferee and not the transferor-otherwise, the net amount paid alone ought to have been taken as the sale price. The High Court's judgment, therefore, not only suffered from apparent inconsistency but on a totality of the situation was inherently contradictory. The profits arising from the working of the two cement factories situated in Pakistan for the year October 1, 1962 to September 30, 1963, and for the year October 1, 1963 to September 30, 1964, were not taxable in the hands of the assessee-company."

The hon'ble Kerala High Court in *Sarala Devi (K.) (Smt.)* v. *CIT* [1996] 222 ITR 211 (Ker) held that it nature of obligation which is a decisive factor. It held as under (headnote) : 'In order to determine

whether there has been a diversion of income by overriding title the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which 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 obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before, it reaches the assessee, it is deductible ; but where the income 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 a portion of one's own income, which has been received and is since applied. The first is a case in which income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable".

49. From the facts of the case, it can be said that where a superior title is created before any income accrues or arises, it would be the diversion of income by overriding title but where there is no obligation attached and income is applied as per assessee's own choice after it accrues, it will not be a case of diversion by superior title as no superior title existed. In diversion, there is no earmarking by the assessee of a particular income but a charge is created upon his property being source of income. A charge created voluntarily for own purpose cannot be claimed as diversion. If there is an obligation before an income accrues and the assessee is under compulsion to discharge his obligation, it would be a case of diversion by superior title but, where there is no compulsion and no pre-existing obligation, but it is the assessee's choice to create an obligation on himself either before income received, accrues or arisen or thereafter, it would only be a case of application of income. A compulsion at source imposed by a third party is necessary to create a superior title. Just because diverted income is collected by the assessee himself for and on behalf of the beneficiary ; it cannot be inferred that it was only an application and not diversion. In the instant case, the assessee has been obligated by virtue of the agreement to divert the income at source and also for the contributions made by the holding company. Thus, we hold that the revenue sharing agreement entered with the holding company by the assessee is diversion of income by overriding title. The Revenue's

contention that the entire transaction is sham and aimed at only to divert the income to EMLL cannot be said to be correct based on the facts and the judicial pronouncements.'"

10 In view of the above finding of the co-ordinate Bench in case of the assessee itself based on the same agreement, we do not find any merit in the appeal of the assessee in deleting the addition made by the learned Commissioner of Income-tax (Appeals) holding that the agreement between the holding company as well as the assessee was not sham agreements. Accordingly, we dismiss the appeal of the learned Assessing Officer.

11 Now we come to the appeal of the assessee. The co-ordinate Bench has also dealt with the issue whether the payment of the disbursement income to the holding company was diversion of income by overriding title or merely an application of income. The co-ordinate Bench has held in paragraph number 51 of the order of the co-ordinate Bench, it has been held that the payment made to the holding company is obligated in diversion of income by overriding title. The co-ordinate Bench also after considering the contribution made by the holding company and keeping in view the amounts that have been already offered for taxation in the hands by the respective entities the above expenditure is allowable in the hands of the company. The relevant paragraphs as cited above that the revenue sharing agreement entered with the holding company by the assessee is a diversion of income by overriding title, we allow ground number one of the appeal following the reasoning given by the co-ordinate Bench.

12 In view of our above finding, the ground number two, three and four of the appeal of the assessee, following the order of the co-ordinate Bench in the assessee's own case for the earlier years and in absence of any change in the facts and circumstances of the case are also allowed with similar directions.

13 In the result, appeal filed by the learned Assessing Officer is dismissed and appeal filed by the assessee is allowed.

Order pronounced in the open court on May 13, 2020.

[2020] 81 ITR (Trib) 41 (Mumbai)

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

WINDSOR MACHINES LTD.

v.

DEPUTY COMMISSIONER OF INCOME-TAX

MANOJ KUMAR AGGARWAL *(Accountant Member)* and
MS. MADHUMITA ROY *(Judicial Member)*

May 28, 2020.

SS ▸ ITA 1961, s 115JB
AY ▸ 2013-14, 2014-15
HF ▸ Department/Assessee

COMPANY—BOOK PROFITS—EXCLUSIONS—SICK INDUSTRIAL COMPANY—ASSESSEE DISCHARGED BY BOARD FOR INDUSTRIAL AND FINANCIAL RECONSTRUCTION AND ITS NET WORTH TURNING POSITIVE BY VIRTUE OF IMPLEMENTATION OF REVIVAL SCHEME—NO RELIEF UNDER SECTION 115JB—AUTHORITIES NOT SPECIFICALLY DEALING WITH ISSUES OF ADJUSTMENT IN COMPUTING BOOK PROFITS UNDER SECTION 115JB—COMMISSIONER (APPEALS) TO READJUDICATE ISSUE BY SPEAKING ORDER—INCOME-TAX ACT, 1961, S. 115JB—SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985, S. 17(1).

The assessee was declared a sick company under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985. The Board for Industrial and Financial Reconstruction sanctioned a rehabilitation scheme for the assessee with directions for implementation thereof for revival of the assessee. The cut-off date had been taken was March 31, 2009. The scheme envisaged various reliefs and concessions from various agencies as a part of the rehabilitation scheme. The rehabilitation period was from April 1, 2009 to March 31, 2017. The scheme envisaged certain tax concessions for the assessee. While computing the income under the normal provisions, the assessee claimed deduction of various items pertaining to the assessment year 2011-12 aggregating to Rs. 19.71 crores. The assessee explained that the provisions of section 28/section 41 should not be applied to the assessment year 2011-12 which was principally accepted by the Board. However, the Directorate of Income-tax (Recovery) did not grant the relief for the assessment year 2011-12. The assessee filed its necessary application before the Directorate of Income-tax (Recovery) in this regard but the application remained to be dealt with by the Directorate of Income-tax (Recovery) till date. Since the date of filing the revised return for the assessment year 2011-12 expired on March

31, 2013, the assessee thought it appropriate to claim the deduction of these items while filing the return for the assessment year 2013-14 which was to be filed subsequently. Accordingly, the assessee claimed deduction of the items while computing the income for the assessment year 2013-14 while agitating the claim before the appellate authorities for the assessment year 2011-12. The Assessing Officer opined that deduction of the items could not be allowed to the assessee. The assessee, while agreeing to the addition, pleaded that the provisions of section 115JB should not be made applicable. Consequently, the deduction of these items was not allowed and the income was computed at Rs. 950.77 lakhs after another disallowance under section 40(a)(ia) of a payment of Rs. 38.69 lakhs for want of tax deduction at source. Against the income so computed, the assessee was allowed set-off of brought forward business losses and depreciation which reduced the total income to nil. However, the Assessing Officer referring to the letter of the Directorate of Income-tax (Recovery) opined that the assessee would be entitled for relief under section 115JB only up to the assessment year 2011-12. Therefore, he computed book profit under section 115JB at Rs. 1076.27 lakhs which was the profit shown by the assessee in the financial statements after excluding exempt dividend income. This was confirmed by the Commissioner (Appeals). On appeal :

Held, *(i) that the assessee's net worth had turned positive as on March 31, 2011. The manner of computation as provided in section 115JB would be a complete code in itself and the computations were to be made strictly in the manner as provided therein.* Explanation 1(vii) *envisages reduction of the profits of a sick industrial company for the assessment year commencing on and from the assessment year relevant to the previous year in which the company has become a sick industrial company under section 17(1) of the 1985 Act and ending with the assessment year during which the entire net worth of such company becomes equal to or exceeds the accumulated losses. Since the assessee was discharged by the 1985 Act on August 16, 2011 and its net worth turned positive by virtue of implementation of the revival scheme, the assessee would be precluded from relief under section 115JB in view of* Explanation 1(vii) *to section 115JB(2) and therefore, no relief would be available from the assessment year 2011-12 onwards.*

CIT *v.* TUBE INVESTMENTS OF INDIA LTD. [2012] 341 ITR 199 (Mad) *distinguished.*

(ii) That under the express provisions of Explanation 1(iii) *to section 115JB(2), the assessee would be entitled to deduction of the loss brought forward or unabsorbed depreciation whichever is less according to the books of account. The assessee had claimed the lower of depreciation and book loss*

while computing the book profits under section 115JB for the assessment year 2012-13 which had not been disturbed by the Assessing Officer for the assessment year 2012-13. The issue of the adjustments had not been gone into either by the Assessing Officer or by the Commissioner (Appeals). Therefore, the matter was remitted to the Commissioner (Appeals) to specifically adjudicate the issues by way of a speaking order and bring on record the correct factual matrix, in this respect.

(iii) That covid 19 pandemic lockdown period would be excluded in computing the 90 days total time-limit for pronouncing the appellate order.

DY. CIT *v.* JSW LTD. [2020] 79 ITR (Trib) 585 (Mumbai) *followed*.

Cases referred to :

Anil Rai *v.* State of Bihar [2002] 3 BCR 360 (SC) (para 8)

Apollo Tyres Ltd. *v.* CIT [2002] 255 ITR 273 (SC) (paras 4, 6)

Ballarpur Industries Ltd. *v.* CIT (No. 2) [2017] 398 ITR 145 (Bom) (para 3)

CIT (Dy.) *v.* JSW Ltd. [2020] 79 ITR (Trib) 585 (Mumbai) (para 8)

CIT (Pr.) *v.* Rajasthan Explosives and Chemicals Ltd. [2017] 398 ITR 736 (Delhi) (para 3)

CIT *v.* Tube Investments of India Ltd. [2012] 341 ITR 199 (Mad) (para 5)

Otters Club *v.* DIT (E) [2017] 392 ITR 244 (Bom) (para 8)

Shivsagar Veg. Restaurant *v.* Asst. CIT [2009] 317 ITR 433 (Bom) (para 8)

Shivalik Venture Pvt. Ltd. *v.* Dy. CIT (I. T. A. No. 2008/Mum/2012 dated August 19, 2015) (para 4)

I. T. A. Nos. 2709, 2710, 4696 and 4697/Mumbai/2019 (assessment years 2013-14 and 2014-15).

Pradip N. Kapasi and *Akhilesh Pevekar*, authorised representatives, for the assessee.

Vinay Sinha, Commissioner of Income-tax-Departmental representative, for the Department.

ORDER

The order of the Bench was pronounced by

MANOJ KUMAR AGGARWAL ***(Accountant Member)***.—The aforesaid **1**
appeals by the assessee for the assessment years (in short referred to as "the AY") 2013-14 and 2014-15 contest separate orders of the learned first appellate authority. There are two appeals for each of the assessment years in view of the fact the order of the learned first appellate authority was

rectified under section 154 of the Act which gave rise to two separate appeals by the assessee for each of the assessment year. Since common issues were involved, the appeals were consolidated and are now being disposed of by way of this consolidated order for the sake of convenience and brevity.

1.2 The Revenue, vide letter dated November 25, 2019 submitted that the assessee did not upload form No. 29B (report under section 115JB for computing the book profits) for the assessment years 2013-14 and 2014-15. The same is also not available in the respective assessment folders. The learned authorised representative for the assessee (AR), during the course of hearing, submitted copies of form No. 29B for the assessment years 2012-13 and 2014-15. Both the forms are dated January 1, 2020. No form has been submitted for the assessment year 2013-14. Form No. 29B is the report under section 115JB for computing the book profits of the company. In the said report, the book profits for both the years have been reflected as nil. Upon a perusal of report submitted by the Revenue, it could be observed that form No. 29B has been filed by the assessee only for the assessment years 2017-18 and 2018-19. The assessee's computation of income for the assessment years 2013-14 and 2014-15 would also reveal that no computations have been made by the assessee under section 115JB. The perusal of the assessment order for the assessment year 2012-13 dated March 18, 2015, as placed on record, would reveal that no computations have been made by the learned Assessing Officer under section 115JB. In the above background, we take up the appeals for the assessment year 2013-14 simultaneously.

I. T. A. No. 2709/Mum/2019, assessment year 2013-14

2 Aggrieved by the order of the leaned Commissioner of Income-tax (Appeals)- 2, Thane dated March 5, 2019, the assessee is under appeal with the following grounds of appeal :

I. *Exemption from MAT*

1. The learned Commissioner of Income-tax (Appeals) erred in law and on facts in upholding the action of the learned Assessing Officer of computing the book profit under section 115JB at Rs. 10,76,27,367 liable to MAT and in denying the exemption from the payment of MAT under section 115JB as directed by the Board for Industrial and Financial Reconstruction (BIFR) and altogether ignoring the provisions of law including the overriding provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 under which your appellant during the period of rehabilitation was entitled to exemption from liability to MAT.

2. Your appellant submits that the relief claimed from the provisions of MAT was as per the order passed by the Board for Industrial and Financial Reconstruction dated September 21, 2010 and the provisions of the Income-tax Act, 1961 including the overriding provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 and the appellant was not liable to MAT. The learned Assessing Officer and/or Directorate of Income-tax (Recovery) had mislead or misapplied the order of the Board for Industrial and Financial Reconstruction.

3. Your appellant prays that the addition of Rs. 10,76,27,367 made to the total income computed under section 115JB be deleted and the appellant be held to be not liable to MAT under section 115JB of the Act.

II. *Non-adjudication of claims by the Commissioner of Income-tax (Appeals)*

1. The learned Commissioner of Income-tax (Appeals), without prejudice to ground No. 1, erred in law and on facts by failing to adjudicate the claims by the appellant for adjustment of book profit on account of (i) amount credited to the profit and loss account vide the restructuring account, and (ii) reduction of the book profit by the amount representing the lower of the unabsorbed depreciation or business loss as per clause (iii) of *Explanation* to section 115JB(2) of the Act.

2. Your appellant submits that the book profit should be calculated as per the provisions of section 115JB and the amount credited to the profit and loss account vide the restructuring account and also the amount representing lower of the unabsorbed depreciation or business loss, should be excluded and/or reduced therefrom.

3. Your appellant prays that the claims of reduction in the book profit be allowed and the amount of MAT liability be reduced.

Ground No. II would become infructuous in view of the fact that the claims not adjudicated in the appellate order has subsequently been dealt with by the learned Commissioner of Income-tax (Appeals) under section 154, against which the assessee has preferred separate appeal which is the subject matter of I. T. A. No. 4696/Mum/2019.

2.2 Briefly stated, the assessee was assessed for year under consideration under section 143(3) on March 18, 2016. The assessee is stated to be engaged in the business of plastic processing machines. It was declared as a sick company under the provisions of the Sick Industrial Companies

(Special Provisions) Act, 1985 (SICA). The hon'ble Board for Industrial and Financial Reconstruction sanctioned the rehabilitation scheme for the assessee on September 21, 2010 with the directions for implementation for revival of the assessee. The copy of the same has been placed on record. The cut-off date has been taken as March 31, 2009. The scheme envisages various reliefs and concessions from various agencies as a part of rehabilitation scheme. As per the scheme, the rehabilitation period was from April 1, 2009 to March 31, 2017. Clause 11.4 of the scheme envisages certain tax concessions for the assessee and the same reads as under :

11.4 *Central Board of Direct Taxes*

To consider to exempt/grant relief to the company from the provisions of sections 41, 72, 43B and 115JB of the Income-tax Act for a period of eight years from the cut-off date except for the prosecution and criminal proceedings.

As evident, the Central Board of Direct Taxes has been directed to consider granting of relief to the assessee under sections 41, 72, 43B and 115JB of the Act for a period of 8 years from the cut-off date. The concluding part of the scheme notes that as per the projected profitability, the net worth of the company becomes positive in the seventh year of rehabilitation and the entire losses would be wiped out in the eighth year of rehabilitation, i. e., the financial year 2016-17.

2.3 Fortunately, the assessee's net worth has turned positive on March 31, 2011. Accordingly, the assessee received a letter dated November 21, 2012 from hon'ble Directorate of Income-tax (Recovery) (DIT (Recovery) mentioning the said fact. The said letter was addressed to the Board for Industrial and Financial Reconstruction. The copy of the letter has been placed in the paper book. In the said letter, it was stated that the Board for Industrial and Financial Reconstruction has discharged the company from the purview of the Sick Industrial Companies (Special Provisions) Act, 1985 vide order dated August 16, 2011 on the ground that the revival of the company has substantially been implemented and the net worth has turned positive and has issued direction that unimplemented provisions of the sanctioned scheme, if any, would be implemented by the concerned agencies. However, the appellate authority, vide order dated February 2, 2012 directed that monitoring will be done by the Board for Industrial and Financial Reconstruction itself under section 18(12) of the Act. In the aforesaid letter of the Directorate of Income-tax (Recovery), the decision of the Central Board of Direct Taxes on the proposed relief was conveyed to the Board for Industrial and Financial

Reconstruction. Regarding relief under section 115JB, it was stated that the said relief would be available only till the net worth becomes positive. Since the assessee was discharged by the Sick Industrial Companies (Special Provisions) Act, 1985 on August 16, 2011 and its net worth turned positive by virtue of implementation of revival scheme, the assessee would be precluded from relief under section 115JB in view of *Explanation 1(vii)* to section 115JB(2) and therefore, no relief would be available to the assessee from the assessment year 2011-12 onwards from the applicability of the provisions of section 115JB.

2.4 Aggrieved by the aforesaid directions, the assessee, vide letter dated December 14, 2012, prayed the Directorate of Income-tax (Recovery) that in terms of the Board for Industrial and Financial Reconstruction Scheme, the Directorate of Income-tax ought to have granted relief under section 115JB for a period of 8 years. Alternatively, the assessee also pointed out the factual error in the letter of the Directorate of Income-tax (Recovery) since the net worth turned positive as on March 31, 2011, the relief should have been allowed up to the assessment year 2011-12 in terms of *Explanation 1(vii)* to section 115JB(2). Therefore, a prayer was made to make necessary modifications in the order. In fact, the assessee sought relief till the end of the rehabilitation period, i. e., up to the assessment year 2017-18 based on certain precedents of similar Board for Industrial and Financial Reconstruction cases, wherein such MAT exemption was allowed by the Board for Industrial and Financial Reconstruction for the rehabilitation period. However, it appears that the said application has remained to be dealt-with by the Directorate of Income-tax (Recovery).

2.5. In the above factual background, during the assessment proceedings, it was noted by the learned Assessing Officer that while computing income under the normal provisions, the assessee claimed deduction of various items pertaining to the assessment year 2011-12 aggregating to Rs.19.71 crores. The same are tabulated in para 3 of the quantum assessment order. The assessee explained that it had claimed relief from taxation by praying that the provisions of section 28/section 41 should not be applied to the assessment year 2011-12 which was principally accepted by the Board for Industrial and Financial Reconstruction. However, the Directorate of Income-tax (Recovery), while passing the order did not specifically grant the relief under section 28 as well as under section 41. No relief was granted in this respect for the assessment year 2011-12. The assessee filed necessary application before the Directorate of Income-tax (Recovery) in this regard but the same remained to be dealt with by the Directorate of

Income-tax (Recovery) till date. Since the date of filing the revised return for the assessment year 2011-12 expired on March 31, 2013, the assessee thought it appropriate to claim the deduction of these items while filing the return for the assessment year 2013-14 which was to be filed subsequently, Accordingly, the assessee claimed deduction of the aforesaid items while computing the income for the assessment year 2013-14 while agitating the same before appellate authorities for the assessment year 2011-12.

2.6 After considering the assessee's submissions, the learned Assessing Officer opined that these items pertained to the assessment year 2011-12 and there was no specific order of relief under section 28/section 41. Therefore, the deduction of the same could not be allowed to the assessee. The assessee, while agreeing for the addition, pleaded that the provisions of section 115JB should not be made applicable.

2.7 Consequently, the deduction of these items was not allowed and the income was computed at Rs. 950.77 lakhs. The aforesaid income was after another disallowance under section 40(a)(ia) for Rs. 38.69 lakhs for want of TDS. Against the income so computed, the benefit of brought forward business losses and depreciation was granted to the assessee which reduced the total income to nil.

2.8 The assessee agitated the applicability of the provisions of section 115JB. However, the learned Assessing Officer referring to letter of the Directorate of Income-tax (Recovery) as discussed in the preceding para 2.3, opined that the assessee would be entitled for relief under section 115JB only up to the assessment year 2011-12. Since the assessee's application before the appropriate authorities was pending and in the absence of specific order or direction from the appropriate authorities, no such exemption could be granted to the assessee. Therefore, the learned Assessing Officer computed book profits under section 115JB at Rs. 1076.27 lakhs which was nothing but profit shown by the assessee in the financial statements (after excluding exempt dividend income).

3 Aggrieved, the assessee agitated the stand of the learned Assessing Officer before the learned first appellate authority vide impugned order dated March 5, 2019. The assessee, in its submissions, inter alia, reiterated that the rehabilitation period was from April 1, 2009 to March 31, 2017 and as per the order of the Board for Industrial and Financial Reconstruction, the relief was available from the provisions of sections 41, 72, 43B and 115JB for a period of 8 years from the cut-off date. The attention was drawn to the provisions of section 19(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 to submit that the Board for Industrial and Financial Reconstruction was empowered to grant the relief from taxation for any

such period as it deems fit, which need not be restricted to the year in which the company's net worth turns positive as per section 115JB(2) *Explanation 1(vii)*. In other words, the power of the Board for Industrial and Financial Reconstruction would extend beyond the aforesaid provisions of section 115JB(2) *Explanation 1(vii)*. The benefit provided under those provisions of section 115JB was available to all sick companies without the order of the Board for Industrial and Financial Reconstruction. Reliance was placed on the decision of the hon'ble Bombay High Court in the case of *Ballarpur Industries Ltd.* v. *CIT (No. 2)* [2017] 398 ITR 145 (Bom) and also on other decisions, which have already been mentioned in the impugned order. A plea was also raised that non-grant of relief would adversely affect the cash flow position of the company.

3.2 In the alternative, the assessee also submitted that the amount credited to the profit and loss account in respect of waiver of loans as per the orders of the Board for Industrial and Financial Reconstruction, would even otherwise have no character of income and therefore, beyond the scope of levy of income-tax. Therefore, the same should be excluded for the purpose of computations under section 115JB.

3.3 Another alternative ground was that accumulated the debit balance in the profit and loss account was adjusted from time to time against the credit balance in the capital reserve and share premium account vide restructuring account. The said set off should not prejudice or affect the assessee's claim for set off of book losses or depreciation, whichever is less, as per the books of account.

3.4 The learned Commissioner of Income-tax (Appeals) noted the directions given in the Board for Industrial and Financial Reconstruction order dated September 21, 2010 which read as under :

> "To consider to exempt/grant relief to the company from the provisions of sections 41, 72, 43B and 115JB of the Income-tax Act for a period of eight years from the cut-off date except for the prosecution and criminal proceedings."

