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**I. T. A. No. 6974/Mum/2017 (assessment year 2011-12).**

*H. N. Motiwala* for the assessee.

*Anadi Verma* for the Department.

**ORDER**

This appeal, filed by the assessee, is directed against the order dated October 4, 2017 passed by the Commissioner of Income-tax (Appeals) in the matter of assessment under section 143(3) read with section 147 of the Income-tax Act, 1961, for the assessment year 2011-12. 1

In the first ground of appeal, the grievance of the appellant, in substance, is that the learned Commissioner of Income-tax Appeals) erred in "confirming the order of the Assessing Officer in respect of reopening the assessment, particularly when the Assessing Officer had no reason, to believe that any income chargeable to tax has escaped the assessment, except the communication from the Director General of Income-tax (Investigation) Kolkata to the effect that the hon'ble justice M. B. Shah Commission has determined that the appellant has under invoiced the export of iron ore to the extent of Rs 11,04,27,609". 2

To adjudicate upon this appeal, only a few material facts need to be taken note of. The assessee before us is a listed public limited company engaged in the business of mining bauxite and selling the same in domestic as well as international market. The assessee had filed an income-tax return disclosing a total loss of Rs. 509.11 crores whereas the assessment under section 143(3) was completed at an assessed income of Rs. 56.15 lakhs, which after setting off the brought forward losses of earlier years, resulted in a nil income. The matter, however, did not end here. On October 15, 2015, however, the Assessing Officer recorded the following reasons to reopen the assessment : 3

Ashapura Minechem Ltd. is assessed to tax under the jurisdiction of this office. The return of income for the assessment year 2011-12 was filed on September 29, 2011 at a total loss of Rs. 5,09,11,18,104. The assessment was completed on March 28, 2014 at a total income of Rs. 56,15,41,962 and after setting off brought forward losses of earlier total income became nil. The total income for the tax purposes was determined at Rs. 55,02,40,678 under section 155JB of the Income-tax Act. The assessee's appeal against the assessment order was disposed of by the learned Commissioner of Income-tax (Appeals) on August 31, 2015.

A communication dated July 17, 2014 received from the office of the Director General of Income-tax (Inv.) Kolkata stated that a commission headed by the reitired Supreme Court Justice M. B. Shah was set up to detect illegal mining activities on iron ore and manganese ore in the States of Odisha, Jharkhand and Goa. The committee has submitted its report and it was noticed that one of the assessees of this charge M/s. Ashapura Minechem Ltd. PAN : AAACA0957F has conducted illegal/unaccounted mining activity in various financial years.

The retired justice M. B. Shah Commission report is also available on the website of the Ministry of Mines, Government of India. It is noticed that in the said report the Commission has summarised the under invoicing of the export of iron ore from the State of Goa :

| *Sr. No.* | *Shipping bill date* | *Name and address of exporter* | *FE content (K)* | *Quantity exported (WMT)* | *FOB value (Rs.)* | *For rate per WMT (Rs.)* | *Country to which exported* | *% of under invoicing* |
|---|---|---|---|---|---|---|---|---|
| 1 | 8-12-2010 | M/s. Ashapura Minechem Ltd. Mumbai | 54 | 474000 | 102631073 | 2165.21 | China | 38 |
| 2 | 3-2-2011 | -do- | 54 | 51300 | 136260392 | 2655.15 | China | 41 |
| 3 | 14-2-2011 | -do- | 54 | 200 | 531230 | 2656.15 | China | 41 |
| 4 | 14-3-2011 | -do- | 49 | 25300 | 27896792 | 1102.64 | UAE | 45 |

In Chapter II of the Commission's report, the Commission has noted as under :

(a) It appears that while export there is a large scale under invoicing committed by some companies. The export data have been analysed by comparing the export of one company with the others. The comparison is based on the export of iron ore of the same grade (Fe) on the same date.

(b) Export of ore different prices by the same company to the different importers on the same date and for the same grade Fe.

(c) Some companies are having their own front of the associated companies registered outside India. They import the ore from their mother companies at low rate.