The contents of the letter of the Directorate of Income-tax (Recovery) dated November 21, 2012 were noted in para 5.2 of the impugned order. It was also noted that consequent to the letter of the Directorate of Income-tax (Recovery), the assessee filed a letter for reconsideration of the aforesaid order.

3.5 After due consideration of the submissions and material on record, the learned Commissioner of Income-tax (Appeals) upheld the action of the learned Assessing Officer by observing as under :

5.4 Now, it is seen that the Directorate of Income-tax (Recovery) vide its letter F No. 2/DIT (R)/BIFR/2010-11/72663 dated November 21, 2012 recorded the fact that the appellant company's net worth has turned positive as on March 31, 2011. The Directorate of Income-tax (Recovery) further recorded that in view of the provisions of *Explanation 1(vii)* to section 115JB, relief is available to the company from the applicability of the provisions of section till the assessment year in which the net worth becomes positive, and as such the relief from section 115JB should be available to the appellant company till 2011-12. The Assessing Officer held that based on the application before the Board for Industrial and Financial Reconstruction which is pending as on date and in the absence of a specific order or a direction from the Board for Industrial and Financial Reconstruction, no relief from exemption of the applicability of section 115JB of the Act can be allowed to the assessee and the provisions of section 115JB of the Act are applicable in the case of the assessee with effect from the assessment year 2012-13.

5.5 The appellant during the course of the appellate proceedings has stated that the Assessing Officer has mistakenly applied the provisions of section 115JB(2)(vii). The appellant has also stated that section 19(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 empowers the Board for Industrial and Financial Reconstruction to confer and grant companies under it the benefit from relief of payment of Income-tax. The appellant has cited cases of the jurisdictional High Courts in the case of *Ballarpur Industries Ltd.* v. *CIT (No. 2)* [2017] 398 ITR 145 (Bom) and the decision of the Delhi High Court in the case of *Pr. CIT* v. *Rajasthan Explosives and Chemicals Ltd.* [2017] 398 ITR 736 (Delhi) and also quoted that in both these decisions, the courts have upheld the unfettered power of the Board for Industrial and Financial Reconstruction. The appellant has further stated that the Assessing Officer was wrong in applying the aforementioned provision in isolation of the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 which he proceeds to state defeats the mandate of the Board for Industrial and Financial Reconstruction. In short the appellant has stated that applying of the provisions of section 115JB(2)(vii) defeats the mandate of the Board for Industrial and Financial Reconstruction as the appellant is covered under the Sick Industrial Companies (Special Provisions) Act, 1985 as well as the Board for Industrial and Financial Reconstruction.

5.6 At this point it is necessary to recapitulate the appellant's application in the Board for Industrial and Financial Reconstruction and the results thereof. The appellant had approached the Board for Industrial and Financial Reconstruction and the Board for Industrial and Financial Reconstruction vide its order dated September 21, 2010 vide para 11.4 stated as under :

'To consider to exempt/grant relief to the company from the provisions of sections 41, 72, 43B and 115JB of the Income-tax Act for a period of eight years from the cut-off date except for the prosecution and criminal proceedings.'

5.7 From the above it is noted that the Board for Industrial and Financial Reconstruction vide its order had directed the Central Board of Direct Taxes to consider to exempt grant of relief to the appellant from the provisions of a number of sections including 115JB for the period of 8 years from cut-off date, which is April 1, 2009 to March 31, 2017. The Board for Industrial and Financial Reconstruction has not given any directions to the Central Board of Direct Taxes regarding the exemptions/reliefs to be granted to the appellant. The Directorate of Income-tax (Recovery) considered the order of the Board for Industrial and Financial Reconstruction and relief under section 115JB of the Act was allowed for up to 2010-11 only and no relief under section 115JB was allowed to the company from the assessment year 2011-12 onwards. The Assessing Officer has followed the decision of the Directorate of Income-tax (Recovery). The appellant had also approached the Directorate of Income-tax (Recovery) for reconsideration of its decision and as per the information gathered from the authorised representative of the appellant, during the course of appellate proceedings the same has not been disposed of/no communication has been received by the appellant in this regard.

5.8 In view of the decision of the Directorate of Income-tax (Recovery) in pursuance of the order dated September 21, 2010 of the Board for Industrial and Financial Reconstruction in the case of the appellant wherein exemption from MAT is available up to the assessment year 2010-11, the action of the Assessing Officer in applying the provisions of MAT as in section 115JB(2)(vii) in the instant case is confirmed.

It is evident that the learned Commissioner of Income-tax (Appeals), going by the decision of the Directorate of Income-tax (Recovery) confirmed the stand of the learned Assessing Officer in applying the provisions of section 115JB. Aggrieved, the assessee is in further appeal before us.

I. T. A. No. 4696/Mum/2019, assessment year 2013-14

4 This appeal arises out of the appellate order passed under section 154 on May 22, 2019. The said order was passed since it was pointed out that without prejudice the claim made by the assessee requesting for reduction of book profits under section 115JB was not adjudicated in the original appellate order. In the alternative grounds, it was submitted that the assessee was not liable to pay MAT even without the benefit of sub-clause (vii). Further, the amount credited to the profit and loss account in respect of waiver of loans as per the order of the Board for Industrial and Financial Reconstruction, even otherwise would have no character of income and therefore, beyond the scope of levy of income-tax. Lastly, the debit balance in the profit and loss account was adjusted from time to time against the credit balance in the capital reserve and share premium account vide restructuring account. The said set off should not prejudice or affect the assessee's claim for set off of book losses or depreciation, whichever is less, as per the books of account. This amount was stated to be Rs. 3942.55 lakhs.

4.2 However, the learned Commissioner of Income-tax (Appeals), in the light of the statutory provisions of section 115JB(2)(a) opined that the starting point for computation would be the net profit as shown in the profit and loss account prepared in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act. The cited case law of the Mumbai Tribunal in *Shivalik Venture Pvt. Ltd.* v. *Dy. CIT* (I. T. A. No. 2008/Mum/2012 dated August 19, 2015), as relied upon by the assessee, was distinguished. Rather, reliance was placed on the decision of the hon'ble Supreme Court rendered in *Apollo Tyres Ltd.* v. *CIT* [2002] 255 ITR 273 (SC) ; [2002] 122 Taxman 562 and finally the submissions were rejected. It is quite discernible that the assessee's specific plea regarding adjustment of accumulated profit and loss account through restructuring account were not dealt with.

4.3 Aggrieved, the assessee is under appeal with the following grounds of appeal :

I Reduction of book profit by lower of unabsorbed depreciation or business loss, whichever is less without setting off of amounts written back as per the order of the Board for Industrial and Financial Reconstruction :

1. The learned Commissioner of Income-tax (Appeals) erred in law and on facts by rejecting the claim of the appellant for reduction of book profit on account of the recomputed/revised amounts representing the lower of the unabsorbed depreciation or business loss as

per clause (iii) of the *Explanation* to section 115JB(2) of the Act to be arrived at by ignoring the credits on account of write backs due to relief given by the Board for Industrial and Financial Reconstruction.

2. Your appellant submits that the company was granted certain reliefs by the Board for Industrial and Financial Reconstruction in repayment of its liabilities which amount of relief was credited to the profit and loss account and as a consequence this balance in unabsorbed losses and depreciation accounts were reduced artificially without there being real profits and your appellant submits that the book profit should be calculated as per the provisions of section 115JB and the amount representing lower of the unabsorbed depreciation or business loss, duly adjusted by the amount written back should be excluded and/or reduced therefrom.

3. Your appellant prays that the claims of reduction in the book profit be allowed and the amount of MAT liability be reduced.

II *Reduction of 'book profits' by amounts credited on account of capital reserve and share premium account to profit and loss account vide the restructuring account*

1. The learned Commissioner of Income-tax (Appeals) erred in law and on facts by rejecting the claim of the appellant for adjustments to be made in book profits on account of credits in the profit and loss account relating to the capital reserve and share premium accounts.

2. Your appellant submits that the book profit should be reduced by the amounts of credit balance of capital reserve and share premium accounts credited/adjusted against the profit and loss account.

3. Your appellant prays that the claims of reduction in the book profit be allowed and amount of MAT liability be reduced.

III. *Failure to rectify the appellate order under section 154*

1. In the alternative, without prejudice, the learned Commissioner of Income-tax (Appeals) erred in law and on facts in rejecting the application under section 154 and as a consequence erred in not rectifying the appellate order dated March 5, 2019 which contained mistakes that were apparent on the face of records inasmuch as the grounds and issues in appeal had remained to be adjudicated in passing the said order.

2. Your appellant submits that the said order of the Commissioner of Income-tax (Appeals) dated March 5, 2019 suffered from apparent mistakes that were required to be rectified inasmuch as ground No. 1 and additional ground filed on February 27, 2019 requesting reduction

of amounts credited to the profit and loss account as per the Board for Industrial and Financial Reconstruction's order from "book profit" by the lower of unabsorbed depreciation and business loss as per section 115JB(2) which ground/plea were not adjudicated by the said order dated May 22, 2019.

3. Your appellant prays that the said appellate order be rectified under section 154 in pursuance of the application dated April 22, 2019 seeking the rectification of order.

Our adjudication

5 We have carefully heard the rival submissions and perused the relevant material on record including documents placed in the paper book. The case law cited during the course of hearing has been deliberated upon. The written submissions have duly been considered. Our adjudication to the subject matter of the present appeals would be as given in the succeeding paragraphs.

Applicability of section 115JB(2), *Explanation 1(vii)* vis-a-vis the Board for Industrial and Financial Reconstruction orders.

5.2 Upon a perusal of factual matrix as enumerated by us in the preceding paragraphs, it is undisputed position that the assessee's net worth has turned positive as on March 31, 2011. It is settled legal position that the manner of computation as provided in section 115JB would be complete code in itself and the computations were to be made strictly in the manner as provided therein. *Explanation 1(vii)* envisages reduction of profit of sick industrial company for the assessment year commencing on and from the assessment year relevant to the previous year in which the said company has become a sick industrial company under section 17(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 and ending with the assessment year during which the entire net worth of such company becomes equal to or exceeds the accumulated losses. Going by these provisions, the assessee is ineligible to claim the deduction of profit earned during the year while making computations under section 115JB.

5.3 So far as the arguments that the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 would prevail over other statute is concerned, we find that as noted in para 2.3 above, the assessee's net worth had turned positive on March 31, 2011. As per the letter dated November 21, 2012 of the hon'ble Directorate of Income-tax (Recovery) to the Board for Industrial and Financial Reconstruction, it is evident that the Board for Industrial and Financial Reconstruction had discharged the company from the purview of the Sick Industrial Companies (Special Provisions) Act, 1985 vide order dated August 16, 2011 on the ground that the

revival of the company had substantially been implemented and the net worth had turned positive. It had issued directions that unimplemented provisions of the sanctioned scheme, if any, would be implemented by the concerned agencies. In the aforesaid letter of the Board for Industrial and Financial Reconstruction, the decision of the Central Board of Direct Taxes on the proposed relief was conveyed to the Board for Industrial and Financial Reconstruction. Regarding relief under section 115JB, it was stated that the said relief would be available only till the net worth becomes positive. Since the assessee was discharged by the Sick Industrial Companies (Special Provisions) Act, 1985 on August 16, 2011 and its net worth turned positive by virtue of implementation of the revival scheme, the assessee would be precluded from relief under section 115JB in view of *Explanation 1(vii)* to section 115JB(2) and therefore, no relief would be available from the assessment year 2011-12 onwards. Therefore, the matter of applicability of section 115JB was delved into by the Central Board of Direct Taxes and it was proposed to restrict the relief under section 115JB as per the provisions contained therein. This being the case, the plea as raised by the learned authorised representative could not be accepted since the assessee's claim was specifically examined by the appropriate authorities and it was decided not to extend the benefit of the provisions of section 115JB after the assessee's net worth turned positive. Therefore, no relief could be granted to the assessee on this point. The case law of the hon'ble Madras High Court in *CIT* v. *Tube Investments of India Ltd.* [2012] 341 ITR 199 (Mad) is factually distinguishable since the assessee's net worth had not turned positive in that case and the relief as proposed by the Board for Industrial and Financial Reconstruction was not specifically rejected by the Central Board of Direct Taxes. Further, that case deal with deduction under section 43B to an entity which has taken over a sick company. Therefore, the said case law, in our opinion, is not applicable to the facts of present case. Consequently, I. T, A. No. 2709/Mum/2019 stands dismissed.

Reduction in book profits under section 115JB

The plea raised by the learned authorised representative are two folds, **6**
viz., (i) Amount credited to the profit and loss account on account of waiver of loan would not partake of the character of income and hence should not form part of book profits under section 115JB ; (ii) Adjustment in accumulated debit balance of the profit and loss account through restructuring account was to be disregarded for the purpose of computation of brought forward losses in terms of *Explanation 1(iii)* to section 115JB(2). As noted by us in para 4.2, the appellate order does not specifically deal with these issues rather the learned Commissioner of Income-tax (Appeals) has

placed reliance on the decision of the hon'ble apex court in *Apollo Tyres Ltd.* v. *CIT* (supra) to support the stand of the learned Assessing Officer.

6.2 In support of the stated submissions, the learned authorised representative has relied upon various binding judicial precedents, the copies of which has been placed on record. After going through the same, we find certain substance in the same. Further, as per the express provisions of *Explanation 1(iii)* to section 15JB(2), the assessee would be entitled for deduction of amount of loss brought forward or unabsorbed depreciation whichever is less as per the books of account. It is also evident that the assessee has claimed lower of depreciation and book loss while computing the book profits under section 115JB for the assessment year 2012-13 which has not been disturbed by the learned Assessing Officer in the assessment order for the assessment year 2012-13. Therefore, we find certain strength in these arguments.

6.3 We find that the issue of the aforesaid adjustments has not been delved upon either by the learned Assessing Officer or by the learned Commissioner of Income-tax (Appeals). Therefore, on the facts and circumstances, we deem it fit to remit the matter back to the file of the learned Commissioner of Income-tax (Appeals) to specifically adjudicate the issues raised under the appeal by way of a speaking order and bring on record correct factual matrix, in this respect. Needless to add that reasonable opportunity of hearing shall be granted to the assessee, who, in turn, is directed to substantiate his claim. The appeal stands allowed for statistical purposes.

Appeals for the assessment year 2014-15

7 The facts are in pari materia the same in the assessment year 2014-15 wherein an assessment has been framed under section 143(3) on December 30, 2016 on similar lines. The book profits has been determined at Rs. 26.45 crores. The stand of the learned Assessing Officer, upon confirmation by the learned Commissioner of Income-tax (Appeals) in similar manner, is under challenge before us. The assessee is before us with similar grounds of appeal in both the appeals. The facts and circumstances being the same as in the assessment year 2013-14, our adjudication in the assessment year 2013-14 shall mutatis mutandis apply to both these appeals also. Consequently, I. T. A. No. 2710/Mum/2019 stands dismissed whereas I.T.A. No. 4697/Mum/2019 stand allowed for statistical purposes.

Reasons for delay in pronouncement of order

8 Before parting, we would like to enumerate the circumstances which have led to delay in pronouncement of this order. The hearing of the matter was concluded on January 7, 2020 and in terms of rule 34(5) of the

Income-tax (Appellate Tribunal) Rules, 1963, the matter was required to be pronounced within a total period of 90 days. As per sub-clause (c) of rule 34(5), every endeavour was to be made to pronounce the order within 60 days after conclusion of hearing. However, where it is not practicable to do so on the ground of exceptional and extraordinary circumstances, the Bench could fix a future date of pronouncement of the order which shall not ordinarily be a day beyond a further period of 30 days. Thus, a period of 60 days has been provided under the extant rule for pronouncement of the order. This period could be extended by the Bench on the ground of exceptional and extraordinary circumstances. However, the extended period shall not ordinarily exceed a period of 30 days.

8.2 The record would show that a draft of the present order was prepared and sent through postal authorities vide receipt No. EM045083040IN dated March 20, 2020 for approval of the hon'ble Judicial Member at Ahmedabad. The package containing the draft orders was delivered at destination on March 23, 2020. It is quite evident that the order was well drafted before the expiry of 90 days and sent for approval of the other member immediately. However, unfortunately, on March 24, 2020, a nationwide lockdown was imposed by the Government of India in view of adverse circumstances created by pandemic Covid-19 in the country. The lockdown was extended from time to time which crippled the functioning of most of the Government departments including the Income-tax Appellate Tribunal (ITAT). The situation led to unprecedented disruption of judicial work all over the country and the draft order could not reach the hon'ble Judicial Member for approval despite lapse of considerable period of time. The situation created by pandemic Covid-19 could be termed as unprecedented and beyond the control of any human being. The situation, thus created by this pandemic, could never be termed as ordinary circumstances and would warrant exclusion of lockdown period for the purpose of aforesaid rule governing the pronouncement of the order. The draft order was subsequently been received at the first available opportunity and approved by the Bench and accordingly, the same is being pronounced now.

8.3 Faced with similar facts and circumstances, the co-ordinate Bench of this Tribunal comprising of the hon'ble President and the hon'ble Vice President, in its recent decision titled as *Dy. CIT* v. *JSW Ltd.* [2020] 79 ITR (Trib) 585 (Mumbai) (I. T. A. Nos. 6264 and 6103/Mum/2018, order dated May 14, 2020) held as under (page 591) :

> "However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on January 7, 2020, this order thereon is being pronounced

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

1. Here printed in italics.

directions, the expression 'ordinarily' has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any 'extraordinary' circumstances.

Let us in this light revert to the prevailing situation in the country. On March 24, 2020, the hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income-tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial work all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated May 6, 2020 read with the 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 words 'ordinarily', in the light of the above analysis of the legal position, the period during which lockout was in force is to excluded for the purpose of time-limits set out in rule 34(5) of the (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."

Driving strength from the ratio of the aforesaid decision, we exclude the period of lockdown while computing the limitation provided under rule 34(5) and proceed with pronouncement of the order.

Conclusion

I. T. A. Nos. 2709-10/Mum/2019 stand dismissed whereas I. T. A. Nos. 4696-97/Mum/2019 stand allowed for statistical purposes. This order is pronounced under rule 34(4) of the Income-tax (Appellate Tribunal) Rules, 1963, by placing the details of the same on the notice board. 9

[2020] 81 ITR (Trib) 61 (Kolkata)

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

ASSISTANT COMMISSIONER OF INCOME-TAX

v.

PADMA LOGISTICS AND KHANIJ PVT. LTD.

J. Sudhakar Reddy *(Accountant Member)* and
A. T. Varkey *(Judicial Member)*

May 22, 2020.

SS ▸ ITA 1961, ss 14A, 37 ; ITR 1962, r 8D
AY ▸ 2010-11
HF ▸ Assessee/Department

Loss—Set off and carry forward—Demerger—Accumulated loss and unabsorbed depreciation—Demerger—Pendency of application before High Court reported to Assessing Officer—Assessee filing nil revised return after order of High Court approving demerger—Right to file revised return not lapsing with issuance of intimation—All conditions stated in section 72A(4) read with section 2(19AA) fulfilled—Assessing Officer bound to accept revised return pursuant to scheme of demerger—Assessee entitled to set off and carry forward of accumulated losses and unabsorbed depreciation—Income-tax Act, 1961.

INCOME—EXPENDITURE INCURRED IN RELATION TO EARNING EXEMPT INCOME—STRATEGIC INVESTMENT—NOT DISALLOWABLE—OWN FUNDS OF ASSESSEE MORE THAN INVESTMENTS—NO DISALLOWANCE—DISALLOWANCE TO BE IN RELATION TO INCOME WHICH DOES NOT FORM PART OF TOTAL INCOME—INCOME-TAX ACT, 1961, S. 14A—INCOME-TAX RULES, 1962, R. 8D.

BUSINESS EXPENDITURE—RENT EXPENSES—COPIES OF RENTAL AGREEMENT AND EVIDENCE OF PAYMENT—FACT NOT CONTROVERTED—ALLOWABLE—INCOME-TAX ACT, 1961, S. 37.

The assessee and SYK filed petitions before the High Courts of Calcutta and Bombay for demerger of the vortal division of SYK under sections 391(2) and 394 of the Companies Act, 1956 with the assessee. The scheme of demerger was duly approved by the respective High Courts. The appointed date of the scheme was March 1, 2010, being the effective date of demerger, which fell within the relevant assessment year 2010-11. Pursuant to the scheme of merger the assessee filed a revised return for this year showing income of Rs. nil after getting approval of the annual general meeting of the assessee. The Assessing Officer held that there was no mention of the scheme of demerger pending before the High Court of Calcutta in the audited accounts of the assessee. The assessee had not filed the return of loss in time as prescribed under section 139(3) of the Income-tax Act, 1961. The assessee had filed a revised return after receipt of intimation under section 143(1) and hence did not fulfil the conditions as laid down in section 139(5) which required the filing of revised return prior to completion of the assessment. Both the demerging company and the resultant company had claimed the same loss resulting in double claim of set off and carry forward of losses pertaining to the demerged undertaking. The Commissioner (Appeals) allowed the claim of the assessee. On appeal :

Held, *(i) that along with the return filed under section 139(1), the assessee had filed the audited financials which revealed that the demerger application was pending before the High Court which fact was duly reported by the assessee. Therefore this reason of the Assessing Officer was factually incorrect.*

(ii) That section 139(3) stipulates that loss of previous year under the head "Income from business/profession" and under the head "Capital gains" cannot be carried forward unless the return of loss is submitted before the due date of filing the return under section 139(1). So, losses of earlier years for which return of loss needed to be filed could be carried forward only if the return was filed within the prescribed due date. The return was filed by the

assessee on September 28, 2010. At that time the assessee did not having any loss of the previous year to be carried forward. The vortel division of SYK stood vested with the assessee only by virtue of the High Court order and the assessee filed a revised return on June 9, 2011. The losses were not losses incurred by the assessee during the relevant previous year under the heads of income "Income from business/profession" or "Capital gains". The assessee had claimed the benefit of set off of losses and carry forward of losses of the demerged undertaking by virtue of section 72A(4) and not under section 72(1), section 73(2) section 73A(2) or sub-section (1) or sub-section (3) of section 74, or sub-section (3) of section 74A, being the sections mentioned in section 139(3). The Calcutta High Court had clearly stated that the losses of the demerged undertaking would be available to the resulting unit, being the assessee. Therefore, section 139(3) was not applicable to the facts of the case as contended by the Assessing Officer and therefore rejection of the revised return by the Assessing Officer was baseless. When the assessee filed the original return it could not predict the outcome of its application for demerger filed before the High Court and it was quite impossible for the assessee to file any return as contemplated under section 139(3). So, section 139(3) would not come in the way in the facts and circumstances of this case. Moreover, the assessee had filed a nil revised return and not a loss return as misunderstood by the Assessing Officer. In the revised return, the assessee had claimed the benefit of set off of business losses and unabsorbed depreciation losses brought forward from earlier years by SYK in respect of its vortal division and carried forward the balance unabsorbed losses pertaining to the demerged undertaking to subsequent years. The Assessing Officer had himself accepted that the assessee had computed the revised total income as nil after making adjustments on account of set off and carry forward of losses of the demerged undertaking pursuant to the scheme of demerger. The assessee had carried forward the balance unabsorbed depreciation to subsequent years. On such facts, the Assessing Officer erred in rejecting the revised return for this reason.

(iii) That the assessee filed return on September 28, 2010 and intimation under section 143(1) was issued on April 14, 2011 and the revised return of income was filed on June 9, 2011, after the High Court's order of demerger was passed on March 8, 2011 and April 21, 2011 with effect from the appointed date March 1, 2010. So it was clear that the assessee could not have filed the revised return claiming set off under section 72A(4) of the demerged company without the High Court's sanctioned the demerger scheme on March 8, 2011 and April 21, 2011. The intimation was issued by the Department under section 143(1) on April 14, 2011. So, the Assessing Officer by raising

this objection asked the assessee to do an impossible thing. The intimation under section 143(1) was not strictly an assessment. The right to file a revised return does not lapse with the issuance of intimation under section 143(1). And the assessment had subsequently been completed under section 143(3). Moreover, section 139(5) states that an assessee can file a revised return of income before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier. In the instant case, the assessee had furnished the revised return of income under section 139(5) on June 9, 2011. The last date for filing the revised return of income was March 31, 2012, being one year from the end of the relevant assessment year. And the assessment order under section 143(3) was passed on March 28, 2013. The return of income was filed on time by the assessee. Therefore the Assessing Officer was bound to accept the revised return filed by the assessee pursuant to the scheme of demerger sanctioned by the hon'ble High Courts.

Dalmia Power Ltd *v.* Asst. CIT [2020] 420 ITR 339 (SC) *applied.*

(iv) That all the conditions stated in section 72A(4) read with section 2(19AA) had been fulfilled. Since the assessee met all the requirements contained in the Act all the carried forward losses and unabsorbed depreciation in respect of the vortal undertaking were transferred, pursuant to section 72A(4) from the demerged company) to the resulting company with effect from the appointed date, i. e., March 1, 2010. The claim of the assessee was in accordance with law and the Assessing Officer erred in refusing to consider the revised return and the Commissioner (Appeals) had rightly allowed the claim of the assessee.

The assessee had earned dividend income of Rs. 77.50 lakhs exempt under section 10(34) and had suo motu disallowed a sum of Rs. 77,500 under section 14A. In the revised return the assessee had declared dividend income of Rs. 77,93,336 and suo motu disallowed a sum of Rs. 77,933 under section 14A. The Assessing Officer applied rule 8D of the Income-tax Rules, 1962 and computed an additional disallowance of Rs. 18,32,751 under section 14A. The Commissioner (Appeals) restricted the disallowance. On appeal :

Held, *that since the assessee had strategic investment in A the investments made in this company could not be brought into the ambit of disallowance under section 14A for the simple reason that the Supreme Court had not accepted the dominant object theory. The assessee's own funds were to the tune of Rs. 35,48,93,349 as compared to investments of only Rs. 20,55,90,500 as at the end of the year. The assessee was had sufficient funds of its own to invest in shares. And since the assessee had common funds consisting of its*

own funds and borrowed funds and if the assessee's own funds were sufficient to invest in non-business activities, a presumption was drawn that the investment was made out of the assessee's own funds. Thus, no disallowance under rule 8D(2)(ii) was warranted. Not all investments become the subject matter of consideration when computing disallowance under section 14A read with rule 8D. The disallowance had to be in relation to the income which did not form part of the total income and this could be done only by taking into consideration the investment which had given rise to this income which did not form part of the total income.

The assessee debited a sum of Rs. 30.75 lakhs as rent in its profit and loss account. Though according to assessee during the course of assessment proceedings, details of such rent debited were furnished before the Assessing Officer, the Assessing Officer opined that all the premises were not used for the assessee's business purposes since rent agreements were not produced and according to him, other concerns were also functioning on the same property and, therefore, disallowed a sum of Rs. 11.82 lakhs out of the total rent paid of Rs. 30.75 lakhs. The Commissioner (Appeals) gave partial relief to the assessee. On appeal :

Held, *that the assessee had paid rent and copies of the rental agreement and evidence of payment were available and this fact had not been controverted. The Assessing Officer had not refuted the claim of the assessee that the expenditure or rent paid was for the purpose of the business.*

Cases referred to :

Coates of India Ltd *v.* Dy. CIT (No. 1) [1995] 214 ITR 498 (Cal) (para 18)

CIT *v.* Himgiri Foods Ltd. [2010] 231 CTR 470 (Guj) (para 18)

CIT (Dy.) *v.* JSW Ltd. [2020] 79 ITR (Trib) 585 (Mum) (para 39)

CIT (Asst.) *v.* Rajesh Jhaveri Stock Brokers Pvt. Ltd. [2007] 291 ITR 500 (SC) (para 17)

CIT *v.* Reliance Utilities and Power Ltd. [2009] 313 ITR 340 (Bom) (para 34)

CIT *v.* Walfort Share and Stock Brokers P. Ltd. [2010] 326 ITR 1 (SC) (para 33)

Dalmia Power Ltd *v.* Asst. CIT [2020] 420 ITR 339 (SC) (para 19)

Marshall Sons and Co. (India) Ltd. *v.* ITO [1997] 223 ITR 809 (SC) (para 28)

Maxopp Investment Ltd. *v.* CIT [2018] 402 ITR 640 (SC) (para 33)

REI Agro Ltd. *v.* Dy. CIT [2013] 36 CCH 360 (Kol.-Trib.) (para 34)

I. T. A. No. 606/Kol/2018 (assessment year 2010-11).

Imokaba Jamir, Commissioner of Income-tax, Departmental representative, for the Department.

S. K. Tulsiyan, Advocate, for the assessee.

ORDER

The order of the Bench was pronounced by

1 A. T. VARKEY ***(Judicial Member)***.—This is an appeal filed by the Revenue against the order of the learned Commissioner of Income-tax (Appeals)-14, Kolkata, dated January 30, 2017 for the assessment year 2010-11 on the following grounds :

> "1. Whether on the basis of facts and in the circumstances of the case and in law the learned Commissioner of Income-tax (Appeals) erred in coming to the conclusion that the assessee is entitled to set-off/adjustment and carry forward of accumulated losses amounting to Rs. 1,21,58,014 and unabsorbed depreciation amounting to Rs. 20,61,04,026 of the demerged company ?
>
> 2. Whether on the basis of facts and in the circumstances of the case and in law the learned Commissioner of Income-tax (Appeals) erred in coming to the conclusion that the assessee is entitled to set-off/adjustment and carry forward of accumulated losses in this assessment year although the same has been claimed by the demerged company in its return of income for this assessment year ?
>
> 3. Whether on the basis of facts and in the circumstances of the case and in law the learned Commissioner of Income-tax (Appeals) erred in restricting the addition under section 14A up to Rs. 77,678 as against Rs. 18,32,751 without appreciating the observation of the Assessing Officer ?
>
> 4. Whether on the basis of facts and in the circumstances of the case and in law the learned Commissioner of Income-tax (Appeals) erred in restricting the addition on account of disallowance of rent up to Rs. 2,16,000 as against Rs. 11,82,000 without appreciating the observation of the Assessing Officer ?
>
> 5. That the appellant craves leave to add modify or alter any of the grounds of appeal and/or adduce additional evidence at the time of hearing of the case."

2 Ground Nos. 1 and 2 are in respect of set off/adjustment and carry forward of accumulated losses amounting to Rs. 1,21,58,014 and unabsorbed depreciation amounting to Rs. 20,61,04,026 of the demerged company.

Facts of the case are that the assessee-company filed the original return **3**
of income on September 28, 2010 showing a total income of Rs. 8,67,51,460. On September 13, 2010 and October 6, 2010, the assessee-company and M/s. Star Ya Kalakaar.com Limited (hereinafter referred to "M/s. SYK Ltd."), a company having its registered Office in Bombay filed a joint petition before the hon'ble High Court of Calcutta and the hon'ble High Court of Bombay for demerger of "Vortal" division of M/s. SYK Ltd. under sections 391(2) and 394 of the Companies Act, 1956 with the assessee-company. The said scheme of demerger was duly approved by the respective the hon'ble High Court at Calcutta and the hon'ble High Court of Bombay on March 8, 2011 and April 21, 2011 respectively. The appointed date of the scheme was March 1, 2010, being the effective date of demerger, which falls within the relevant assessment year 2010-11. Pursuant to the scheme of merger approved by the hon'ble High Courts, the assessee filed a revised return of income on June 9, 2011 showing income of Rs. nil after getting approval of the annual general meeting of the assessee-company. Subsequently, the case was selected for scrutiny assessment under CASS. Notices under section 143(2) and 142(1) of the Income-tax Act, 1961 (hereinafter referred to as the "Act") on August 29, 2011 was issued and served on the assessee and thereafter again a notice under section 142(1) of the Act dated October 16, 2012.

In response to the notices, the assessee appeared from time to time and **4**
submitted the required documents. During the course of assessment, it was brought to the notice of the Assessing Officer that pursuant to the scheme of demerger between the assessee and M/s. SYK Ltd.com Limited duly approved by the High Court of Calcutta and the hon'ble High Court of Bombay, the assessee-company had acquired the "Vortal" division from M/s. SYK Ltd. with effect from March 1, 2010 and copy of the hon'ble High Court orders was also submitted to him a copy of which is found enclosed at pages 69-155 of the paper book. All the necessary formalities in connection with the said scheme of demerger were completed as per law and the scheme was also found to be compatible in terms of section 2(19AA) of the Income-tax Act, 1961. It was also brought to the notice of the Assessing Officer that when the original return of income (ROI) was filed on September 28, 2010, since the hon'ble High Courts did not clear the demerger (supra), the impact of demerger and merger of "Vortal" division to the assessee-company by way of revised return could not be filed within the due date allowed by statute, yet the revised return taking into consideration the impact of demerger and the assessee acquiring "Vortal" division was filed at the earliest on June 9, 2011 declaring "nil" income after adjustment

of brought forward losses and unabsorbed depreciation relating to the "Vortal" division of M/s. SYK Limited merged with the assessee-company. Thus, as per the revised return of income the total income was revised at nil an adjustment of brought forward loss and under section 115JB tax payable was at Rs. 1,09,17,085. However, the Assessing Officer did not appreciate the submissions of the assessee and refused to take cognizance of the said revised return of income filed on June 9, 2011 wherein the assessee-company has claimed the set off of brought forward losses and unabsorbed depreciation of "Vortal" division merged into the assessee-company with effect from March 1, 2010 on the following grounds :

(i) There was no mention of the scheme of demerger pending before the hon'ble High Court of Calcutta in the audited accounts of the company.

(ii) The assessee has not filed the return of loss in time as prescribed under section 139(3) of the Act.

(iii) The assessee-company has filed a revised return after receipt of intimation under section 143(1) and hence do not fulfil the conditions as laid down in section 139(5) which required the filing of revised return prior to completion of the assessment.

(iv) Both the demerging company and the resultant company have claimed the same loss resulting in double claim of set off and carry forward of losses pertaining to the demerged undertaking.

5 Aggrieved, the assessee preferred an appeal before the learned Commissioner of Income-tax (Appeals) who allowed the appeal of the assessee. Aggrieved, the Revenue is in appeal before us.

6 The learned Departmental representative assailing the decision of the learned Commissioner of Income-tax (Appeals) pointed out that there was no mention of the scheme of demerger being pending before the hon'ble High Court in the corresponding audited accounts of the company as passed through the annual general meeting of the company, in any manner, may it be as an auditor's note, director's report, etc., so that the total income could be revised lawfully. He drew our attention to paragraph 23.2 page 10 of the assessment order to the contentions of the Assessing Officer and submitted that the action of the Assessing Officer is correct. Thereafter, the learned Departmental representative further submitted that the assessee has not filed the return of loss in time as prescribed under section 139(3) of the Act, hence the return filed on June 9, 2011 was not accepted by the Assessing Officer and referred to paragraph 23.1 page 11 of the assessment order and submitted that the Assessing Officer could not have accepted the revised return which was a correct action. The learned

Departmental representative further submitted that the assessee-company has filed a revised return after intimation under section 143(1) dated April 14, 2011 was passed against the assessee and hence the revised return under section 139(5) of the Act was not filed on time and referred our attention to paragraphs 23.4 page 12 of the assessment order and submitted that the Assessing Officer could not have accepted the revised return which was belatedly filed. The learned Commissioner of Income-tax, Departmental representative also pointed out to us that both the demerging company and the resultant company have claimed the same loss resulting in double claim of set off of losses and carry forward of losses pertaining to the demerged undertaking and drew our attention to paragraph 22 page 10 of the assessment order. And thus, he contended that the impugned order of the learned Commissioner of Income-tax (Appeals) needs to be reversed and the Assessing Officer's order to be sustained.

Per contra, the learned authorised representative supporting the decision of the learned Commissioner of Income-tax (Appeals) and filed a detailed written submission and took pains in controverting the issues pointed out by the learned Commissioner of Income-tax, Departmental representative which we would discuss infra and also drew our attention to various case law to controvert the submission of the learned Commissioner of Income-tax, Departmental representative and he does not want us to interfere with the order of the learned Commissioner of Income-tax (Appeals). 7

We have heard rival the submissions and gone through the facts and circumstances of the case. We note that the assessee-company filed return under section 139(1) of the Act for the relevant assessment year on September 28, 2010 showing income of Rs. 8,67,51,460. Thereafter, the Department gave intimation to the assessee under section 143(1) dated April 14, 2011 accepting the returned income. We note that before filing of the return, the assessee (which is a company registered at Kolkata) filed an application on September 13, 2010 jointly with M/s. Staryakalakaar.com Limited (Bombay) before the hon'ble High Court of Calcutta and the hon'ble High Court of Bombay for demerger of "Vortal" division of M/s. Staryakalakar.com Ltd. (henceforth referred to M/s. SYK Limited) under sections 391(2) and 394 of the Companies Act, 1956. Since the application for demerger was filed before the return of income (hereinafter "ROI") originally on September 28, 2010 and meanwhile there was no order from the hon'ble High Courts (before the date of filing of return of income), this plan of action by the assessee-company was duly reported in the audited accounts filed along with the return on September 28, 2010 which fact is 8

discernible on a perusal of schedule 18, note 5 of the notes of the accounts, which is placed at page 73 of the paper book. The relevant para is seen which is duly reproduced below :

> "An application has been filed with the hon'ble High Court at Kolkata in respect of merger of 'Vortal Undertaking' of M/s. Star Ya Kalakarcom Ltd. with the company. As per the proposed scheme, the date of merger is effective March 1, 2010. In view of the above application being pending, no adjustments have been made for incorporation of the financial statements of the aforesaid 'Vortal Undertaking' in the books of the company and shall be done on receipt of requisite approval as per statute."

9 It is noted that the scheme of demerger was duly approved by the hon'ble High Court of Calcutta and the hon'ble High Court of Bombay on March 8, 2011 and April 21, 2011 respectively. The appointed date of the scheme was fixed on March 1, 2010, being the effective date of demerger, and falls within the relevant assessment year (AY 2010-11). Since the order of the hon'ble High Courts were passed only on March 8, 2011 and April 21, 2011, the assessee filed a revised return of income on June 9, 2011 showing income of Rs. nil after getting the approval of the annual general meeting of the assessee-company. Subsequent to the filing of the revised returns by the assessee, the case of the assessee was selected for scrutiny assessment under CASS. During the course of assessment, it was explained to the Assessing Officer that pursuant to the scheme of demerger between the assessee and M/s. Star Ya Kalakaar.com Limited duly approved by the hon'ble High Court of Calcutta and the hon'ble High Court of Bombay, the assessee-company had acquired the "Vortal" division from M/s. Star Ya Kalakaar.com Limited with effect from March 1, 2010 and since the orders of the hon'ble High Court were passed only in March/April, 2011, the assessee-company after receipt of the order, immediately started preparing revised accounts taking into consideration the impact of demerger (revised audited account dated June 8, 2011) and filed the revised returns prescribed under section 139(5) of the Act declaring "nil" income on June 9, 2011 after adjustment of brought forward losses relating to the demerged undertaking (Vortal division of M/s. Star Ya Klakaar.com Ltd.). Thereafter, on August 29, 2011, the assessee's case was selected for scrutiny and the Assessing Officer issued the statutory notice under sections 143(2) and 142(1) of the Act and the assessee participated in the assessment proceedings. However, the Assessing Officer refused to accept the revised return for the following reasons :

(i) Since there was no mention of the scheme of demerger pending before the hon'ble High Court of Calcutta in the audited accounts of the assessee-company.

(ii) The revised return was filed by the assessee after its original return was processed under section 143(1) of the Act.

(iii) Since the revised return was not filed within the time prescribed under section 139(5).

(iv) Since M/s. SYK in its return of income has taken the benefit of loss of its demerged Vortal Division, and the assessee claiming the same loss through the revised return amounted to double deduction. Therefore, the Assessing Officer did not allow the set off/adjustment and carry forward of accumulated losses and unabsorbed depreciation of the demerged company. On appeal the learned Commissioner of Income-tax (Appeals) accepted the contention put forth by the assessee and allowed the claim of the assessee. The Revenue has assailed the action of the learned Commissioner of Income-tax (Appeals). We will now deal with the Assessing Officer's reason for refusal of considering the revised return of income filed on June 9, 2011.

(a) First of all, the Assessing Officer did not accept the revised return for the reason that there was no mention in the audited accounts of the company of the scheme of demerger pending before the hon'ble High Court of Calcutta. According to us, the Assessing Officer was factually wrong in making this assertion. In this respect, we note that along with the return of income filed under section 139(1) of the Act dated September 28, 2010, the assessee filed the audited financials and a perusal of schedule 18, note 5 to accounts placed at page 73 of the paper book reveals that the demerger application was pending before the hon'ble High Court which fact was duly reported by the assessee-company which is reproduced as under :

> "An application has been filed with the hon'ble High Court at Kolkata in respect of merger of 'Vortal Undertaking' of M/s. Star Ya Kalakar.com Ltd. with the company. As per the proposed scheme, the date of merger is effective March 1, 2010. In view of the above application being pending, no adjustments have been made for incorporation of the financial statements of the aforesaid 'Vortal Undertaking' in the books of the company and shall be done on receipt of requisite approval as per the statute."

So, we find that this reason of the Assessing Officer is factually incorrect and so it fails.

(b) Coming to the next reason of the Assessing Officer for not accepting the revised return was that since the assessee has not filed the return of loss within time as prescribed under section 139(3) of the Act, he did not accept the revised return. We note that section 139(3) of the Act reads as under :

> "If any person who has sustained a loss in any previous year under the head 'Profits and gains of business or profession' or under the head 'Capital gains' and claims that the loss or any part thereof should be carried forward under sub-section (1) of section 72, or sub-section (2) of section 73, or sub-section (2) of section 73A or sub-section (1) or sub-section (3) of section 74, or sub-section (3) of section 74A, he may furnish, within the time allowed under sub-section (1), a return of loss in the prescribed form and verified in the prescribed manner and containing such other particulars as may be prescribed, and all the provisions of this Act shall apply as if it were a return under sub-section (1)."

10 Thus, from a reading of the above provision it is clear that section 139(3) of the Act stipulates that loss of previous year under the head "Income from business/profession" and under the head "Capital gains" cannot be carried forward unless the return of loss is submitted before the due date of filing the return under section 139(1) of the Act. So, losses of earlier years for which return of loss need to be filed within the prescribed due date then only it can be carried forwarded to subsequent years.

11 However, it has to be kept in mind that this sub-section (3) of section 139 of the Act applies to the assessee who wants to avail of it while filing the return of income within the stipulated time prescribed under section 139(1) of the Act. In the present case, the return of income was filed by the assessee on September 28, 2010. At that time the assessee was not having any loss of the previous year to be carried forward. Only after the demerger order of Vortel division of M/s. SYK Ltd. stood vested with the assessee-company by virtue of the hon'ble High Court order in March/April, 2011, the assessee filed revised return of income on June 9, 2011 and the said losses does not pertain to the losses incurred by the assessee during the relevant previous year under the heads of income—(a) Income from business/profession, (b) Capital gains.

12 We note that in this case the assessee has claimed the benefit of set off of losses and carry forward of losses of the demerged undertaking by virtue of section 72A(4) of the Act and not under section 72(1), section 73(2) section 73A(2) or sub-section (1) or sub-section (3) of section 74, or sub-section (3) of section 74A, being the sections mentioned in section 139(3) of the Act.

Section 72A(4) of the Income-tax Act, 1961 reads as under :

"Notwithstanding anything contained in any other provisions of this Act, in the case of a demerger, the accumulated loss and the allowance for unabsorbed depreciation of the demerged company shall—

(a) where such loss or unabsorbed depreciation is directly relatable to the undertakings transferred to the resulting company, be allowed to be carried forward and set off the hands of the resulting company ;

(b) where such loss or unabsorbed depreciation is not directly relatable to the undertakings transferred to the resulting company, be apportioned between the demerged company and the resulting company in the same proportion in which the assets of the undertakings have been retained by the demerged company and transferred to the resulting company, and be allowed to be carried forward and set-off in the hands of the demerged company or the resulting company, as the case may be."

Sub-section (4) of section 72A provides that the eligible losses and unabsorbed depreciation of the demerged company shall be allowed to be carried forward and set off in the hands of the resulting company.

We have taken note of the order of the hon'ble High Court which is found enclosed at pages 69-155 of the paper book. Here we note at page 113 of the order wherein the hon'ble High Court at Calcutta has clearly stated that the losses of the demerged undertaking will be available to the resulting unit, being the assessee-company in the present case. The relevant extract of the order is reproduced below : **13**

"The Vortal Division of Star Ya Kalakaar.com Limited, the demerged company, has unabsorbed business losses and unabsorbed depreciation as per the Income-tax Act, 1961 eligible to be carried forward and set off under section 72A(4) of the Income-tax Act, 1961 in the hands of the resulting company, i. e., Padma Logistic and Khanij Private Limited as follows."

Hence, we are of the opinion that section 139(3) of the Act is not applicable to the facts of the case as contended by the Assessing Officer and therefore this ground raised by the Assessing Officer in rejecting the revised return filed by the assessee is baseless.