Based on the Commission's report it is seen that the total under invoicing of export value in the case of the assessee was as under :

| | | |
|---|---|---|
| 8-12-2010 | 102631073 × 3896% | = 38999808 |
| 3-2-2011 | 136260392 × 4196% | = 55866761 |
| 14-2-2011 | 531230 × 41% | = 217804 |
| 14-3-2011 | 27896792 × 55% | = 15343236 |
| Total under invoicing | | = 11,04,27,609 |

The Commission has also noted that the export price fixed by some companies are beyond imagination, when compared with the cost of production (Rs. 250 per metric tonne) royalty, cost of transportation, loading and unloading charges, port handling charges, export duty, charges of sampling and analysis, rent of plots at stocking yards (various stages), etc. The prudent exporter can afford such low prices. The exporter cannot sell the iron ore at the rate of Rs. 500 to Rs. 600 per MT.

In view of the methodology adopted by the Commission and the data analysis of the export material and value, the assessee has under invoiced the export of iron ore of Rs. 11,04,27,609. The perusal of the assessment folder, submissions made by the assessee during the course of original assessment clearly shows that the assessee has suppressed the information regarding under invoicing of export of iron ore as mentioned above.

Hence, in terms of the provisions of section 147 of the Income-tax Act I have reason to believe that the assessee has engaged in under invoicing of export of iron ore and the income of Rs. 11,04,27,609 chargeable to assessment has escaped assessment for the assessment year 2011-12.

Armed with these reasons recorded for reopening the assessment, the **4** Assessing Officer proceeded to refer the matter to his Additional Commissioner of Income-tax who approved the action of the Assessing Officer by observing as follows :

In view of the findings of underinvoicing the exports as pointed out by M. B. Shah Commission, I am satisfied that this is a fit case for issuance of notice under section 148.

5 The Assessing Officer thus proceeded to reopen the completed assessment. The assessee did raise the objections to reopening of the assessment, but the same were rejected, vide letter dated October 25, 2016, by the Assessing Officer. Aggrieved, the assessee carried the matter in appeal before the Commissioner of Income-tax (Appeals) but without any success. The assessee is not satisfied and is in further appeal before us.

6 We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

7 We find that, as rightly pointed out by the learned counsel for the assessee, the issue in appeal, so far as the validity of the reassessment proceedings is concerned, by the hon'ble jurisdictional High Court's judgment, in the case of *Sesa Sterlite Ltd.* v. *Asst. CIT* [2019] 417 ITR 334 (Bom) wherein their Lordships have, inter alia, observed as follows (page 346) :

> "Let us now see what was the information or material available to the Assessing Officer and which is disclosed in the reasons to believe stated in the original order-sheet. The information is said to be the Shah Commission report, which, inter alia, reported underinvoicing of exports by the exporters of iron ore mentioned in it including the assessee herein. If one has regard to the Shah Commission report and its use made in the reopening notice, it is at once apparent that under-invoicing in the concerned exports is nothing but a matter of expression of opinion by the Commissioner. As this court has explained in the case of *Fomento Resources (P.) Ltd.* v. *Union of India* (W. P. No. 606 of 2014 decided on July 2, 2019) where this very report of the Shah Commission was a matter of direct challenge by the mining lessees and exporters, including the assessee herein, facts found, as also conclusions drawn, by a commission of inquiry are not judicial pronouncements. The report of the Commission neither constitutes a binding judgment nor a definitive pronouncement. The Commission, as held by the Supreme Court in *State of Karnataka* v. *Union of India* [1977] 4 SCC 608 is required to submit its report, which may or may not be accepted by the appointing authority. If it is not accepted, it has no legal consequences. The Commission, in other words, has no power to adjudicate in the sense of passing an order which can be enforced. What the Commission says is merely an expression of its opinion ; it lacks both finality and authoritativeness. The differences in export prices of various exporters, so far as iron ore is concerned, may be matters of fact, which are said to have been derived by the Shah Commission from the material available in public domain, but the Commission's conclusion on the basis of these differences in