Another angle to it is that when the assessee filed the original return of income on September 28, 2010, the application for demerger was only filed before the hon'ble High Court and it was only in the pipe line and the **14**

hon'ble High Court sanctioned the demerger scheme only in March/April, 2011, so the assessee filed revised return of income on June 9, 2011. So, when the assessee filed the original return of income on September 28, 2010, it cannot predict the outcome of its application for demerger filed before the hon'ble High Court and it is quite impossible for the assessee to file any return as contemplated under section 139(3) of the Act. So, section 139(3) of the Act would not come in the way in the facts and circumstances of this case.

15 Moreover, it was brought to our notice by the learned authorised representative that in the instant case, the assessee had filed a "nil" revised return of income and not a loss return of income as misunderstood by the Assessing Officer. In the revised return of income filed by the assessee on June 9, 2011, the assessee has claimed the benefit of set off of business losses and unabsorbed depreciation losses brought forward from earlier years by SYK Ltd. in respect of its "Vortal Undertaking" and carried forward the balance unabsorbed losses pertaining to the said demerged undertaking to subsequent years. A copy of acknowledgment of the return is found enclosed at page 202 of the paper book. This fact is also evident from reading the assessment order itself, at para 18, page 5 of the assessment order. We note that at page 5, para 18, the Assessing Officer has reproduced the computation of income contained in the revised return of income filed on June 9, 2011. In the said para, the Assessing Officer has himself accepted that the assessee has computed revised total income as nil after making adjustments on account of set off and carry forward of losses of the demerged undertaking pursuant to the scheme of demerger. We also note that the assessee had carried forward the balance unabsorbed depreciation to subsequent years. On such facts, we find that the Assessing Officer erred in his understanding on this issue and erred in rejecting the revised return for this reason.

16 The other reason given by the Assessing Officer to reject the revised return was that the assessee-company has filed the revised return after receipt of intimation under section 143(1) of the Act and hence do not fulfil the conditions as laid down in section 139(5) of the Act which provision required the filing of revised return prior to completion of assessment. We note that in the instant case the assessee filed return of income on September 28, 2010 and intimation under section 143(1) was issued on April 14, 2011 and the revised return of income was filed on June 9, 2011, after the hon'ble High Court's order of demerger was passed on (March 8, 2011 and April 21, 2011) with effect from the appointed date March 1, 2010. So from the dates of events given above, it is clear that the assessee could not

have filed the revised return claiming set off under section 72A(4) of the Act of the demerged company without the hon'ble High Court's sanctioned the demerger scheme on March 8, 2011 and April 21, 2011. The intimation was issued by the Department under section 143(1) of the Act on April 14, 2011. So, the Assessing Officer by raising this objection is asking the assessee to do an impossible thing. Be that as it may be intimation under section 143(1) of the Act is not strictly assessment, when the Assessing Officer has passed in the relevant year scrutiny assessment under section 143(3) of the Act.

17 According to us, the right to file a revised return of income does not lapse with the issuance of intimation under section 143(1) of the Act. Intimation under section 143(1) of the Act cannot be said to be a "completion of assessment" and more so, when assessment has subsequently been completed under section 143(3) of the Act. Reliance is placed on the judgment of the hon'ble Supreme Court in the case *Asst. CIT* v. *Rajesh Jhaveri Stock Brokers Pvt. Ltd.* [2007] 291 ITR 500 (SC) wherein it was held that (page 509) :

> ". . . The expressions 'intimation' and 'assessment order' have been used at different places. The contextual difference between the two expressions has to be understood in the context the expressions are used. The assessment is used as meaning sometimes 'the computation of income', sometimes 'the determination of the amount of tax payable' and sometimes 'the whole procedure laid down in the Act for imposing liability upon the taxpayer'. In the scheme of things, as noted above, the intimation under section 143(1)(a) cannot be treated to be an order of assessment."

18 The hon'ble Calcutta High Court in *Coates of India Ltd* v. *Dy. CIT (No. 1)* [1995] 214 ITR 498 (Cal) held that where the order under section 143(1)(a) is followed by a regular assessment under section 143(3), the order under section 143(1)(a), in so far as it is contrary to the regular assessment under section 143(3) ceases to be executable and becomes ineffective. Further, in *CIT* v. *Himgiri Foods Ltd.* [2010] 231 CTR 470 (Guj) it was held by the hon'ble High Court of Gujarat that the provision mandates that if after the issuance of intimation, a revised return is furnished by an assessee under sub-section (5) of section 139 it is incumbent upon the Assessing Officer to process the revised return and amend the intimation issued under section 143(1)(a) of the Act on the basis of the revised return. At this stage there is no question of going into the validity of the return filed under section 139(5) of the Act if the revised return is filed within the prescribed period of limitation. An intimation under section 143(1)(a) of the Act

cannot be equated with an assessment framed under section 143(3) of the Act and the Assessing Officer cannot refuse to process the revised return and modify the intimation in accordance with section 143(1B) of the Act.

19 Further, reliance is also placed on the judgment of the hon'ble Supreme Court in the case of *Dalmia Power Ltd.* v. *Asst. CIT* [2020] 420 ITR 339 (SC) pronounced on December 18, 2019 wherein on identical facts it was held that

> "It is incumbent upon the Department to assess the total income of successor in respect of the previous assessment year after the date of succession. Thus, where the predecessor companies/transferor companies had been succeeded by the appellants-transferee companies who had taken over their business along with all assets, liabilities, profits and losses, etc., in view of provisions of section 170(1), the Department was required to assess the income of the appellants after taking into account the revised returns filed after amalgamation of companies."

20 In view of the above judgment, the Assessing Officer was bound to accept the revised return filed by the assessee pursuant to the scheme of demerger sanctioned by the hon'ble High Courts. Section 139(5) of the Act reads as under :

> "If any person, having furnished a return under sub-section (1) or in pursuance of a notice issued under sub-section (1) of section 142 discovers any omission or any wrong statement therein, he may furnish a revised return at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier."

21 Moreover, section 139(5) of the Act states that an assessee can file a revised return of income before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier. In the instant case, the assessee had furnished the revised return of income under section 139(5) of the Act on June 9, 2011. The last date of filing the revised return of income was March 31, 2012, being one year from the end of the relevant assessment year. And the assessment order under section 143(3) of the Act was passed on March 28, 2013. As such, the return of income was filed on time by the assessee. However, the Assessing Officer has opined that since the intimation under section 143(1) of the Act was passed on April 14, 2011, the assessee lost its right to file a revised return thereafter, is on wrong understanding of law and so the reason of the Assessing Officer fails.

22 So in the light of the case law discussed (supra), we are of the opinion that the intimation issued under section 143(1) of the Act does not preclude the assessee from filing a revised return of income. More so, when the assessment order under section 143(3) of the Act was also passed in the present case of the assessee, thus the intimation under section 143(1) of the Act loses its importance. And we find in this case the assessee has rightly filed the revised return of income under section 139(5) of the Act within the stipulated time frame as per statute. And as such, this contention of the Assessing Officer is incorrect in law.

23 The other reason given by the Assessing Officer to reject the revised return of income was that both the demerging company and the resultant company have claimed the same loss resulting in double claim of set off and carry forward of losses pertaining to the demerged undertaking. On this allegation of the Assessing Officer, we note from the submission of the learned authorised representative that in the present case, the Assessing Officer has erred in his understanding that both the assessee and SYK Limited has claimed the business loss and unabsorbed depreciation of the demerged "Vortal undertaking" in the current year. The learned authorised representative submitted that the Assessing Officer noted that the assessee has filed a revised return of income claiming the benefit of set off and carry forward of losses pertaining to the demerged undertaking and also noted that M/s. SYK Ltd. had also claimed the same benefit of set off and carry forward of losses pertaining to the demerged undertaking in the original return filed by the said company. Hence, he opined that the benefit of set off and carry forward of losses pertaining to the demerged undertaking was taken twice, both by the resulting company (assessee) and the demerged company (M/s. SYK Ltd.). Accordingly, the revised return filed by the assessee was rejected by the Assessing Officer.

24 Against this objection of the Assessing Officer the learned authorised representative submitted that M/s. Star Ya Kalakaar.com Limited (SYK) has not taken the benefit of unabsorbed business loss or unabsorbed depreciation relating to the "Vortal Undertaking" as alleged by the Assessing Officer. The entire losses of the demerged undertaking were transferred to the resulting company on March 1, 2010 by virtue of the hon'ble High Court orders. In this regard, the learned authorised representative pointed out to our attention a copy of the letter written by M/s. SYK Ltd. to its Assessing Officer, namely, Circle-9(3), Mumbai, which is found placed at pages 61-68 of the paper book wherein it has been clearly written that pursuant to the scheme of demerger being approved by the hon'ble High Courts, the brought forward losses of the demerged undertaking gets

transferred to the resulting company (here the assessee-company) and thus to that extent, the company (M/s. SYK) shall not be entitled to take the benefit of brought forward losses relating to the demerged undertaking. Along with the letter, the company (M/s. SYK Ltd.) also submitted the revised computation of income for the assessment year 2010-11 wherein the business losses and unabsorbed depreciation relating to the demerged "Vortal undertaking" was not carried forward to the subsequent years. M/s. SYK Ltd. also submitted the computation for the immediately succeeding assessment year 2011-12 wherein again the business losses and unabsorbed depreciation relating to the demerged "Vortal undertaking" was not taken into account. The relevant extract of the letter of M/s. SYK Ltd. submitted to its Assessing Officer is reproduced below :

> "Our company had brought forward losses as stated in annexure 'A' of the Vortal Division which, pursuant to section 72A(4) of the Income-tax Act, 1961 were retransferred to the resultant company M/s. Padma Logistic and Khanij Pvt. Ltd. during the assessment year 2010-11 since the demerger scheme took effect from the date of merger, i. e., March 1, 2010.
>
> We had filed our original return for the assessment year 2010-11 on October 4, 2010. By this time the final order of the hon'ble High Courts as stated above had not been received and hence the effect of the scheme of demerger could not be incorporated in the return of income. A suitable letter has been submitted to our Assessing Officer informing him about the scheme and its effects on carry forward losses.
>
> We hereby confirm that with effect from the assessment year 2010-11 we are not entitled to any benefit of brought forward losses of the Vortal undertaking since the same is statutorily and compulsorily transferred to M/s. Padma Logistic and Khanij Pvt. Ltd. With a view to explain the aforesaid issues, we are deputing our authorised representative Mr. Ravindra Khandelwal to appear before your goodself and explain the scheme and its impact along with all relevant documents to remove any ambiguity in the matter and the compatibility of the scheme with the Income-tax Act, 1961."

25 Further, we note that in response to the summons issued by the Assessing Officer of the assessee to M/s. SYK Ltd, Shri Ravindra Khandelwal, FCA and authorised representative of M/s. SYK Ltd. also personally appeared before the Assessing Officer and confirmed that M/s. SYK Limited has not claimed set off or carry forward of brought forward losses or unabsorbed depreciation attributable to the demerged undertaking. This

fact is evident from the abstract of the order-sheet enclosed at pages 57-58 of the paper book. Moreover, vide submissions dated March 14, 2011 (refer pages 17-21 of the paper book), the assessee has also submitted a letter received from M/s. SYK Ltd. addressed to the assessee's Assessing Officer encompassing the facts of demerger and confirming that the brought forward losses of the demerged unit is retransferred to M/s. Padma Logistics and Khanij Pvt Ltd. during the assessment year 2010-11 since the demerger scheme took place with effect from March 1, 2010. In the said letter it was also confirmed that with effect from the assessment year 2010-11, M/s. SYK Ltd. is not entitled to any benefit of brought forward losses of the demerged unit (refer pages 18-21 of the paper book). Further, we note that the brought forward losses of the demerged unit was not carried forward by M/s. SYK Limited to the subsequent years, from the enclosed income-tax return of M/s. SYK Ltd. for the immediately succeeding year, being the assessment year 2011-12, found placed at pages 195-196 and 178-200 of the paper book. From a perusal it is evident that the losses of the demerged unit was neither set off during the year nor was carried forward to the subsequent years.

26 However, the Assessing Officer did not accept and was of the opinion that since M/s. SYK Limited has not filed a revised return forgoing the set off and carry forward of brought forward losses and unabsorbed depreciation attributable to the demerged undertaking he held that both the assessee-company and M/s. SYK Ltd. has taken the benefit of set off and carry forward of brought forward losses and unabsorbed depreciation attributable to the demerged undertaking and hence denied the claim of set off of losses of the demerged undertaking to the assessee.

27 However, it was brought to our notice that the demerged entity, namely, M/s. SYK has filed a revised computation for the assessment year 2010-11, being the relevant year, before its jurisdictional Assessing Officer without taking into consideration the brought forward claims and allowances pertaining to the demerged unit. So, the Assessing Officer's allegation/objection cannot sustain. Moreover, it is noted that when the assessee has brought to the notice of the Assessing Officer the aforesaid facts, the Assessing Officer being a quasi-judicial authority ought to have been fair and just. In this advanced technological era, the Assessing Officer (Kolkata) could have cross checked the veracity of the contention of M/s. SYK that they have filed a revised return of income forgoing the claims of "Vortal division" for the assessment year 2010-11 without doing that the Assessing Officer has stuck to his allegation which action of the Assessing Officer cannot be countenanced. And in any way the Department has the power

vested in them to ensure that M/s. SYK does not get the benefit of M/s. Vortal division for the assessment year 2010-11 after it has filed the revised returns disclaiming the benefits. In the light of the above discussion, we do not find any merit in the objection raised by the Assessing Officer. Hence, there was no double claim as alleged by the Assessing Officer since the demerged company (SYK Ltd.) has forsaken its claim with respect of brought forward losses of the demerged unit.

28 In the facts and in the circumstances discussed supra, we note that the scheme of arrangement enabling the demerger was drawn and approved by the respective board of directors of the assessee-company and M/s. SYK and submitted under sections 391(2) and 394 of the Indian Companies Act, 1956 and was duly sanctioned by the hon'ble High Courts at Calcutta (on March 8, 2011) and Bombay (on April 21, 2011) specifying the appointed date as March 1, 2010. The question of relevancy of effective date/ appointed date in a scheme of merger sanctioned by the hon'ble High Court, the hon'ble Supreme Court held in the case of *Marshall Sons and Co. (India) Ltd.* v. *ITO* [1997] 223 ITR 809 (SC) ; [1997] 2 SCC 302, the hon'ble apex court held that once the scheme had been sanctioned with effect from a particular date, it is binding on everyone including the statutory authorities. The scheme of demerger, as defined under the Income-tax Act, 1961 under section 2(19AA), is summarised as follows :

"As per section 2(19AA) of the Act 'demerger' in relation to companies means the transfer of the undertaking in the following manner :

(i) All the property of the undertaking, being transferred by the demerged company, immediately before the demerger becomes the property of the resulting company by virtue of the demerger ;

(ii) All the liabilities relatable to the undertaking, being transferred by the demerged company, immediately before the demerger, become the liabilities of the resulting company by virtue of the demerger.

(iii) The property and the liabilities of the undertaking or undertakings begin transferred by the demerged company are transferred at values appearing in its books of account immediately before the demerger.

(iv) The resulting company issues, in consideration of the demerger, its shares to the shareholders of the demerged company on a proportionate basis.

(v) The shareholders holding not less than three fourths in value of the shares in the demerged company (other than shares already

held therein immediately before the demerger, or by a nominee for, the resulting company or, its subsidiary) become shareholders of the resulting company or companies by virtue of the demerger, otherwise than as a result of the acquisition of the property or assets of the demerged company or any undertaking thereof by the resulting company ;

(vi) The transfer of the undertaking is on a going concern basis.

29 Once demerger is sanctioned by the hon'ble High Court the enabling provision is section 72A of the Act, which allows carry forward and set off of accumulated loss and unabsorbed depreciation allowance in the cases of amalgamation or demerger, etc. Sub-section (4) of section 72A provides that in the case of a demerger is compatible to the scheme as envisaged and defined under section 2(19AA) of the Act, the eligible accumulated loss and the allowance for unabsorbed depreciation of the demerged company shall be allowed to be carried forward and set off in the hands of the resulting company.

30 In the instant case, all the conditions stated in section 72A(4) read with section 2(19AA) of the Act has been fulfilled. In view of the same, the assessee-company is eligible to claim the set off of brought forward losses transferred from the demerged company M/s. SYK. Since the assessee-company meets all the requirements contained in the Income-tax Act, 1961, all the carried forward losses and unabsorbed depreciation in respect of M/s. Vortal undertaking were transferred, pursuant to section 72A(4) of the Act, from the demerged company (M/s. Star Ya Kalakaar.Com Limited) to the resulting company (M/s. Padma Logistic and Khanij Private Limited) with effect from the appointed date, i. e., March 1, 2010. The claim of the assessee is as per law and the Assessing Officer erred in refusing to consider the revised return of income so, the learned Commissioner of Income-tax (Appeals) rightly allowed the claim of the assessee and, therefore, ground Nos. 1 and 2 raised by the Revenue lacks merit and, therefore, dismissed.

31 Ground No. 3 of the Revenue's appeal is against the action of the learned Commissioner of Income-tax (Appeals) in restricting the addition under section 14A up to Rs. 77,678 as against Rs. 18,32,751 without appreciating the observation of the Assessing Officer. Briefly stated facts are that on perusal of the original computation of income, the Assessing Officer noted that the assessee has earned dividend income of Rs. 77,50,000, exempt under section 10(34) of the Act and has suo motu disallowed a sum of Rs. 77,500 under section 14A of the Act. However, in the revised return of income filed on June 9, 2011, the assessee has declared dividend income

of Rs. 77,93,336 and suo motu disallowed a sum of Rs. 77,933 under section 14A of the Act. The Assessing Officer opined that section 14A of the Act provides for disallowance of the expenditure in relation to income which does not form part of the total income and applied rule 8D and computed an additional disallowance of Rs. 18,32,751 under section 14A of the Act as follows :

	(Rs.)
Rule 8D(2)(i) Expenditure directly relating to exempt income	77,500
Rule 8D(2)(i) Amount of expenditure by way of interest	9,58,898
Rule 8D(2)(i) 0.5% of average value of investments	8,72,853
Total	19,10,251
Less : Amount suo motu disallowed by the assessee	77,500
	18,32,751

32 Aggrieved, the assessee preferred an appeal before the learned Commissioner of Income-tax (Appeals) who gave relief to the assessee by holding as under :

"The Assessing Officer, in paragraph 26.1.3 of the assessment order has stated that :

'Whereas, as per the provision of section 14A of the Act, there are laid down rules to be adopted to compute the amount of expenses to have been involved to earn such exempted income for disallowance. It is specifically stated in rule 8D of the Income-tax Rules, 1962.'

It thus appears that the Assessing Officer was of the view that the provisions of section 14A are mandatorily required to be adopted in computing this disallowance under section 14A of the Income-tax Act, 1961. This is not correct. The provisions of section 14A can be invoked only if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under the Act.

There is no doubt that the assessee has earned dividend income amounting to Rs. 77,50,000 which is exempt from tax and therefore, expenses in connection with such exempt income ought to be disallowed. The assessee has represented that the investments made by the assessee in shares of Aryan Mining and Trading Corporation Pvt. Ltd., Electro Steels Castings Limited, Ganhitya Housing (P.) Limited and Ganit Pragnaya Housing (P.) Limited made during the year were strategic in nature and hence, on the basis of various citations referred to by the assessee in its representation, could not be brought under

the ambit of disallowance under section 14A. The claim of the assessee appears authentic to some extent. As far as investments in Aryan Mining and Trading Corporation Pvt. Ltd. is concerned, the same appears to be strategic in nature. From the audited statement of accounts of the assessee it is apparent that most of the income of the assessee in the assessment year under consideration is arising out of sale of iron ore and Aryan Mining and Trading Corporation Pvt. Ltd. is a company which is engaged in the mining of iron ore. However, with respect to other investments, the assessee has not been able to properly substantiate that the investment is strategic in nature.

Such other investments cannot be treated as strategic one since they, primarily, do not sync with the business of the assessee. The assessee has claimed that its company is engaged in the business of mining which is evident from the audited statement of accounts and at least one investment, i. e., investment made in Aryan Mining and Trading Corporation Pvt. Ltd. amounting to Rs. 18,88,20,000 (previous year Rs. 12,92,50,000) is a strategic one. Therefore, other investments made apart from this investment are perhaps not strategic and hence provisions of section 14A ought to be applied.

Further, from the audited statement of accounts it is evident that the self-owned funds of the assessee-company are in excess of Rs. 35 crores whereas the investments are as at the end of the year amount to Rs. 20.56 crores. Therefore, the claim of the assessee that the availability of interest-free funds with the assessee is much more than the amount of investment is correct. Further, as far as unsecured loans taken by the assessee is concerned on which the assessee has paid interest, despite increase in investments, have fallen from Rs. 313 lakhs as at the beginning of the year to Rs. 48 lakhs as at the end of the, year which shows that the additional investment made during the year is out of self-owned funds of the assessee-company. Thus there should be no disallowance on the interest paid by the assessee.

In the light of the aforesaid discussion, I hereby limit disallowance under section 14A to investments made by the company in companies other than investment made in Aryan Mining and Trading Corporation Pvt. Ltd. as per follows :

Particulars	*Rs.*
Opening investments (other than investment made in Aryan Mining and Trading Corporation Pvt. Ltd.	1,43,00,500

Closing investments (other than investment in Aryan Mining and Trading Corporation Pvt. Ltd.	1,67,70,500
Total	3,10,71,000
Average thereof	1,55,35,500
½% thereof	77,678

Hence I limit the disallowance to Rs. 77,678 and the balance amount of disallowance is not sustained."

33 Having heard both the parties on this issue, we do not subscribe to the reason given by the learned Commissioner of Income-tax (Appeals) that since the assessee had strategic investment in the M/s. Aryan Mining and Trading Corporation Ltd., the investments made in this company cannot be brought into the ambit of disallowance under section 14A of the Act for the simple reason that the hon'ble Supreme Court in *Maxopp Investment Ltd.* v. *CIT* [2018] 402 ITR 640 (SC) ; [2018] 91 taxmann.com 154 (SC) has not accepted the "dominant object" theory canvassed by the assessees and held as under (pages 664-666 of 402 ITR) :

"We have given our thoughtful consideration to the argument of counsel for the parties on both sides, in the light of various judgments which have been cited before us, some of which have already been taken note of above.

In the first instance, it needs to be recognised that as per section 14A(1) of the Act, deduction of that expenditure is not to be allowed which has been incurred by the assessee 'in relation to income which does not form part of the total income under this Act'. Axiomatically, it is that expenditure alone which has been incurred in relation to the income which is includible in total income that has to be disallowed. If an expenditure incurred has no causal connection with the exempted income, then such an expenditure would obviously be treated as not related to the income that is exempted from tax, and such expenditure would be allowed as business expenditure. To put it differently, such expenditure would then be considered as incurred in respect of other income which is to be treated as part of the total income.