prices that there was under-invoicing, is a matter of conclusion drawn by the Commission. This conclusion is purportedly drawn on the basis of the primary facts of differences in export prices; and it is a detection by the Commissioner by way of an expression of his opinion, as we have explained above. That per se cannot be treated as a primary fact, on the basis of which any belief can be formed by the assessing authorities. Besides it must be noted that when the Shah Commission matters were argued before this court, the Union of India made an express statement on the same lines as was made before the Supreme Court in the *Goa Foundation* petition. The learned counsel appearing for the Union stated before this court, and which statement has been noted in our orders dated July 2, 2019, that the Union would not take any action against mining lessees or traders for exports of ore only on the basis of the Commission's report without making its own assessment of facts and without first giving opportunity of producing evidence to the affected parties. For the reasons stated above, which bear generally on the status of the Commission's report and its findings, as well as the statement made by the Union of India as noted above, it is impermissible to 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. In the present case, since it is a reopening notice under section 148, it may not be necessary to give any pre-notice opportunity of hearing or producing of evidence to the affected parties. The notice itself admits of a cause being shown by the affected parties, namely, in the present case, the assessee. It is, however, imperative that the Assessing Officer must apply his own mind and make his own assessment of facts before he issues any notice under section 148.

In the present case, as we have noted above, the only primary fact which was available in the public domain and which is made part of the Shah Commission report is the differences in export prices charged by the assessee to its counter parties abroad as compared to other exporters, in the cases referred to in the Shah Commission report, and noted in the reopening notice ; the assessee's prices were lower than other exporters. Even if it is assumed that so far as this fact is concerned, the information contained in the report of the Shah Commission by itself can be treated as information available to the Assessing Officer within the meaning of section 147, the further information, however, that there was therefore under-invoicing of exports by the assessee does not simply follow from this primary

information. There is nothing whatsoever in the impugned notice issued by the Assessing Officer to indicate that he has applied his mind to this aspect of the matter. The learned counsel for the Revenue relies on the case of *Calcutta Discount Co. Ltd.* v. *ITO* [1961] 41 ITR 191 (SC) to support his contention that it is not only the primary facts but inference to be drawn from such facts which also can form part of the material on which the Assessing Officer may form his belief. The learned counsel is right there. As the Supreme Court has explained in this case, from the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise, the assessing authority has to draw inferences as regards certain other facts ; and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw a proper legal inference on whether any income has escaped assessment. But then, any inference to be drawn from the primary facts in possession of the Assessing Officer must be such as might follow from those primary facts ; it cannot be a matter of conjecture or surmise and in any event, the officer has to apply his mind to arrive at such inference.

As the Supreme Court has explained in the case of *CIT* v. *A. Raman and Co.* [1968] 67 ITR 11 (SC), the law does not oblige a trader to make maximum profit out of his trading transactions. It is the income which accrues to a trader which is taxable in his hands ; not the income which he could have, but has not earned. No doubt, by adopting a device, if it is made to appear that income which really belonged to the assessee had been earned by some other person or by the assessee in some other form or means, that income may be brought to tax in the hands of the assessee and if such income has escaped tax in a previous assessment, a case for reassessment under section 147(b) may be made out. There is nothing, however, in the reasons indicated by the Assessing Officer in the present case to suggest that any such income has accrued to any person or the assessee. The reasons do not indicate that the Assessing Officer has formed any belief that under-pricing was adopted by the assessee as a device by which income had accrued to any other person or the assessee himself in any other form and such income had escaped assessment.

In any event, as we have explained above, there must be a direct nexus or live link between the information found by the Assessing Officer and the escapement of income arising in the case. In the present case, all that was available to the Assessing Officer was the

information that the export prices recovered by the assessee were less in some cases than the market prices said to be prevailing on those days. This information itself is highly doubtful since there is nothing to indicate that there was any particular market price as at the relevant date which ruled or which alone was the correct price. The export prices of other exporters, considered in the Shah Commission report, do not suggest even a trend to indicate any particular market price. Besides, the price in an individual export contract is a function of various parameters as claimed by the assessee, and as indicated whilst noting the assessee's objections to the reopening notice. But, these are matters of merit and need not engage us today, except the fact that the Commission's conclusion that any particular price was the market price was itself a matter of conjecture and hardly a primary fact. For our purposes, even if we assume that the assessee's export prices were in fact so less, there is nothing to indicate that any particular income has accrued to anyone as a result of such difference in prices. There is, thus, no direct nexus or live link between the difference in prices and escapement of income. There is, in other words, no way the Assessing Officer could have formed a belief that any income has escaped assessment simply on the basis of the differences in the export prices of the assessee when compared to others.