There is no quarrel in assigning this meaning to section 14A of the Act. In fact, all the High Courts, whether it is the Delhi High Court on the one hand or the Punjab and Haryana High Court on the other hand, have agreed in providing this interpretation to section 14A of the Act. The entire dispute is as to what interpretation is to be given to the words 'in relation to' in the given scenario, viz., where the

dividend income on the shares is earned, though the dominant purpose for subscribing in those shares of the investee company was not to earn dividend. We have two scenarios in these sets of appeals. In one group of cases the main purpose for investing in shares was to gain control over the investee company. Other cases are those where the shares of investee company were held by the assessees as stock-in-trade, (i. e., as a business activity) and not as investment to earn dividends. In this context, it is to be examined as to whether the expenditure was incurred, in respective scenarios, in relation to the dividend income or not.

Having clarified the aforesaid position, the first and foremost issue that falls for consideration is as to whether the dominant purpose test, which is pressed into service by the assessees would apply while interpreting section 14A of the Act or we have to go by the theory of apportionment. We are of the opinion that the dominant purpose for which the investment into shares is made by an assessee may not be relevant. No doubt, the assessee like Maxopp Investment Limited may have made the investment in order to gain control of the investee company. However, that does not appear to be a relevant factor in determining the issue at hand. Fact remains that such dividend income is non-taxable. In this scenario, if expenditure is incurred on earning the dividend income, that much of the expenditure which is attributable to the dividend income has to be disallowed and cannot be treated as business expenditure. Keeping this objective behind section 14A of the Act in mind, the said provision has to be interpreted, particularly, the word 'in relation to the income' that does not form part of total income. Considered in this hue, the principle of apportionment of expenses comes into play as that is the principle which is engrained in section 14A of the Act. This is so held in *CIT* v. *Walfort Share and Stock Brokers P. Ltd.* [2010] 326 ITR 1 (SC) relevant passage whereof is already reproduced above, for the sake of continuity of discussion, we would like to quote the following few lines therefrom (page 16 of 326 ITR) :

'The next phrase is, "in relation to income which does not form part of total income under the Act". It means that if an income does not form part of total income, then the related expenditure is outside the ambit of the applicability of section 14A. . . The theory of apportionment of expenditure between taxable and non-taxable has, in principle, been now widened under section 14A.'

The Delhi High Court, therefore, correctly observed that prior to introduction of section 14A of the Act, the law was that when an assessee had a composite and indivisible business which had elements of both taxable and non-taxable income the entire expenditure in respect of said business was deductible and, in such a case, the principle of apportionment of the expenditure relating to the non-taxable income did not apply. The principle of apportionment was made available only where the business was divisible. It is to find a cure to the aforesaid problem that the Legislature has not only inserted section 14A by the Finance (Amendment) Act, 2001 but also made it retrospective, i. e., 1962 when the Income-tax Act itself came into force. The aforesaid intent was expressed loudly and clearly in the Memorandum explaining the provisions of the Finance Bill, 2001. We, thus, agree with the view taken by the Delhi High Court, and are not inclined to accept the opinion of the Punjab and Haryana High Court which went by dominant purpose theory. The aforesaid reasoning would be applicable in cases where shares are held as investment in the investee company, may be for the purpose of having controlling interest therein. On that reasoning, the appeals of Maxopp Investment Limited as well as similar cases where shares were purchased by the assessees to have controlling interest in the investee companies have to fail and are, therefore, dismissed."

34 However, we do agree with the learned Commissioner of Income-tax (Appeals) that no disallowance under rule 8D(2)(ii) be resorted to since we note that own funds of the company was to the tune of Rs. 35,48,93,349 as compared to investments of only Rs. 20,55,90,500 as at the end of the year. As such, it can be safely presumed that the assessee was having sufficient own funds to invest in shares. And since the assessee was having a common fund consisting of both own funds and borrowed funds and in case the own funds are sufficient to invest in non-business activities, a presumption drawn is that the said investment is made out of own funds. For this proposition of law, we rely on the judgment of the hon'ble Bombay High Court in the case of *CIT* v. *Reliance Utilities and Power Ltd.* [2009] 313 ITR 340 (Bom) and hold that no disallowance under rule 8D(2)(ii) is warranted. However, we are of the opinion that disallowance under rule 8D(2)(iii) needs to be recomputed accordingly as per the law laid in *REI Agro Ltd.* v. *Dy. CIT* [2013] 36 CCH 360 (Kol.-Trib.) wherein it was held that :

"Thus, not all investments become the subject matter of consideration when computing disallowance under section 14A read with

rule 8D. The disallowance under section 14A read with rule 8D is to be in relation to the income which does not form part of the total income and this can be done only by taking into consideration the investment which has given rise to this income which does not form part of the total income. Under the circumstances, the computation of the disallowance under section 14A read with rule 8D(2)(iii), which is issue in the appellant's appeal, is restored to the file of the Assessing Officer for recomputation in line with the direction given above."

So, we set aside the order of the learned Commissioner of Income-tax (Appeals) on this issue for the limited purpose of recomputing the disallowance as per rule 8D(2)(iii) as discussed (supra) and the order the Assessing Officer to do so and allow partly this ground of appeal of the Revenue as directed supra.

Ground No. 4 of the Revenue's appeal is against the action of the **35** learned Commissioner of Income-tax (Appeals) in restricting the addition on account of disallowance of rent up to Rs. 2,16,000 as against Rs. 11,82,000. During the year under consideration, the assessee debited a sum of Rs. 30,75,000 as rent in its profit and loss account. Though according to the assessee during the course of assessment proceedings, details of such rent debited were furnished before the Assessing Officer. However, the Assessing Officer opined that all the premises were not used for the assessee's business purposes since rent agreements were not produced and according to him, other concerns were also functioning on the same property and, therefore, disallowed a sum of Rs. 11,82,000 out of the total rent paid of Rs. 30,75,000. Aggrieved, the assessee preferred an appeal before the learned Commissioner of Income-tax (Appeals) who gave partial relief to the assessee by holding as under :

"The assessee has taken various premises on hire and paid rent on the same. The same has been detailed in the assessment order as well as in various submissions filed by the assessee during the course of appellate hearing. The assessee has also filed copies of rental agreements as well as evidence of payment of rent. The Assessing Officer, on the basis of his presumption that some of the rent paid by the assessee were not for business purposes, had disallowed rent amounting to Rs. 11,82,000 out of total rent paid Rs. 30,75,000. The assessee had filed detailed submissions and a report was sought from the Assessing Officer in this regard. From the assessment records, it is evident that the Assessing Officer has not questioned the genuinity of payment made for rent. However, he was not convinced about the usage of such property for business purposes and hence resorted to

addition of Rs. 11,82,000. In his remand report he has also raised some technical issues.

I have carefully perused the remand report submitted by the Assessing Officer and the submissions filed by the assessee in this regard. I do not find any infirmity in the claim of the assessee. The assessee has paid rent and copies of rental agreement and evidence of payment are available. The Assessing Officer has raised an issue with respect to non-registration or delayed registration of property by the landlords which are non-consequential as far as the Revenue is concerned. It is well settled law that the assessing authority cannot step into the shoes of the assessee and decide the business expediency of a business expenditure. In this case it has to be proved that the expenditure that of rent was the purpose of the appellant's business. This has been brought on record by the appellant and has nowhere been refuted by the Assessing Officer. However, in the case of rent paid to Nathmall Girdharilal Steels Ltd. the assessee has failed to deduct TDS on rent paid for two properties at 1,08,000 each totalling Rs. 2,16,000 and the same ought to be disallowed under section 40(a)(ia). Therefore, I limit the disallowance to Rs. 2.16.000 and the balance rent Rs. 9,66,000 is allowed."

Aggrieved by the aforesaid action of the learned Commissioner of Income-tax (Appeals), the Revenue is before us.

36 The learned authorised representative drew our attention to the fact that the assessee had filed the details of the break up of Rs. 11,82,000 which was disallowed by the Assessing Officer is as follows and contended that it was exclusively used by the assessee for business purposes.

Name of the owner to whom rent paid	*Purpose of taking the premises on rent*	*Rent paid (Rs.)*
Atryee Housing (P.) Ltd.	Flat at Barbil, Orissa (site of mines)	60,000
Nathmall Girdharill Steels Ltd.	Registered office of the assessee	1,08,000
Agam Housing Pvt. Ltd.	Land at Rajarhat for parking of trucks and other goods vehicles	1,08,000
Anshumati Housing (P.) Ltd.	Land at Rajarhat for parking of trucks and other goods vehicles	1,08,000
Dover Properties (P.) Ltd.	Flat for accommodating visiting staff and others at 14/2, Burdwan Road, Kolkata-700 0027.	3,00,000
Aisawat Housing (P.) Ltd.	Land at Rajarhat for parking of trucks and other goods vehicles	3,00,000
Sukumar Bose	Railway siding, Barajmanda, Barbil, Orissa	90,000

Nathmall Girdharill Steels Ltd.	Record room for keeping old files of the assessee-company at 159, J. N. Mukherjee Road, Howrah-6.	1,08,000
	Total	11,82,000

Having heard both the parties, we note that the learned Commissioner **37**
of Income-tax (Appeals) has given a clear finding of fact that "the assessee has paid rent and copies of rental agreement and evidence of payment are available" and this finding of fact has not been controverted in the grounds of appeal raised by the Revenue which reads as under :

> "4. Whether on the basis of the facts and in the circumstances of the case and in law the learned Commissioner of Income-tax (Appeals) erred in restricting the addition on account of disallowance of rent up to Rs. 2,16,000 as against Rs. 11,82,000 without appreciating the observation of the Assessing Officer."

Since the Department while preferring the grounds of appeal has not **38**
assailed the factual finding rendered by the learned Commissioner of Income-tax (Appeals), the result is that the assessee on the strength of the rental agreements referred to by the learned Commissioner of Income-tax (Appeals) establishes the relation of the assessee as that of tenant with the land/building owner. With this factual finding in the backdrop, when we peruse the impugned order of the learned Commissioner of Income-tax (Appeals) we note that the learned Commissioner of Income-tax (Appeals) has taken note that the Assessing Officer has not refuted the claim of the assessee that the expenditure/rent paid was for the purpose of the business. This factual assertion of the learned Commissioner of Income-tax (Appeals) has also not been assailed before us which is evident from the ground raised by the Department. So, the factual finding of the learned Commissioner of Income-tax (Appeals) crystallises and therefore, the order of the learned Commissioner of Income-tax (Appeals) is based on material and cannot be termed as perverse. Therefore, we confirm the action of the learned Commissioner of Income-tax (Appeals) and dismiss the ground of appeal of the Revenue.

Before parting, it is noted that the order is being pronounced after **39**
ninety (90) days of hearing. However, taking note of the extraordinary situation in the light of the COVID-19 pandemic and lockdown, the period of lockdown days need to be excluded. For coming to such a conclusion, we rely upon the decision of the co-ordinate Bench of the Mumbai Tribunal in the case of *Dy. CIT* v. *JSW Limited* [2020] 79 ITR (Trib) 585 (Mum) I. T. A. Nos. 6103 and 6264/Mum/2018, assessment year 2013-14,

order dated May 14, 2020. In the light of the above discussion, the appeal of the Revenue is partly allowed for statistical purposes.

40 In the result, the Revenue's appeal is partly allowed for statistical purposes.

41 Order is pronounced in the open court on 22nd May, 2020

[2020] 81 ITR (Trib) 90 (Cochin)

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

ASSISTANT COMMISSIONER OF INCOME-TAX

v.

JOJO FROZEN FOODS P. LTD.

CHANDRA POOJARI *(Accountant Member)* and
GEORGE GEORGE K. *(Judicial Member)*

March 3, 2020.

SS ▶ ITA 1961, ss 147, 148
AY ▶ 2009-10
HF ▶ Assessee

REASSESSMENT—NOTICE AFTER FOUR YEARS—CONDITION PRECEDENT—FREEZER SECURITY DEPOSITS—TAXABILITY CONSIDERED AND ADDITION TO INCOME BY ASSESSING OFFICER—ASSESSING OFFICER NOT ESTABLISHING FAILURE ON PART OF ASSESSEE TO DISCLOSE TRULY AND FULLY ALL MATERIAL FACTS—LAPSED LIABILITY TAXED IN ORIGINAL ASSESSMENT ON PROPORTIONATE BASIS OVER FOUR YEARS FROM DATE OF RECEIPT—REASSESSMENT TO TAX IT ON BASIS THAT LIABILITY TO REPAY CEASED—CHANGE OF OPINION—TRIBUNAL FINDING IN EARLIER YEAR THAT AMOUNT TAXABLE ONLY IN YEAR OF TERMINATION—REASSESSMENT NOT VALID—INCOME-TAX ACT, 1961, SS. 147, 148.

There are only two conditions to be satisfied according to section 147 of the Income-tax Act, 1961, that is, escapement of income chargeable to tax and reason available with the Assessing Officer to believe that chargeable income has escaped assessment. However, when the reassessment is attempted after the period of four years, necessarily, the question of absence of full and true disclosure by the assessee of material facts becomes relevant.

The assessee's case for the assessment year 2009-10 was reopened on the ground that since the entire freezer deposits prior to the assessment year 2006-07 had already lapsed by the assessment year 2009-10, the deposits ought to have been brought to tax in the assessment year 2009-10.

Held, *that in the original assessment order the taxability of freezer security deposits was considered and addition to the income was made by the Assessing Officer. The Assessing Officer had not mentioned or established that the reassessment was proposed due to failure on the part of the assessee to disclose truly and fully all material facts which is a pre-condition when the notice under section 148 is issued beyond a period of four years. While completing the original assessment, the lapsed liability was taxed on a proportionate basis over four years from the date of receipt, whereas in the reassessment all the lapsed freezer deposits which were outstanding as on March 31, 2006 were taxed on the ground that the liability to repay had ceased. Thus, the reopening was on a change of opinion. Further the Tribunal in the assessee's case for the earlier year held that the amount was taxable only in the year of termination and the assessee had already offered such amount to tax in the return filed by it. The order of the Tribunal had not been reversed by the High Court. Therefore, the freezer security deposit was taxable only on the year of termination of agreement between the assessee and the dealer/distributor.*

Cases referred to :

Alcatel Lucent France *v.* Asst. DIT [2016] 384 ITR 113 (Delhi) (para 6)

CIT *v.* Hindustan Latex Ltd. [2016] 389 ITR 407 (Ker) (para 7)

CIT (Dy.) v. Jojo Frozen Foods P. Ltd. (I. T. A. No. 311/Cochin/2013 dated July 29, 2013) (paras 3, 5, 7)

IBS Software Services P. Ltd. *v.* Union of India [2015] 379 ITR 66 (Ker) (paras 6, 7)

ITO *v.* Techspan India P. Ltd. [2018] 404 ITR 10 (SC) (para 7)

I. T. A. No. 545/Cochin/2019 (assessment year 2009-10).

Mritunjaya Sharma, Senior Departmental representative, for the Department.

P. M. Veeramani, Chartered Accountant, for the assessee.

ORDER

The order of the Bench was pronounced by

GEORGE GEORGE K. ***(Judicial Member)***.—This appeal at the instance of the Revenue is directed against the Commissioner of Income-tax (Appeals)'s order dated June 24, 2019. The relevant assessment year is 2009-10. 1

Two issues are raised in these appeals : 2

> "(i) Whether the Commissioner of Income-tax (Appeals) is justified in quashing the reopening of assessment as invalid ?
>
> (ii) Whether the Commissioner of Income-tax (Appeals) is correct in holding that the lapsed freezer deposits cannot be treated as income in the hands of the assessee ?"

3 The brief facts of the case are as follow :

The assessee is a private limited company. It is engaged in the business of manufacture and dealer of ice cream and frozen foods. The assessee was giving freezers to its dealers/distributors for storing the ice cream. For giving the freezers, the assessee was collecting deposits, which were refundable on termination of the dealership. The assessee as per the terms of agreement (entered between the assessee and dealer/distributor), could recover 25 per cent. of the deposit each year towards wear and tear, when agreements were terminated. According to the assessee, such recoveries were offered as income in the year in which the dealership was terminated and such recovery was made. The Revenue was of the view that 25 per cent. of the deposit should be treated as income in each year irrespective whether the dealership was terminated or not.

3.1 In the original assessment completed under section 143(3) of the Income-tax Act (order dated December 29, 2012), the Assessing Officer had made an addition of Rs. 20,16,542, being lapsed liability towards freezer security deposit. The addition made by the Assessing Officer was deleted by the Commissioner of Income-tax (Appeals) vide order dated January 28, 2013. The Commissioner of Income-tax (Appeals) deleted the addition by following the Income-tax Appellate Tribunal order in the assessee's own case for the earlier assessment years. The Department appeal as against the order of the Commissioner of Income-tax (Appeals) was dismissed by the Tribunal in *Dy. CIT* v. *Jojo Frozen Foods P. Ltd.* (I. T. A. No. 311/Cochin/2013, order dated July 29, 2013).

4 The Department issued notice under section 148 of the Income-tax Act on March 30, 2016. The reason for issuance of notice under section 148 of the Income-tax Act was to bring to tax lapsed security deposits up to the assessment year 2006-07 in the current assessment year. A sum of Rs. 1,80,61,857 was treated as income towards lapsed liability in the reassessment order dated December 30, 2016 passed under section 143(3) read with section 147 of the Income-tax Act (The present appeal proceeding is out of the order of reassessment dated December 30, 2016).

5 Aggrieved by the reassessment completed, the assessee preferred an appeal to the first appellate authority. Before the first appellate authority, the assessee raised two issues, viz., (i) whether the reopening of assessment is valid ; and (ii) on the merits whether the lapsed freezer deposit could be brought to tax in the current assessment year when the dealership agreement has not been terminated. The Commissioner of Income-tax (Appeals) decided both the issues in favour of the assessee.

5.1 As regards the issue of validity of reopening of assessment, the relevant finding of the Commissioner of Income-tax (Appeals) reads as follow :

"5. The appellant stated that the notice under section 148 was issued on March 30, 2016 for the assessment year 2009-10, obviously beyond 4 years and, therefore, it could only be done if all the material facts were not disclosed fully and truly during the course of original assessment. The appellant had objected to reassessment on this ground and the Assessing Officer dismissed the objection of the appellant with the following remarks :

'The authorised representative's objections were considered and disposed of vide this office letter dated December 26, 2016. It was replied to the assessee that the materials relevant to the receipt of freezer deposit necessary for the assessment were not fully and truly furnished by the assessee at the time of original scrutiny assessment. And the assessee-company was requested to furnish the documents, accounts and any other evidence on which it relied in support of the return filed for this assessment year by issue of notice under section 143(2) of the Act dated December 23, 2016.'

6. From the remarks of the Assessing Officer, it is clear that the issue of freezer deposits was considered by the Assessing Officer while framing the original assessment order. The Assessing Officer has also not mentioned as to what material fact was not fully and truly disclosed by the assessee. A mere assertion, without giving any details of such non-disclosure, in my opinion, is not sufficient to reopen the case, beyond a period of 4 years, especially so, when the assessment has been completed under section 143(3) and the issue has been considered by the Assessing Officer during original scrutiny proceedings. Thus, on the facts of this case, in my opinion, the reassessment under section 147 is bad in law and needs to be quashed."

5.2 With reference to the issue on the merits, the Commissioner of Income-tax (Appeals) followed the order of the Income-tax Appellate Tribunal in the assessee's own case in *Dy. CIT* v. *Jojo Frozen Foods P. Ltd.* (I. T. A. No. 311/Cochin/2013 order dated July 29, 2013). The relevant finding of the Commissioner of Income-tax (Appeals) reads as follow :

"7. On the merits also, the issue of taxing the freezer deposits stands covered in favour of the appellant by the order of the hon'ble Income-tax Appellate Tribunal, Cochin Bench, in its own case for the instant assessment year itself. Understandably, the Department is in High Court on this issue. Until the hon'ble High Court reverse the

order of the hon'ble Income-tax Appellate Tribunal, the order of the hon'ble Income-tax Appellate Tribunal stands good."

6 Aggrieved by the order of the Commissioner of Income-tax (Appeals), the Revenue has filed the present appeal before the Tribunal. The learned Departmental representative strongly supported the assessment order and relied on the grounds raised.

6.1 The learned authorised representative filed a brief written submission, which reads as follow :

Issue before the Income-tax Appellate Tribunal.

1. Whether the reopening of the assessment for the assessment year 2009-10, which was originally completed under section 143(3) by making addition towards the freezer deposit received between the assessment year 2009-10, was valid to consider the same addition in respect of the freezer deposits received by the appellant from the inception up to the assessment year 2006-07 ?

2. Whether the freezer deposit collected by the appellant could be treated as income as a lapsed liability ?

Particulars	*Supporting document*	*Reference*
Date of original assessment	Order under section 143(3) dated 29-12-2011	Pages 15-22 of the paper book
Date of the Income-tax Appellate Tribunal order dismissing the Department appeal against the original assessment.	Income-tax Appellate Tribunal order No. 311/Coch/2013 dated 29-7-2013	Pages 3-6 of the paper book.
Notice under section 148	Notice dated 30-3-2016	Page 7 of the paper book.

Particulars	*Reference in assessment order*	*Reference in CIT(A) order*	*Case law relied on*
Whether there was failure on the part of the assessee to disclose truly and fully material facts during original assessment	Discussion and conclusion in the original assessment Para 2.1 (page 16 of the paper book) Conclusion in the original assessment Para 2.7 (page 18 of the paper book)	Paragraph 6 (internal pages 7 and 8) of the order of the Commissioner of Income-tax (Appeals)	*IBS Software Services Private Ltd.* v. *UOI* (379 ITR 66 Ker)

	Para 2 (pages 13-14 of paper book) order dated 26-12-2016 rejecting the assessee's objection to reopening. Para 4 (internal page 2 of 8) of assessment order)		
Whether the third proviso to section 147 is attracted that the addition is already a subject matter of appeal and hence beyond the scope of reopening	Para 4 (pages 13-14 of the paper book) order dated 26-12-2016 rejecting the objections for reopening of the assessment.	Ground 2 of grounds of appeal but no adjudication on this point.	*Alcatel Lucent France* v. *Asst. DIT* (384 ITR 113 (Delhi))
Whether the freezer deposit can be considered as income on account of lapsed liability in view of the Income-tax Appellate Tribunal decision on the same point.	Paras 9 and 10 of the assessment order.	Para 7 (page 7) of the order of the Commissioner of Income-tax (Appeals).	

7 We have heard the rival submissions and perused the material on record. Admittedly, the reopening of the assessment in the present case was made after four years from the end of the assessment year. Therefore, the Revenue ought to have been established in the reasons recorded for reopening that there was failure on the part of the assessee to disclosure fully and truly all material facts. The hon'ble Kerala High Court in the case of *IBS Software Services P. Ltd* v. *Union of India* [2015] 379 ITR 66 (Ker) held that "There are only two conditions to be satisfied according to section 147 of the Income-tax Act, 1961, that is, escapement of income chargeable to tax and reason available with the Assessing Officer to believe that chargeable income has escaped assessment. However, when the reassessment is attempted after the period of four years, necessarily, the question of absence of full and true disclosure by the assessee of material facts becomes relevant". It was further observed by the hon'ble High Court that "If essential and basic documents which are to be necessarily examined before grant of exemption, were not gone into, it is the default of the officer and not the assessee. . .".

7.1 The hon'ble Kerala High Court in the case of *CIT* v. *Hindustan Latex Ltd.* [2016] 389 ITR 407 (Ker) held that "It has to be pointedly noted here that action under the first proviso to section 147, that is to say, for a

period after the expiry of four years, can be generated only if the income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under section 142(1) or section 148 or to disclose fully and truly all material facts necessary for the assessment."

7.2 In this case, the audited accounts filed by the assessee (schedule F current liabilities and provision) reflected the following :

As at		As at
March 31, 2008		March 31, 2009
2,36,29,596	Deposit and advances from customers	2,61,28,024

7.3 In the original assessment order completed under section 143(3) of the Income-tax Act, the taxability of freezer security deposits was considered and addition to the income was made by the Assessing Officer. The observation of the Assessing Officer in original assessment reads as follows :

> "2.7 In the light of the foregoing discussion, it is evident that dealer deposit become taxable with efflux of time. The amount that is taxable is worked out and as per annexure 1 to this order. This comes to Rs. 20,16,542. The amount is added to the total income."

7.4 The reasons recorded for reopening recorded by the Assessing Officer is as follows :

> "Since the entire freezer deposits prior to the assessment year 2006-07 had already got lapsed by the assessment year 2009-10, the same ought to have been brought to tax in the assessment year 2009-10. By not bringing to tax the lapsed freezer deposits pertaining to the assessment years prior to 2006-07, there is short assessment of income in the assessment year 2009-10. I am therefore, satisfied that income to the tune of Rs. l,80,61,857 had escaped assessment within the meaning of clause (c) of the *Explanation* to section 147 in so far as disallowance of the lapsed liability on account of freezer deposit for the period prior to the assessment year 2006-07 already got lapsed."

7.5 The Assessing Officer has not mentioned nor established that the reassessment is proposed due to failure on the part of the assessee to disclose truly and fully all material facts which is a pre-condition when the notice under section 148 of the Income-tax Act is issued beyond a period of four years. While completing the original assessment, the lapsed liability was taxed on a proportionate basis over four years from the date of receipt, whereas in the reassessment all the lapsed freezer deposits which were

outstanding as on March 31, 2006 were taxed on the ground that the liability to repay has ceased. Thus, the reopening was on a change of opinion. The hon'ble apex court in the case of *ITO* v. *Techspan India P. Ltd.* [2018] 404 ITR 10 (SC) has held as follows (headnote) :

> "The language of section 147 of the Income-tax Act, 1961 makes it clear that the Assessing Officer has the power to reassess any income which has escaped assessment for any assessment year subject to the provisions of sections 148 to 153. However, the use of this power is conditional upon the fact that the Assessing Officer has some reason to believe that income has escaped assessment. The words 'reason to believe' in section 147 have to be interpreted schematically as a liberal interpretation would have the consequence of conferring arbitrary powers on the Assessing Officer who may even initiate reassessment proceedings merely on his change of opinion on the basis of the same facts and circumstances which have already been considered by him during the original assessment proceedings. Such could not be the intention of the Legislature. Doing so would have the effect of giving the Assessing Officer the power of review. Section 147 confers the power to reassess and not the power to review. The provision was incorporated in the scheme of the Act so as to empower the Assessing Officer to reassess any income on a ground which was not brought on record during the original proceedings and escaped his knowledge ; and the fact would have material bearing on the outcome of the relevant assessment order."

7.6 As mentioned earlier, admittedly reopening of assessment was initiated after four years and the original assessment order was completed under section 143(3) of the Income-tax Act. Therefore, the necessary precondition in such situation for reopening the assessment, is that the income has escaped assessment by reason of the failure on the part of assessee to disclose fully and truly all material facts. The Assessing Officer in the reasons recorded for issuance of notice under section 148 of the Income-tax Act had not mentioned that income has escaped assessment, on account of non-disclosure on the part of the assessee of full and true material facts necessary for completion of assessment. The taxability of lapsed freezer deposit on proportionate was basis of original assessment, whereas in the reassessment, the lapsed freezer deposit as on March 31, 2006 was sought to be taxed as income for the assessment year 2009-10. Therefore, the reassessment was initiated on mere change of opinion. Hence, going by the judicial pronouncements cited supra, we hold that reassessment order for the assessment year 2009-10 is bad in law.

7.7 As regards the issues on the merits are concerned, we notice that the Income-tax Appellate Tribunal Cochin Bench had dismissed the Department appeal against the original assessment following its own orders for the earlier years on the ground that the said amount is taxable only in the year of termination and the assessee had already offered such amount to tax in the return of income filed by it. The observation of the Tribunal *Dy. CIT* v. *Jojo Frozen Foods P. Ltd.* (I. T. A. No. 311/Cochin/2013 order dated July 29, 2013) while dismissing the Revenue appeal is reproduced below for ready reference :

> "We have considered the rival submissions on either side and relevant material on record. The issue arises is whether the deposits in respect of the freezer has to be considered as income of the assessee or not. As rightly submitted by the learned authorised representative of the assessee that this issue was considered by the Tribunal in one of the assessees for the earlier assessment year and found that such deposits cannot be considered as income of the assessee. The only objection of the learned Departmental representative is that the appeal was filed against the order of the Tribunal and the same is pending before the High Court. But on a query from the Bench, the learned Departmental representative has clarified that the High Court has not granted any stay of the operation of the earlier order of the Tribunal. Since the Commissioner of Income-tax (Appeals) has followed the order of the Tribunal, this Tribunal is of the considered opinion that mere pending of the appeal before the High Court against the order of the Tribunal cannot be a reason to take a different view. Therefore, by following the order of the Tribunal for the earlier assessment year, this Tribunal is of the considered opinion that the deposits collected by the assessee for freezer cannot be considered as income of the assessee."

7.8 The above order of the Tribunal has not been reversed by the hon'ble High Court. It was submitted by the learned authorised representative, the appeals filed by the Revenue against the Tribunal's orders in the assessee's own cases for earlier years was withdrawn for the reasons that tax effect in those cases were below the monetary limit. Therefore, following the Tribunal order, in the assessee's own case (supra), we hold that the freezer security deposit is taxable only on the year of termination of agreement between the assessee and the dealer/distributor. It is ordered accordingly.

8 In the result, the appeal filed by the Revenue is dismissed.

Order pronounced on this 3rd day of March, 2020.

[2020] 81 ITR (Trib) 99 (Jaipur)

[Before the Income-tax Appellate Tribunal — Jaipur "A" Bench]

ABC EXPORTS

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

Ramesh C. Sharma *(Accountant Member)* and
Vijay Pal Rao *(Judicial Member)*

March 18, 2020.

SS ▸ I T A 1961, s 246
AY ▸ 2002-03 to 2004-05
HF ▸ Assessee

Appeal to Commissioner (Appeals)—Maintainability of appeal—Order of Assessing Officer giving effect to order of High Court not containing decision on any issue or computation of income—Not appealable—Whether interest to be levied for period reckoning from original demand till recomputation of tax as per outcome of finality of dispute—Assessing Officer to take decision—Once Assessing Officer decides period from which interest has to be calculated on outstanding demand—Appealable order—Income-tax Act, 1961, s. 246—Circular No. 334, dated 3-4-1982[1].

The assessee was in the business of export of woollen carpets, woollen durries, brass art ware, cotton and woollen bags, etc., The assessee for the assessment year 2002-03 declared a total income of Rs. 2,40,04,791. The Assessing Officer disallowed the claim of deduction under section 80-IB of the Income-tax Act, 1961 in respect of income from duty drawback and duty entitlement passbook. Further he disallowed deduction under section 80HHC in respect of interest received on fixed deposit. The Commissioner (Appeals) confirmed the disallowance. The Tribunal granted relief in respect of the disallowance of deduction under section 80-IB. The High Court decided the issues of deduction under section 80-IB as well as under section 80HHC in favour of the Department. In the meantime, the assessee paid the tax after the orders of the Commissioner (Appeals) but after the order of the Tribunal granting the relief to the assessee, the Assessing Officer granted refund along with the interest. To give effect to the judgment of the High Court, the Assessing Officer passed an order raising a demand along with the interest under sections 244A, 220(2) and 234D. The Commissioner (Appeals) did not

1. See [1982] 135 ITR (St.) 10.

go into the merits of the issue raised by the assessee holding that the order was not appealable. On appeal :

Held, *that so far as the recomputation of the total income of the assessee pursuant to the judgment of the High Court was concerned, the Assessing Officer had not passed any order or decided any issue but had simply computed the total income as determined while passing the original assessment order. Therefore, to that extent the order of the Assessing Officer could not be regarded as a decision of the Assessing Officer which could be challenged in the appeal until and unless some calculation mistake or typographical mistake occurred which could be rectified under section 154. Whether the interest under section 220(2) would be reckoned from the original demand arising from the assessment order or from the date of the order giving effect to the judgment of the High Court. This aspect required application of mind and a decision had to be taken whether the interest under section 220(2) was to be levied for the period reckoning from the original demand till the recomputation of income-tax as per the outcome of the finality of the dispute. Once the Assessing Officer took such a decision regarding the reckoning of the period from which the interest has to be calculated on the outstanding demand the order of the Assessing Officer could certainly be challenged by filing appeal before the Commissioner (Appeals) under section 246.*

TELEVISTA ELECTRONICS LTD. v. DY. CIT [2018] 400 ITR 36 (Delhi) *relied on*.

Cases referred to :

ANZ Grindlays Bank PLC *v*. CIT [2000] 241 ITR 269 (Cal) (paras 4, 5)

Associated Stone Industries (Kotah) Ltd. *v*. CIT [1997] 224 ITR 560 (SC) (para 5)

Bakelite Hylam Ltd. *v*. CIT [1988] 171 ITR 344 (AP) (paras 3, 5)

British Bank of the Middle East *v*. CIT [2004] 266 ITR 269 (Bom) (para 5)

Caltex Oil Refining (India) Ltd. *v*. CIT [1993] 202 ITR 375 (Bom) (paras 3, 5)

Central Provinces Manganese Ore Co. Ltd. *v*. CIT [1986] 160 ITR 961 (SC) (para 5)

CIT *v*. Mahabir Prashad and Sons [1980] 125 ITR 165 (Delhi) (para 5)

Empire Industries Ltd. *v*. CIT [1992] 193 ITR 295 (Bom) (paras 3, 5)

Kooka Sidhwa and Co. *v*. CIT [1964] 54 ITR 54 (Cal) (paras 3, 5)

Televista Electronics Ltd. *v*. Dy. CIT [2018] 400 ITR 36 (Delhi) (paras 3, 5)

I. T. A. Nos. 1352 to 1354/Jaipur/2019 (assessment year 2002-03 to 2004-05).

Rajeev Sogani, Chartered Accountant, for the assessee.

K. C. Gupta, Joint Commissioner of Income-tax, for the Department.

ORDER

The order of the Bench was pronounced by

Vijay Pal Rao ***(Judicial Member)***.—These three appeals by the assessee are directed against 3 separate orders of the learned Commissioner of Income-tax-2, Jaipur, all dated November 8, 2019 for the assessment years 2002-03 to 2004-05. The assessee has raised common grounds in these three appeals except the quantum involved in the disputes. The grounds raised for the assessment year 2002-03 are reproduced as under : 1

"1. In the facts and in the circumstances of the case and in law the learned Commissioner of Income-tax has erred in considering that the appeal effect order passed by the learned Assessing Officer in order to give effect to the order of the hon'ble Rajasthan High Court under section 260A is not appealable under section 246A. The action of the learned Commissioner of Income-tax is illegal, unjustified and arbitrary and against the facts of the case. Appropriate relief may please be granted.

2. In the facts and in the circumstances of the case and in law the learned Commissioner of Income-tax has erred in charging interest of Rs. 13,63,760 under section 220(2) in ITNS 150, i. e., section 143(3) read with section 260A while giving appeal effect of the order of the hon'ble Rajasthan High Court. The action of the learned Assessing Officer is illegal, unjustified and arbitrary and against the facts of the case. Relief may please be granted by quashing the said charge of interest of Rs. 13,63,760.

3. In the facts and in the circumstances of the case and in law the learned Commissioner of Income-tax has erred in charging interest of Rs. 4,43,248 under section 234D in ITNS 150, i. e., section 143(3) read with section 260A while giving appeal effect of the order of the hon'ble Rajasthan High Court. The action of the learned Assessing Officer is illegal, unjustified and arbitrary and against the facts of the case. Relief may please be granted by quashing the said charge of interest of Rs. 4,43,248.

4. In the facts and in the circumstances of the case and in law the learned Commissioner of Income-tax has erred in charging interest of Rs. 1,86,479 under section 244A in ITNS 150, i. e., section 143(3) read

with section 260A while giving appeal effect of the order of the hon'ble Rajasthan High Court. The action of the learned Assessing Officer is illegal, unjustified and arbitrary and against the facts of the case. Relief may please be granted by quashing the said withdrawal.

5. The assessee-firm craves its right to add, amend or alter any of the grounds on or before the hearing."

Ground No. 1 is regarding the maintainability of the appeal filed before the learned Commissioner of Income-tax against the appeal effect order passed by the Assessing Officer in pursuant to the judgment of the hon'ble jurisdictional High Court.

2 The assessee is a partnership firm and was engaged in the business of export of woollen carpets, woollen durries, brass art ware, cotton and woollen bags, etc. The assessee filed its return of income for the assessment year 2002-03 on October 22, 2002 declaring a total income of Rs. 2,40,04,791. While completing the assessment under section 143(3) of the Income-tax Act on December 16, 2004, the Assessing Officer disallowed the claim of deduction under section 80-IB in respect of income from duty draw back and DEPB. The Assessing Officer has also disallowed deduction under section 80HHC in respect of interest received on FDR. Aggrieved by the assessment order passed by the Assessing Officer, the assessee filed an appeal before the learned Commissioner of Income-tax (Appeals) which was dismissed by the learned Commissioner of Income-tax (Appeals) vide order dated March 14, 2006. The matter was carried to this Tribunal and this Tribunal vide order dated March 20, 2008 allowed the appeal of the assessee and granted relief in respect of the disallowance of deduction under section 80-IB. The Department challenged the order of this Tribunal before the hon'ble jurisdictional High Court and vide judgment dated January 12, 2016 the hon'ble High Court has reversed the order of this Tribunal and decided these issues of deduction under section 80-IB as well as under section 80HHC in favour of the Revenue and against the assessee. In the meantime, the assessee paid the tax after the orders of the learned Commissioner of Income-tax but after the order of this Tribunal granting the relief to the assessee, the Assessing Officer granted refund along with the interest. Since the issue was finally settled and decided by the hon'ble jurisdictional High Court, therefore, to give effect to the judgment of the hon'ble High Court, the Assessing Officer passed the giving effect order raising the demand along with the interest under sections 244A, 220(2) and 234D of the Income-tax Act. The details of the demand as well as interest raised by the Assessing Officer while passing giving effect order dated June 17, 2016 are as under :

AY	*Balance demand*	*Interest under section 244A*	*Interest under section 220(2)*	*Interest under section 234D*	*Total payable*
2002-03	11,18,684	1,86,479	13,63,760	4,43,248	31,12,171
2003-04	19,71,966	4,53,552	27,32,800	10,78,073	62,36,391
2004-05	11,52,998	2,36,362	28,42,211	—	42,31,571
Total	42,43,648	8,76,393	69,38,771	15,21,321	

The interest under section 244A is the amount which was earlier paid by the Assessing Officer at the time of issuing the refund and, therefore, the same is on account of withdrawal of interest allowed under section 244A of the Act. The assessee was aggrieved by the levy of interest under sections 220(2), 234D as well as withdrawal of interest under section 244A of the Act by the Assessing Officer while passing the giving effect order to the judgment of the hon'ble jurisdictional High Court. The learned Commissioner of Income-tax (Appeals) dismissed the appeals of the assessee on the ground that the giving effect order passed by the Assessing Officer under section 260A of the Income-tax Act is not an appealable order and, therefore, in view of the learned Commissioner of Income-tax the appeals were not maintainable and the same were dismissed. The learned Commissioner of Income-tax (Appeals) did not go into the merits of the issue raised by the assessee. Aggrieved by the orders of the learned Commissioner of Income-tax, the assessee filed these appeals.

Before us, the learned authorised representative of the assessee has **3** referred to the judgment of the hon'ble Bombay High Court in the case of *Caltex Oil Refining (India) Ltd.* v. *CIT* [1993] 202 ITR 375 (AP) ; [1994] 73 Taxman 231 (Bom) and submitted that the hon'ble High Court has held that the effect of the appellate order is that the assessment either stands confirmed, reduced or enhanced or it stands annulled or set aside. In the case of confirmation, reduction or enhancement of assessment, the original order of assessment stands modified to the extent of the directions given by the appellate authority. In case an order is set aside, the authority has to start the entire process afresh and make a fresh order of the assessment complying with the directions of the appellate authority. Therefore, what remains as a final order after giving effect to the orders of the appellate authorities is an order of the assessment under section 143(3) or 144. The learned authorised representative has contended that the hon'ble High Court has held that an assessment under section 143(3) would include not only determination of the amount of tax calculated at the rate prescribed under the Finance Act but also interest or any other thing which has the effect of reducing or enhancing the total amount payable by the assessee

under such an assessment. Therefore, the interest charged under section 220(2) is part of the assessment and is deemed to be tax for the purpose of section 246 of the Income-tax Act and consequently the appeal filed by the assessee against such order of the Assessing Officer objecting to the amount of interest is maintainable. The learned authorised representative has then relied upon the judgment of the hon'ble Calcutta High Court in the case of *Kooka Sidhwa and Co.* v. *CIT* [1964] 54 ITR 54 (Cal) and submitted that the order passed by the Assessing Officer to give effect to the directions of the appellate authority is an appealable order as held by the hon'ble High Court. He has then relied upon the judgment of the hon'ble Bombay High Court in the case of *Empire Industries Ltd.* v. *CIT* [1992] 193 ITR 295 (Bom) ; 59 Taxman 443 (Bom) and submitted that the hon'ble Bombay High Court has also taken a similar view that the order passed by the Assessing Officer to give effect to the order of the appellate authority is an appealable order and the appeal filed by the assessee is maintainable. Similarly he has relied upon the hon'ble Andhra Pradesh High Court in the case of *Bakelite Hylam Ltd.* v. *CIT* [1988] 171 ITR 344 (AP) ; [1988] 37 Taxman 210 (AP). Thus, the learned authorised representative has submitted that in all these judgments it is held that the giving effect order passed by the Assessing Officer to the orders of the appellate authority is an appealable order. The learned authorised representative has then relied upon the judgment of the hon'ble Delhi High Court in the case of *Televista Electronics Ltd.* v. *Dy. CIT* [2018] 400 ITR 36 (Delhi) and submitted that the hon'ble Delhi High Court decided the issue in favour of the assessee.

4 On the other hand, the learned Departmental representative has submitted that the Assessing Officer has not taken any decision while passing the giving effect order to the order of the hon'ble jurisdictional High Court but has calculated the amount of demand in pursuant to the judgment of the hon'ble jurisdictional High Court. He has further contended that the learned Commissioner of Income-tax has followed the judgment of the hon'ble Calcutta High Court in the case of *ANZ Grindlays Bank PLC* v. *CIT* [2000] 241 ITR 269 (Cal) wherein the hon'ble High Court after considering the earlier judgment in the case of *Kooka Sidhwa and Co.* v. *CIT* (supra) has held that the order passed by the Assessing Officer giving effect to the order of the appellate authority is not an appealable order as the Assessing Officer was not having any discretion but to follow the orders of the appellate authority. The learned Departmental representative has submitted that this is not the case of setting aside the matter to the Assessing Officer for fresh adjudication or for reconsideration of any issue in

terms of the directions of the High Court order but the issue was finally decided by the hon'ble High Court and consequently the Assessing Officer has passed the giving effect order calculating the demand which includes tax and interest. He has relied upon the order of the learned Commissioner of Income-tax (Appeals).

We have considered the rival submissions as well as the relevant material on record. In the case in hand, the Assessing Officer while framing the original assessment under section 143(3) on December 16, 2004 for the assessment year 2002-03 has assessed/determined the total income of the assessee as under : 5

"9. Subject to above remarks the total income of the assessee is computed as under :

Profit as per profit and loss account		Rs. 7,02,72,801
Add :		
Depreciation for separate consideration		Rs. 25,56,045
		Rs. 7,28,28,846
Add : expenses disallowed—		
(i) Income-tax	84,28,958	
(ii) Charity and donation	17,82,422	
(iii) Delayed PF payment under section 1	35,081	
(iv) Delayed PF payment under section 43B	39,786	
(v) On account of telephone expenses	45,357	
(vi) On account of travelling and conveyance	22,199	Rs. 1,03,53,803
		Rs. 8,31,82,649
Less : DEPB for separate considered	2,29,806	
Less : Depreciation as claimed	25,56,045	Rs. 27,85,851
Gross income from business and profession		Rs. 8,03,96,798
Less :		
1. Deduction under section 80-IB as calculated above	1,22,73,389	
2. Deduction under section 80HHC as calculated	4,69,80,196	Rs. 5,92,53,585
Income from business :		Rs. 2,11,43,213
Add : Income from other sources DEPB		Rs. 2,29,806
Total income		Rs. 2,13,73,019"

Thus, the Assessing Officer computed the total income of the assessee at Rs. 2,13,73,019. The assessee challenged this order of the Assessing Officer in respect of the disallowance of deduction under section 80-IB and deduction under section 80HHC. The matter was carried to this Tribunal and this Tribunal vide order dated March 20, 2008 allowed the claim of deduction under section 80-IB as well as under section 80HHC and consequently the

demand to the extent of relief granted by the Tribunal got reduced. The Assessing Officer then granted refund to the assessee along with the interest under section 244A in pursuant to the order of the Tribunal. The Revenue challenged the order of the Tribunal before the hon'ble jurisdictional High Court and vide judgment dated January 12, 2016 the hon'ble High Court has reversed the order of the Tribunal on these two issues of deduction under section 80-IB as well as under section 80HHC and consequently the order of the Assessing Officer got restored. In pursuant to the judgment of the hon'ble jurisdictional High Court, the Assessing Officer has again computed the total income of the assessee vide order dated June 17, 2016 as under :

1.	Name of the assessee	:	M/S ABC Exports 43, Sangram Colony, C-Scheme Jaipur
2.	PAN	:	AABFA5592Q
3.	Status	:	Firm
4.	Assessment Year	:	2002-03

Order u/s 260A of the I. T. Act, 1961

Consequent upon the order of the Hon'ble High Court, Jaipur in Appeal No. 647/2008 dated 12.01.2016. The revised total income of the Assessee is computed as under:

Income from business or profession As per order u/s 143(3)			Rs. 8,03,96,796/-
Less:			
5. Deduction u/s 80IB as per calculated in order u/s 143(3)	Rs. 1,22,73,389/-		
6. Deduction u/s 80HHC as per calculated in order u/s 143(3)	Rs. 4,69,80,196/-		Rs. 5,92,53,585/-
Income from business			Rs. 2,11,43,213/-
Add: Income from other source – DEPB			Rs. 2,29,806/-
Revise Total Income			Rs. 2,13,73,019/-

Dated: 17.06.2016

(G.D.Sharma)
Asstt. Commissioner of Income tax,
Circle-6, Jaipur

Copy to the Assessee

Asstt. Commissioner of Income tax,
Circle-6, Jaipur

So far as the computation of total income by the Assessing Officer in pursuant to the judgment of the hon'ble jurisdictional High Court, the income of the assessee remained the same as it was computed at the time of passing the original assessment order under section 143(3). Hence there is no dispute or grievance of the assessee against this recomputation of income as a result of the judgment of the hon'ble jurisdictional High Court. The Assessing Officer then also computed the income-tax liability of the assessee on the total income and, therefore, the tax liability of the assessee is varied from as it was at the time of the original assessment order passed under section 143(3) due to the reason of levy of interest under section 220(2) as well as interest under section 234D of the Act though the Assessing Officer has also raised the demand by adding an amount on account of withdrawal of interest under section 244A which was granted along with the refund. The main grievance of the assessee is against the interest levied under section 220(2) of the Act and, therefore, the said computation of income-tax in pursuant to the judgment of the hon'ble High Court was challenged by the assessee before the learned Commissioner of Income-tax (Appeals). The learned Commissioner of Income-tax (Appeals), as we have discussed earlier, has dismissed the appeal of the assessee in limine being not maintainable as the said order of the Assessing Officer in computing the income-tax liability/demand is not appealable. The learned authorised representative of the assessee has relied upon a series of decisions in support of the contention that the order passed by the Assessing Officer in pursuant to the appellate authority is an appealable order. It is pertinent to note that there are divergent views on this issue about the maintainability of the appeal against the order of the Assessing Officer and particularly levying the interest under section 220(2) in pursuant to the order/judgment of the appellate forum. The learned Commissioner of Income-tax relied upon the judgment of the hon'ble Calcutta High Court in the case of *ANZ Grindlays Bank PLC* v. *CIT* (supra) whereas the learned authorised representative of the assessee has relied upon a series of decisions of other High Courts in support of his contention. So far as the recomputation of the total income of the assessee in pursuant to the judgment of the hon'ble High Court, the Assessing Officer has not passed any order or decided any issue but he has simply computed the total income as it was determined while passing the original assessment order. Therefore, to that extent the said order of the Assessing Officer dated June 17, 2016 cannot be regarded as a decision of the Assessing Officer which can be challenged in the appeal until and unless some calculation mistake or typographical mistake occurred which can be rectified under section 154 of the Income-tax Act.

However, the computation of income-tax liability of the assessee in pursuant to the said order certainly increased the demand which was raised at the time of original assessment order passed under section 143(3) and further since after the order of the Tribunal there was no demand outstanding against the assessee and, therefore, it becomes a debatable question whether the interest under section 220(2) will be reckoned from the original demand arising from the assessment order passed under section 143(3) or it will be reckoned from the giving effect order passed by the Assessing Officer to the judgment of the hon'ble High Court. This aspect requires application of mind and also to take a decision whether the interest under section 220(2) has to be levied for the period reckoning from the original demand till the recomputation of income-tax as per the outcome of the finality of the dispute. Once the Assessing Officer has to take a decision regarding the reckoning of the period from which the interest has to be calculated on the outstanding demand then the said order of the Assessing Officer would certainly be challenged by filing appeal before the Commissioner of Income-tax (Appeals) under section 246 of the Income-tax Act. In the recent judgment in the case of *Televista Electronics Ltd* v. *Dy. CIT* (supra), the hon'ble High Court has held in paragraphs 14 to 18 as under (page 40 of 400 ITR) :

> "In our opinion, in the present case, the appeal would be maintainable under clause (c) of section 246(1) of the Act. The said provision, as applicable to the case of the assessee in the relevant year when the appeal was preferred, reads as under :
>
> '246. *Appealable orders.*—(1) Subject to the provisions of sub-section (2), any assessee aggrieved by any of the following orders of an Assessing Officer (other than the Deputy Commissioner) may appeal to the Deputy Commissioner (Appeals) (before the 1st day of June, 2000) against such order :. . .
>
> (c) an order under section 154 or section 155 having the effect of enhancing the assessment or reducing a refund or an order refusing to allow the claim made by the assessee under either of the said sections.'
>
> The order under section 154 of the Act had the effect of enhancing the assessment. Such orders are appealable on all aspects decided and adjudicated. The order under section 154 of the Act had also specifically dealt with and examined the question of interest under section 220(2) of the Act and the date from which the interest was chargeable. The direction to charge interest was specifically given in the order under section 154 of the Act. The claim and contention of

the appellant-assessee to the contrary was rejected and disallowed. The Assessing Officer had refused to accept the contention made by the assessee that interest would not be chargeable under section 220(2) of the Act until and unless there was non-payment pursuant to the order passed. This is a peculiar case wherein the question of levy of interest under section 220(2) of the Act, which is payable on non-payment was decided, levied and imposed in the order under section 154 of the Act. In the present case, there was a specific direction and finding in the order passed under section 154 in respect of charging interest under section 220(2) of the Act. Consequently, the direction for payment of interest which was contested by the appellant-assessee would be appealable under clause (c) of section 246(1) of the Act.

We are aware of the decisions in *Associated Stone Industries (Kotah) Ltd.* v. *CIT* [1997| 90 Taxman 553 ; [1997] 224 ITR 560 (SC), *Central Provinces Manganese Ore Co. Ltd.* v. *CIT* [1986] 27 Taxman 275 ; [1986] 160 ITR 961 (SC), *CIT* v. *Mahabir Prashad and Sons* [1980] 125 ITR 165 (Delhi) ; [1980] 4 Taxman 166 (Delhi) which draw a distinction between cases where the assessee denies his liability to pay interest ; and where quantum of interest is in dispute or where waiver and reduction is prayed. In the latter cases appeal is not maintainable, whereas in the former set of cases where the assessee claims that he is not liable to pay interest at all appeal would be maintainable and the plea as to non-liability to pay interest may be raised while disputing the assessment in appeal. However, more appropriate and direct on the point is the decision of the Bombay High Court in *British Bank of the Middle East* v. *CIT* [2003] 131 Taxman 106/204 ; [2004] 266 ITR 269 (Bom), wherein reference was made to section 246(1)(f) which was in pari materia to the clause applicable and it was held as under (page 273 of 266 ITR) :

'However, we find merit in the argument advanced on behalf of the assessee that appeal was maintainable under section 246(1)(f). For the sake of convenience, we reproduce hereinbelow section 246(1)(f) which reads as follows :

'Subject to the provisions of sub-section (2). Any assessee aggrieved by any of the orders of the Income-tax Officer may appeal against such order under section 144 (sic. 154) or section 155 having the effect of enhancing the assessment or reducing the refund or refusing to allow the claim made by the assessee under either section 154 or section 155.'

In the case of *Empire Industries Ltd.* v. *CIT* [1992] 193 ITR 295 (Bom) the assessee had paid advance tax of Rs. 24.47 lakhs on regular assessment being completed under section 143(3). The Assessing Officer raised the demand under section 156 of the Act of Rs. 7.27 lakhs including interest of Rs. 56,000. By order dated June 27, 1974 the appellate authority allowed the appeal partly. While giving effect to the appellate order, the Income-tax Officer determined the amount refundable to the assessee at Rs. 9.46 lakhs. The amount was refunded but interest thereon under section 214 of the Act was not paid. Being aggrieved, the assessee filed an appeal before the appellate authority and claimed that the Income-tax Officer ought to have granted interest under section 214. The appellate authority and the Tribunal held that the appeal was not competent. On a reference, it was held by the Bombay High Court that the Income-tax Officer's order had been passed under section 154 and appeal therefrom was competent under section 246(1)(f). This judgment, to the above extent, applies to the facts of our case. In the present case also, the Assessing Officer was concerned with giving effect to the order dated December 31, 1986 passed by the Commissioner of Income-tax (Appeals) when he failed to grant interest under section 214 and under section 244(1A). This is very clear also from page 5 of the paper book which refers to the order of the Assessing Officer dated February 18, 1987 giving effect to the order passed by the appellate authority dated December 31, 1986. Hence, the second part of the above issue is answered in favour of the assessee and against the Department. We accordingly hold that the appeal filed by the assessee with the Commissioner of Income-tax (Appeals) being Appeal No. CIT(A)/XXII/ARIII/D/227/87-88 was maintainable under section 246(1)(f).'

The question of law is accordingly, answered in favour of the appellant-assessee and against the Revenue. We, however, clarify that we have not examined the question of chargeability of interest under section 220(2) of the Act or the date from which it would be payable as the said question would be examined by the Tribunal.

We have not expressed any opinion on the contention raised by the counsel for the Revenue that they would be entitled to raise the issue of levy of interest under sections 215 and 217 of the Act. If any such contention is raised, the same would be examined by the Tribunal including the question whether the Revenue can raise such a contention or not."

Accordingly, in view of the facts and circumstances of the case, the impugned order of the learned Commissioner of Income-tax is set aside and the matter is remanded to the record of the learned Commissioner of Income-tax for deciding the issue on the merits. Needless to say, Circular No. 334, dated April 3, 1982[1] issued by the Central Board of Direct-tax is also relevant to be considered.

All the impugned orders of the learned Commissioner of Income-tax are identical and rather based on the one order. Therefore, in view of our finding for the assessment year 2002-03, the orders of the learned Commissioner of Income-tax for the assessment years 2003-04 and 2004-05 are set aside on the similar terms and directions. 6

In the result, the appeals of the assessee are allowed for statistical purposes. 7

Order is pronounced in the open court on March 18, 2020.

[2020] 81 ITR (Trib) 111 (Mumbai)

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

ASHAPURA MINECHEM LTD.

v.

DEPUTY COMMISSIONER OF INCOME-TAX

P. P. BHATT ***(President)*** and **PRAMOD KUMAR** ***(Vice-President)***

May 27, 2020.

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

REASSESSMENT—NOTICE—ASSESSEE CARRYING ON MINING BUSINESS —OPINION OF COMMISSION APPOINTED BY CENTRAL GOVERNMENT THAT THERE HAD BEEN UNDERINVOICING OF EXPORTS—ASSESSING OFFICER MUST APPLY HIS OWN MIND AND MAKE HIS OWN ASSESSMENT OF FACTS BEFORE HE ISSUES ANY NOTICE—REOPENING MERELY ON BASIS OF REPORT—NOT JUSTIFIED—INCOME-TAX ACT, 1961, SS. 147, 148.

Belief that income has escaped assessment under section 147 of the Income-tax Act, 1961 is not a matter of a mere opinion of the Assessing Officer. It must be demonstrably shown that the material used by the Assessing Officer

1. [1982] 135 ITR (St.) 10.

is reasonably capable of formation of his belief that income has escaped assessment.

Held, *that the reopening of the assessment, beyond any doubt or controversy, was entirely based on the M. B. Shah Commission report which, inter alia, reported underinvoicing of exports by exporters of iron ore mentioned in it including the assessee. The under-invoicing in the concerned exports was nothing but a matter of expression of opinion by the Commission. The report of the Commission neither constituted a binding judgment nor a definitive pronouncement. It was impermissible for the Department to act exclusively on the basis of the Commission's report. It must make its own assessment of facts before any action is initiated. There was nothing whatsoever in the notice issued by the Assessing Officer to indicate that he had applied his mind to this aspect of the matter. The reasons had no such bearing or rational connection with the formation of the belief. It was purely speculative on the part of the Assessing Officer to form a belief of escapement of income from taxation simply on the basis of the lower export prices charged by the assessee. There was no material or even suggestion that any income corresponding to the so-called under-invoicing of exports was in fact received by any party or by the assessee through any backdoor method. In the premises, there was no legitimate reason to believe that income had escaped assessment, which could sustain the notice issued by the Assessing Officer. Thus, the initiation of reassessment proceeding itself, on the facts of this case as evidenced by the reasons recorded by the Assessing Officer, was unsustainable in law.*

SESA STERLITE LTD. *v.* ASST. CIT [2019] 417 ITR 334 (Bom) *relied on.*

Cases referred to :

AGR Investment Ltd. *v.* Addl. CIT [2011] 333 ITR 146 (Delhi) (para 7)

Anil Rai *v.* State of Bihar [2002] 3 BCR 360 (SC) (para 12)

Calcutta Discount Co. Ltd. *v.* ITO [1961] 41 ITR 191 (SC) (para 7)

Central Provinces Manganese Ore Co. Ltd. *v.* ITO [1991] 191 ITR 662 (SC) (para 7)

CIT *v.* A. Raman and Co. [1968] 67 ITR 11 (SC) (para 7)

CIT (Asst.) *v.* Rajesh Jhaveri Stock Brokers (P.) Ltd. [2007] 291 ITR 500 (SC) (para 7)

Fomento Resources (P.) Ltd. *v.* Union of India (W. P. No. 606 of 2014, dated July 2, 2019) (para 7)

Hindustan Lever Ltd. *v.* R. B. Wadkar, Asst. CIT (No. 1) [2004] 268 ITR 332 (Bom) (para 7)

I. P. Patel and Co. *v.* Dy. CIT [2012] 346 ITR 207 (Guj) (para 7)

THE
ITR'S TRIBUNAL TAX REPORTS
VOLUME 81 — 2020
(SHORT NOTES OF CURRENT CASES)

[2020] 81 ITR (Trib) (S. N.) 1 (Chennai)

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

INCOME-TAX OFFICER

v.

SMT. REKHA SHETTY

DUVVURU RL. REDDY *(Judicial Member)* and **S. JAYARAMAN *(Accountant Member)***

July 20, 2020.

SS ▸ ITA 1961, s 54
AY ▸ 2016-17
HF ▸ Assessee

CAPITAL GAINS—EXEMPTION—SALE OF PROPERTY AND PURCHASING NEW RESIDENTIAL HOUSE—CONDITIONS PRECEDENT—ASSESSEE DEPOSITING GAINS IN CAPITAL GAINS ACCOUNTS SCHEME BEFORE DUE DATE FOR FILING RETURN UNDER SECTION 139(4) AND PURCHASING NEW HOUSE WITHIN TWO YEARS OF TRANSFER—ASSESSEE EXPLAINING REASONS FOR DELAY IN DEPOSITING AMOUNT IN CAPITAL GAINS ACCOUNTS SCHEME—SUBSTANTIAL COMPLIANCE—FAILURE TO DEPOSIT SUM WITHIN TIME SPECIFIED IN SECTION 139(1)—MERE NON-COMPLIANCE WITH PROCEDURAL REQUIREMENT UNDER SECTION 54(2)—NOT A REASON FOR DENYING EXEMPTION—INCOME-TAX ACT, 1961, S. 54.

The assessee, an individual and a senior citizen, received her share from the sale of immovable property. The assessee deposited the proceeds in the Capital Gains Accounts Scheme on August 18, 2016 and utilised the money in purchasing a new house on August 26, 2016. In her return for the assessment year 2016-17, she claimed exemption, inter alia, at Rs. 4.33 crores under section 54 of the Income-tax Act, 1961 being the amount utilised towards

purchase of the new house. Since the due date for filing the return under section 139(1) was on August 5, 2016 and the amount was not deposited in the scheme within the due date for filing of return, the Assessing Officer did not allow the exemption. Before the Commissioner (Appeals) the assessee explained, inter alia, that she had negotiated with the owner of the new property during June, 2016 and the directors of the company and their authorised signatory were stationed in Mumbai. The owners had assured her that they would come to Chennai and register the property soon, i. e., immediately after the negotiations in June, 2016. But the owners took considerable time and thus there was a delay on the owner's part to come to Chennai and register the property. When it was getting delayed, she decided to deposit the amount in the scheme and accordingly, did it on August 18, 2016. A week later, i. e, on August 26, 2016, the owner visited Chennai and registered the property in the name of the assessee. The Commissioner (Appeals) held that if the assessee utilised the amount in purchasing or constructing the new residential house before the due date for filing the return the assessee was eligible for the exemption under section 54 or 54F irrespective of whether the assessee deposited the amount in the specified schemes before investing it in the new house or not. Since in this case, the assessee had purchased the new property on August 26, 2016 itself which was well before the due date for filing the return under section 139(4), the utilisation of the amount in purchasing a new residential property was within the time-limit permitted in the provisions of section 54(2) and accordingly the assessee was eligible for the exemption under section 54. Therefore, he directed the Assessing Officer to allow the exemption under section 54 to the assessee in respect of the new house purchased. On appeal :

Held, *that in order to be eligible for the exemption under section 54, the assessee should have substantially complied with section 54(1). In this case, the assessee should have purchased the residential house within two years from October 19, 2015, i. e., the date of transfer. She had utilised such sum towards purchase of the new house on August 26, 2016 itself. Further, she had explained the reasons for not depositing the amount in the scheme. Since the assessee had substantially complied with section 54(1), a mere non-compliance with a procedural requirement under section 54(2) itself could not stand in the way of the assessee getting the benefit under section 54. Therefore, the assessee was entitled to exemption.*

VENKATA DILIP KUMAR *v.* CIT [2019] 419 ITR 298 (Mad) *relied on.*

I. T. A. No. 2777/Chennai/2019 and C. O. No. 106/Chennai/2019 (assessment year 2016-17).

Ms. Vijaya Prabha,, Additional Commissioner of Income-tax-Departmental representative, for the Department.

G. Baskar, Advocate, for the assessee.

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

[2020] 81 ITR (Trib) (S. N.) 3 (Delhi)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — DELHI "SMC-2" BENCH]

TELEKON MEDIA INDIA P. LTD.

v.

INCOME-TAX OFFICER

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

July 21, 2020.

SS ▸ ITA 1961, ss 24(a), 56(2)(iii)
AY ▸ 2012-13
HF ▸ Department

INCOME FROM HOUSE PROPERTY—INCOME FROM OTHER SOURCES—LEASE—DEMISED PREMISES MENTIONED AS WORKSTATION IN BUILDING IN LEASE AGREEMENT—PRIME OBJECTIVE EXPLOITATION OF ASSET AND NOT BUILDING OR ANY PART THEREOF—USE OF EASEMENT AND COMMON AREAS BY LESSEE INCIDENTAL TO LEASE OF EXPLOITATION OF WORKSTATION—WORKSTATION IN THE FORM OF PLANT AND MACHINERY INSEPARABLE FROM BUILDING AND FOR EXPLOITATION OR USE OF WORKSTATION, USE OF BUILDING INCIDENTAL—ASSESSABLE AS INCOME FROM OTHER SOURCES—INCOME-TAX ACT, 1961, SS. 24(a), 56(2)(iii).

In proceedings under section 263 of the Income-tax Act, 1961 the Commissioner set aside the assessment made in the case of the assessee for the assessment year 2012-13 on the ground, inter alia, that standard deduction under section 24(a) had been wrongly allowed by the Assessing Officer. Consequent thereto, the Assessing Officer found that the assessee had shown the rental income from certain parties under the head "Income from house property". According to him, in the case of the rental income from P the letting of workstation, i. e., machinery, plant or furniture was inseparable from the letting of the building and therefore he rejected the submission of the assessee that the business of the assessee was closed and the building with furniture was lying vacant for long and so the assessee gave them on rent. He rejected the

contention of the assessee that leasing of plant, machinery furniture was incidental to the letting of the building. Accordingly he disallowed the standard deduction claimed under section 24(a) at the rate of the 30 per cent., i. e., amounting to Rs. 6.75 lakhs from the rental income of Rs. 22.50 lakhs and assessed the rental income of Rs. 22.50 lakhs under the head "Income from other sources" as against the head "Income from house property" as claimed by the assessee. The Commissioner (Appeals) upheld the action of the Assessing Officer. On appeal :

Held, *that in terms of section 22, any annual value (rental income from leasing) of building or lands appurtenant thereto is chargeable under the head "Income from house property" and during the relevant period, deduction against such income under section 24(a) was allowable in a sum equal to 30 per cent. of the annual value. Section 56(2)(iii) provides that where an assessee lets on hire machinery, plant or furniture belonging to him and also the building and the letting of the building is inseparable from the letting of the machinery, plant or furniture, the income from such a letting, if it is not chargeable under the head "Profit and gains of business or profession" shall be chargeable to the head "Income from other sources". In the lease agreement between the parties, the demised premises had been mentioned as workstation in the building. Use of the building was incidental to the main object of leasing of workstation by the assessee. The assessee had given the ground and the first floor of the building on rent to another party separately and income therefrom had been offered by the assessee under the head "Income from house property" and this had not been disturbed by the Assessing Officer. Thus, the prime objective was exploitation of the asset in the form of workstation installed by the assessee and not the building or any part thereof. The use of easement and common areas by the second party was incidental to the lease of exploitation of workstation. The workstation in the form of plant and machinery were inseparable from the building and for exploitation or use of the workstation, the use of the building was incidental. The order of the Commissioner (Appeals) called for no interference.*

I. T. A. No. 5352/Delhi/2019 (assessment year 2012-13).

Rajeev Saxena, Advocate, for the assessee.

R. K. Gupta, Senior Departmental representative, for the Department.

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

[2020] 81 ITR (Trib) (S. N.) 5 (Ahmedabad)

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

DEPUTY COMMISSIONER OF INCOME-TAX

v.

CHHOTABHAI JETHABHAI PATEL AND CO.

P. P. Bhatt *(President)* and **Pradip Kumar Kedia *(Accountant Member)***

July 20, 2020.

SS ▸ ITA 1961, s 80-IA(4)
AY ▸ 2012-13
HF ▸ Assessee

Infrastructure development—Generation of electricity—Special deduction—Computation of profits of eligible business—Initial assessment year—Embargo placed under section 80-IA(5) for quantification of deduction of profits and gains of eligible business applicable from assessment years immediately succeeding initial assessment years only—Assessee not required to notionally reduce losses arising from eligible business in earlier years already set off against other business of assessee in terms of sections 70, 71 and 72 prior to exercise of option of initial assessment year—Losses arising in eligible business subsequent to earmarking of initial assessment year to be governed by embargo placed in section 80-IA(5)—Income-tax Act, 1961, s. 80-IA(4)—Circular No. 1 of 2016 dated 15-2-2016[1].

The assessee was engaged in generation of electricity through windmills installed in various parts of the country. For the assessment year 2012-13, it claimed deduction of Rs. 3,61,15,115 being the profits from eligible business under section 80-IA(4) of the Income-tax Act, 1961 without notionally adjusting the losses and depreciation of the earlier years arising from the eligible business which already stood set off in accordance with law from other streams of income. The Assessing Officer denied the deduction of profits arising from eligible business invoking the embargo placed by sub-section (5) of section 80-IA and proceeded to make adjustment on account of notionally carry forward losses and depreciation of earlier years from the actual commencement of eligible business. Resultantly, he denied the deduction under section 80-IA(1) on the profits amounting to Rs. 3,61,15,115 arising from

1. See [2016] 381 ITR (St.) 1.

generation of electricity through windmills. The Commissioner (Appeals) held that losses and depreciation of the windmill business for the years prior to the initial assessment year which had been already set off against the income of other business could not be brought forward notionally and again set off against the income of the eligible business. Accordingly, he directed the Assessing Officer to allow the deduction under section 80-IA(4) to the extent of income of the eligible business, i. e., Rs. 3,61,15,115 in the year 2012-13 without adjusting the losses and depreciation of earlier years brought forward notionally since the assessee had chosen the year 2012-13 as the initial assessment year. On appeal :

Held, *that the assessee, while determining the eligible profits, was not required to notionally reduce the losses arising from the eligible business in the earlier years already set off against other business of the assessee in terms of sections 70, 71 and 72 prior to exercise of the option with respect to the initial assessment year. The losses arising in the eligible business, if any, subsequent to earmarking of initial assessment year shall however be governed by the embargo placed in section 80-IA(5).*

The manner of determination of quantum of deduction as provided under section 80-IA(5) had since been clarified by Circular No. 1 of 2016 dated February 15, 2016[1]*. The circular has given a categorical interpretation on exercise of the option of choosing the initial assessment year referred to subsection (5) of section 80-IA in favour of the assessee. The circular has also clarified that the embargo placed under section 80-IA(5) for quantification of deduction of the profits and gains of an eligible business would apply from the assessment year immediately succeeding the initial assessment year only.*

I. T. A. No. 567/Ahd/2017 (assessment year 2012-13).

Vidhyut Trivedi, Senior Departmental representative, for the Department.

S. N. Soparkar, Senior Advocate, for the assessee.

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

---

1. see [2016] 381 ITR (St.) 1.

[2020] 81 ITR (Trib) (S. N.) 7 (Delhi)

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

HCL FOUNDATION

v.

COMMISSIONER OF INCOME-TAX (EXEMPTIONS)

Amit Shukla *(Judicial Member)* and **Prashant Maharishi *(Accountant Member)***

July 20, 2020.

SS ▸ ITA 1961, s 12A(1)(ab)
HF ▸ Department

Charitable purpose—Changes in objects clause—Section 12A(1)(ab) providing for reason of amendment of objects clause of trust should be verified clarificatory in nature—Assessee requesting Commissioner to take amended objects on record after proper verification but no communication from Commissioner—Commissioner to take into account amended object examine its genuineness and its compliance with respect to section 2(15)—Income-tax Act, 1961, s. 12A(1)(ab).

The assessee was a charitable trust and registered under section 12A read with section 12AA of the Income-tax Act, 1961. It wanted to make certain changes in its objects clause. It sought prior approval of the Commissioner attaching the audited financial statements, copy of the return, the trust deed, approval under section 80G and registration certificate under section 12AA. Since the assessee did not receive any response it amended the objects of the trust. The Commissioner held that modification of any object to the trust which did not conform to the conditions of the registration was required to be filed in form 10A within 30 days from the date of certain additions or modification. However, the requirement of intimating the modification of object had come into effect only with effect from April 1, 2018 and as in the case of the assessee the modification had been made prior thereto, the application filed by the assessee did not fall into the provision of section 12A(1)(ab) which had come into effect from April 1, 2018. Therefore, he rejected the application filed by the assessee. On appeal :

Held, *that the provisions of section 12A(1)(ab) were inserted only because earlier there were no requirement by which the Department could have examined, in case of trust already registered under section 12A if they amended their object with respect to the genuineness of the activities. The circular of the Board states that the provisions are clarifactory in nature. The*

two letters submitted by the assessee were clearly requests to the Commissioner to take the amended objects on record after proper verification. There was no communication from the office of the Commissioner and therefore, this appeal was filed. In view of these facts, the Commissioner was directed to take into account the amended object which were amended prior to April 1, 2018, examine its genuineness and its compliance with respect to section 2(15). In fact the assessee had gone a step ahead and requested the Department to examine its amended objects with reference to the provision of sections 2(15) and 12A. The assessee was not obliged to do so as per the provision of the Act.

I. T. A. No. 9036/Delhi/2019.

Ajay Vohra, Senior Advocate, *Neeraj Jain* and *Aditya Vohra*, Advocates, and *Arpit Goyal*, Chartered Accountant, for the assessee.

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

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

[2020] 81 ITR (Trib) (S. N.) 8 (Mumbai)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — MUMBAI VIRTUAL COURT "DB-II" BENCH]

STAR INDIA P. LTD.

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

M. BALAGANESH *(Accountant Member)* and **AMARJIT SINGH *(Judicial Member)***

July 17, 2020.

SS ▶ ITA 1961, ss 32, 37, 40(a)(ia)
AY ▶ 2013-14
HF ▶ Assessee

DEPRECIATION—SATELLITE TELEVISION CHANNELS—BRAND LICENCE FEES—PAYMENTS INCLUDING AMOUNT APPROVED BY COMPETENT AUTHORITY THAT SPECIFICALLY CONSIDERED VALUE OF BRAND LICENCE—NO DISALLOWANCE ON ACCOUNT OF DEPRECIATION ON PAYMENT OF BRAND LICENCE FEES—ENTITLED TO DEPRECIATION—INCOME-TAX ACT, 1961, S. 32.

BUSINESS EXPENDITURE—LEAVE AND LICENCE FOR RUNNING PREMISES—REIMBURSEMENT OF PROPERTY TAX PAID FOR RENTAL PREMISES—WHETHER REIMBURSEMENT OF PROPERTY TAX PARTAKES OF CHARACTER

OF RENT ONLY—WHETHER TO AGGREGATE AMOUNT OF RENT PLUS REIMBURSEMENTS COMPARES WELL WITH EARLIER YEARS PAYMENT—DUTY OF ASSESSEE TO JUSTIFY PAYMENT—ASSESSING OFFICER TO DECIDE AFRESH—INCOME-TAX ACT, 1961, S. 37.

DEPRECIATION—SOFTWARE EXPENDITURE—EXPENDITURE INCURRED TOWARDS SOFTWARE TREATED AS CAPITAL IN NATURE—ASSESSING OFFICER DIRECTED TO GRANT DEPRECIATION ON SOFTWARE EXPENDITURE INCURRED DURING YEAR IN ADDITION TO DEPRECIATION ON OPENING WRITTEN DOWN VALUE OF COMPUTER AND COMPUTER SOFTWARE—INCOME-TAX ACT, 1961, S. 32.

BUSINESS EXPENDITURE—DISALLOWANCE—PAYMENTS LIABLE TO DEDUCTION OF TAX AT SOURCE—PLACEMENT FEES UNDER CONTRACT BETWEEN ASSESSEE AND CABLE OPERATORS—NOT COMMISSION OR ROYALTY—NO DISALLOWANCE COULD BE MADE—INCOME-TAX ACT, 1961, S. 40(a)(ia).

The assessee produced television programmes, movies and broadcasting of the programmes on satellite television channels. It exported programmes to overseas media companies and provided other media services. It acted as an agent for advertisement as well as for overseas media companies and carried on channel subscription business. The authorities allowed depreciation on payment of brand licence fees. On appeal :

Held, *that the consideration for the payment towards brand licence was determined based on valuation of the brand by an independent valuer and the payment towards brand licence was capitalised in the books of account and depreciation was claimed only on yearly basis. The payment for the consideration was subjected to the Reserve Bank of India approvals. Further, the Department had taxed the entire amount received by the television channel from the assessee in the assessment year 2011-12. Once the payments including the amount had been approved by the competent authority that had specifically considered the value of the brand licence fees paid for the channel there could not be any disallowance of expenses. The Assessing Officer was directed to delete the disallowance made on account of depreciation on payment of brand licence fees.*

STAR INDIA P. LTD. *v.* ASST. CIT (I. T. A. Nos. 1901/Mum/2016 and 1048/Mum/2017 dated August 1, 2019) *followed*.

The Assessing Officer observed that the assessee had entered into an addendum to the leave and licence agreement with PCPL for running of the premises. The assessee had reimbursed to PCPL, the property tax at

Rs. 31,54,827 paid by PCPL. The assessee claimed the reimbursement of property tax paid on the rental premises as business expenditure under section 37(1) of the Income-tax Act, 1961. The authorities disallowed property tax amounting to Rs. 31,54,827 which was reimbursed to PCPL on the ground that it need not be reimbursed by the assessee as the property tax had to be borne by the landlord. On appeal :

Held, *that the assessee was right in contending the reimbursement of property tax partook of the character of rent. Hence, what was required to be seen was whether to aggregate amount of rent plus reimbursements compared well with the earlier years payment. If it did not compare well, it was the duty of the assessee to justify the payment. The issue was remanded to the Assessing Officer to decide afresh.*

Star India P. Ltd. *v.* Addl. CIT (I. T. A. Nos. 4818 and 4675/Mum/2010 dated April 1, 2016) *followed*.

The authorities disallowed the depreciation on software expenditure. On appeal :

Held, *that the entire details of the software expenditure had been provided before the Assessing Officer by the assessee and the expenditure was treated as capital expenditure by the Assessing Officer in earlier years. The assessee pleaded for grant of depreciation on the fresh software expenditure incurred during the year and on the opening written down value of software expenditure grouped under the head "computers". The assessee was not pressing the issue whether the expenditure was capital or revenue in nature. The expenditure incurred towards software had to be treated as capital in nature in the facts and circumstances and the Assessing Officer was directed to grant depreciation on the software expenditure incurred during the year in addition to granting depreciation on opening written down value of computer and computer software.*

The signals of television channels telecast by the broadcaster were distributed in the area covered by the foot print of the channels by distributors such as the assessee. However, the last mile connectivity was provided by the cable operator and it was the cable operator's discretion to place a particular channel on a preferred band or a higher frequency. To ensure such placement of the channel on a preferred band or high frequency, which in turn would ensure higher viewership, higher subscriptions and higher advertising revenues, the assessee paid the cable operators the channel placement fees. The cable operator collected subscriptions and passed them on after retaining a portion thereof. The Assessing Officer observed that the channel placement fees charges paid by the broadcasters to the multi system operator for placing

their channel on a particular frequency or bandwidth. These charges were paid to put the channel in prime band so that viewership as well as quality of the channel could be increased. The carrying of a particular channel on a particular frequency was an integral part of transmission or broadcasting process. Hence, he held that the process would be covered within the ambit of the definition of the term "royalty" as per Explanation 6 *to section 9(1)(vi) which was introduced with retrospective effect from June 1, 1976. Accordingly, he held that the amount would fall within the ambit of deduction of tax provisions in section 194J instead of section 194C. Since there was short deduction of tax at source made by the assessee, the Assessing Officer disallowed the differential sum under section 40(a)(ia) in the assessment which was upheld by the Dispute Resolution Panel. On appeal :*

Held, *that when services were rendered as per the contract by accepting the placement fee or carriage fee, the fees were similar to the services rendered against the payment of standard fees paid for broadcasting of channels on any frequency. The placement fees were paid under the contract between the assessee and the cable operators. Therefore, the carriage fees or placement fees were not in the nature of commission or royalty. The Assessing Officer was directed to delete the disallowance made under section 40(a)(ia) in the hands of the assessee.*

CIT *v.* UTV ENTERTAINMENT TELEVISION LTD. [2017] 399 ITR 443 (Bom) *and* CIT *v.* TIMES GLOBAL BROADCASTING CO. LTD. (I. T. A. No. 399 of 2016 dated August 14, 2018) *relied on.*

I. T. A. No. 30/Mumbai/2018 (assessment year 2013-14).

Porus Kaka, Senior Advocate, for the assessee.

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

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

[2020] 81 ITR (Trib) (S. N.) 12 (Mumbai)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — MUMBAI VIRTUAL COURT DB-II BENCH]

CONFEDERATION OF INDIAN TEXTILE INDUSTRY

v.

INCOME-TAX OFFICER (EXEMPTION)

M. BALAGANESH *(Accountant Member)* and **AMARJIT SINGH *(Judicial Member)***

July 17, 2020.

SS ▸ ITA 1961, s 11
AY ▸ 2013-14
HF ▸ Assessee

CHARITABLE PURPOSE—EXEMPTION—NON-PROFIT ORGANISATION—ACTIVITIES OF ASSESSEE NOT EXISTING FOR PURPOSE OF MAKING PROFITS AND DISTRIBUTION OF SUCH PROFITS TO ITS MEMBERS—NOTHING SUGGESTING ASSESSEE'S ACTIVITIES INVOLVED IN NATURE OF TRADE, COMMERCE OR BUSINESS OR ACTIVITY OF RENDERING ANY SERVICE IN RELATION TO ANY TRADE, COMMERCE OR BUSINESS AND IN CONSIDERATION OF WHICH CESS OR FEE RECEIVED BY ASSESSEE—ENTITLED TO EXEMPTION—INCOME-TAX ACT, 1961, S. 11.

The assessee was formed to promote and protect trade, commerce and industries of India in general and more particularly in respect of cotton textile industry and allied industries and trades. It was a non-profit organisation and an apex industry association representing the entire value chain of the textile and clothing sector. It was constituted by member associations, members and corporate members and young entrepreneurs group. The member associations covering all the geographical areas of India nominated their selected members to the executive committee of the confederation. All textile companies which were members of these associations automatically became the members of the confederation. The assessee was registered under section 12A of the Income-tax Act, 1961 and claimed exemption under section 11 which was granted up to the assessment year 2012-13. For the assessment year 2013-14, the assessee claimed the deficit of Rs. 8,40,487 to be carried forward to the subsequent years. The assessee was bound to apply the income derived from the property held under trust solely towards promotion of its objects and not for the benefit of its members. The Assessing Officer applied the principles of mutuality observing that the regular income derived by the assessee from its members were exempt on the principle of mutuality. However, with regard to the interest income, exchange gain and miscellaneous

income, he observed that these incomes were derived by the assessee from its non-members and accordingly, the income would not be exempt on the principle of mutuality. Accordingly, he taxed the income of Rs. 1,48,65,975 as receipts from non-members by treating the income as business income by applying the proviso to section 2(15) and consequently rejected the claim of exemption under section 11. The Commissioner (Appeals) upheld the action of the Assessing Officer. On appeal :

Held, *that the activities carried on by the assessee were not with a view to make profit. It was not even the case of the Department that the assessee was not existing for the purpose of profit within the meaning of sections 11 to 13. The Assessing Officer had erroneously treated the assessee as a mutual association instead of a charitable organisation merely on the ground that services were rendered by the assessee to its members. The assessee had not even claimed to be a mutual association and had not claimed any exemption from income-tax on the basis of principle of mutuality. What had been claimed by the assessee was only exemption under section 11 being a charitable organisation and on fulfilment of all the conditions stipulated in sections 11 to 13. It was not even the case of the Department that the assessee had violated any of the provisions of sections 11 to 13 in the instant case. The authorities brought no evidence to prove that the activities of the assessee were existing for the purpose of making profits and that such profits were in turn distributed to its members. The Department had not pointed out that the assessee's activities were in the nature of trade, commerce or business or activity of rendering any service in relation to any trade, commerce or business and in consideration of which a cess or fee had been received by the assessee. Hence, the assessee's case did not fall within the ambit of the proviso to section 2(15). Therefore, the assessee was entitled to exemption under section 11 in respect of the interest income, exchange gain and miscellaneous income totalling into Rs. 1,48,65,975*

ALL INDIA RUBBER INDUSTRIES ASSOCIATION *v.* ADDL. DIT (EXEMPTIONS) [2018] 173 ITD 615 (Mumbai) *followed*.

I. T. A. No. 2435/Mumbai/2019 (assessment year 2013-14).

Ketan Ved for the assessee.

Amit Pratap Singh, Senior Departmental representative, for the Department.

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

[2020] 81 ITR (Trib) (S. N.) 14 (Mumbai)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — MUMBAI VIRTUAL COURT "DB-II" BENCH]

WILHELMSEN SHIP MANAGEMENT INDIA PVT. LTD.

v.

DEPUTY COMMISSIONER OF INCOME-TAX

M. BALAGANESH *(Accountant Member)* and **RAM LAL NEGI *(Judicial Member)***

July 17, 2020.

SS ▸ ITA 1961, s 38(2)
AY ▸ 2003-04
HF ▸ Assessee

BUSINESS INCOME—INCOME FROM HOUSE PROPERTY—REPAIRS AND MAINTENANCE—RENTAL INCOME FROM 100 SQUARE FEET OUT OF 10,000 SQUARE FEET LET OUT FOR FIVE MONTHS TAXED AS INCOME FROM HOUSE PROPERTY—CORRESPONDING DEDUCTION AT 30 PER CENT. TOWARDS REPAIRS GIVEN ONLY FOR FIVE MONTHS—ASSESSEE ENTITLED TO PROPORTIONATE DEDUCTION FOR REMAINING PERIOD OF SEVEN MONTHS OF REPAIRS AND MAINTENANCE—INCOME-TAX ACT, 1961, S. 38(2).

INTERNATIONAL TRANSACTIONS—TRANSFER PRICING—ARM'S LENGTH PRICE—MANNING SERVICE FEE—TRIBUNAL IN ASSESSEE'S CASE FINDING MANNING SERVICE FEE AT ARM'S LENGTH IN EARLIER YEARS—NO CHANGE IN FACTS—MANNING SERVICE FEE AT ARM'S LENGTH—INCOME-TAX ACT, 1961.

The assessee let out an area of 100 square feet for a period of five months. During the previous year relevant to the assessment year 2003-04 out of its total office area of 10,000 square feet and derived rental income of Rs. 57,500. This rental income was offered to tax by the assessee under the head "Income from business". The Assessing Officer assessed the rental income under the head "Income from house property" and granted a 30 per cent. deduction towards repairs thereof. The regular repairs and maintenance of Rs. 12,23,559 debited by the assessee and claimed as deduction under the head "Income from business" was disallowed by the Assessing Officer in the assessment. Further, he disallowed a sum of Rs. 1,40,53,158 on account of depreciation claimed on the business premises. The Commissioner (Appeals) granted 100 per cent. relief with regard to the claim of depreciation giving a categorical finding that 100 square feet of the premises was utilised by the assessee for its own business for a period of seven months. On appeal :

Held, *that the Department had not appealed against the finding of the Commissioner (Appeals) that the 100 square feet of premises was utilised by the assessee for its own business for a period of seven months. The Commissioner (Appeals) however, sustained the disallowance of expenses claimed on account of repairs and maintenance holding that the assessee had already been given flat deduction at 30 per cent. of rental income towards repairs under head "Income from house property" and no further deduction was eligible to the assessee. The rental income offered by the assessee in the sum of Rs. 57,500 was only in respect of 100 square feet of premises let out for five months. Hence, the corresponding deduction at 30 per cent. towards repairs under the head "Income from house property" was also given only for a period of five months. The assessee was entitled to proportionate deduction for the remaining period of seven months of these repairs and maintenance in respect of 100 square feet of property.*

The Commissioner (Appeals) confirmed the addition made on account of manning services fee of Rs. 6,82,62,238 being the arm's length price adjustment made by the Transfer Pricing Officer. On appeal :

Held, *that the Commissioner (Appeals) had already granted relief in this regard and had confirmed only the remaining sum. No appeal was preferred by the Department. Further while deciding the issue in the assessment year 2002-03 the Tribunal after considering all factual as well as legal aspects of the issue, had accepted the price charged by the assessee towards manning services to its associated enterprise to be at the arm's length.*

I. T. A. No. 6203/Mumbai/2010 (assessment year 2003-04).

Uodol Raj Singh for the assessee.

Nishant Thakkar for the Department.

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

[2020] 81 ITR (Trib) (S. N.) 16 (Delhi)

[Before the Income-tax Appellate Tribunal. — Delhi "SMC-1" Bench]

VIRENDRA VERMA

v.

INCOME-TAX OFFICER

Bhavnesh Saini *(Judicial Member)* and
O. P. Kant *(Accountant Member)*

July 15, 2020.

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

Cash credits—Confirmations and ledger account of creditors prima facie showing that balances came from earlier years—If credits in books of account pertain to earlier year addition could not be made in instant year—Balance-sheet for preceding year and earlier years not on record—Assessing Officer to re-decide issue in light of material brought on record—Income-tax Act, 1961, s. 68.

The Assessing Officer during the course of assessment proceedings noted that in the case of three cash credits the assessee was neither able to prove the genuineness nor provide confirmations from the parties nor any proof of payment. In reply to the notice the sundry creditors had confirmed that during the year 2014-15 no transactions had been made with the parties. Hence, the sundry credits were treated as unexplained and made the addition under section 68 of the Income-tax Act, 1961 in a sum of Rs. 36,11,872. The Commissioner (Appeals) confirmed the disallowance. On appeal :

Held, *that the balances of the three sundry creditors appeared in the books of account of the assessee as on March 31, 2014. The assessee filed confirmations and ledger account of the creditors which prima facie showed that balances came from the earlier years. But the Assessing Officer in the remand report had specifically mentioned that two parties had submitted replies in response to the notice that they had no transactions with the assessee even in earlier years and even in the case of the third party the ledger account showed nil opening and closing balance. In the case of the third creditor notice could not be served. This created a doubt in the mind of the authorities that the assessee had not brought the correct facts on record. However, if the documents on record and the remand report were considered in the proper*