The learned counsel for the Revenue places strong reliance on the case of *Central Provinces Manganese Ore Co. Ltd.* v. *ITO* [1991] 191 ITR 662 (SC) ; [1991] 59 Taxman 17. Relying on this case, it is submitted that based on export prices showing a systematic lesser value as compared with the prevailing market prices for the same quality of goods, a reopening notice could indeed be issued under section 148. In *Central Provinces Manganese Ore Co. Ltd.* (supra), the facts were quite peculiar. The appellant before the court was a non-resident company having its office in London. It also had an office in India at Nagpur and was assessed to income-tax in Nagpur. It had been the practice of the appellant to produce before the Income-tax Officer relevant books kept at its local office at Nagpur and balance-sheets, trading accounts and profit and loss accounts at its head office in London. The customs authorities came to know that the appellant had declared a very low prices in respect of all its consignments of manganese ore exported out of India. It was also found that most of its export was only to 2 to 3 buyers, who in turn did not purchase ore from any other company except the appellant. After due inquiry/ investigation, customs authorities had found that the appellant was

systematically showing lesser value for the manganese ore exported as compared with the prevailing market prices for the same grade of manganese ore. The customs authorities accordingly came to a definite conclusion that the prices mentioned in the relevant contracts between the assessee and its buyers were lesser than contemporaneous market prices and it was found as a fact that the appellant company was indulging in underinvoicing. Final orders were accordingly passed under the Customs Act. It is in the context of these facts that the Supreme Court countenanced a reopening notice under section 148 in that case. It is to be noted, firstly, that what the customs authorities found was by way of an order passed under law ; it was a final order of the Collector of Customs, and it found under-invoicing as a matter of fact. Secondly, the facts disclosed peculiar circumstances such as all consignments of exports being systematically priced at lesser value. Thirdly, it must be noticed that these exports were made to related parties who did not buy from any other source. In the light of these circumstances, which were found as matters of fact, and that in a quasi-judicial order, which had attained finality, the Supreme Court found formation of belief by the Assessing Officer as having a reasonable connection with the information available to him and did not find fault with the reopening notice. These facts are entirely distinguishable. In our case, there is no systematic undervaluation of export prices. In fact, as pointed out by Mr. Pardiwala, there have been cases where the export prices of the petitioner are taken to be market prices and on the basis of those prices, under-invoicing has been claimed vis-a-vis other exporters. So much for systematic undervaluation. There is no finding by a court of law or a statutory authority as a matter of fact that there was any under-invoicing. The so-called finding is by a commission of inquiry ; that commission has itself made it clear in its very opening statement that it was not in a position to finalise illegalities or irregularities with regard to the export of iron ore by individual lessees or their representatives or traders comprehensively due to time constraints. It is at best a tentative opinion expressed by a commission of inquiry without affording any opportunity to the concerned exporters to explain the material used against them. Besides, there is no case of related parties to whom such exports were made. At least, the reopening notice and the reasons indicated by the Assessing Officer do not indicate any of these things. In the absence of these and such other materials, the simple and bare primary fact of the assessee having charged lesser

export prices from its counter-parties as compared to some other exporters, is no basis for formation of any belief that any income has escaped assessment to tax.

The judgments in the cases of *Phool Chand Bajrang Lal* v. *ITO* [1993] 203 ITR 456 (SC) ; [1993] 69 Taxman 627, *I. P. Patel and Co.* v. *Dy. CIT* [2012] 346 ITR 207 (Guj) ; [2012] 27 taxmann.com 200, *ITO* v. *Selected Dalurband Coal Co. (P.) Ltd.* [1996] 217 ITR 597 (SC), *Rattan Gupta* v. *Union of India* [1998] 234 ITR 220 (Delhi), *AGR Investment Ltd.* v. *Addl. CIT* [2011] 333 ITR 146 (Delhi) ; [2011] 9 taxmann.com 62 ; 197 Taxman 177, *Raymond Woollen Mills Ltd.* v. *ITO* [1999] 236 ITR 34 (SC) and *Asst. CIT* v. *Rajesh Jhaveri Stock Brokers (P.) Ltd.* [2007] 291 ITR 500 (SC) ; [2007] 161 Taxman 316 cited by the learned counsel for the Revenue, bear on the aspect of sufficiency or otherwise of the material used for formation of belief. These judgments make it clear that what can be submitted to judicial scrutiny is whether or not there was material on the basis of which belief could have been formed about escapement of income from assessment, and not whether the material was actually adequate or sufficient for formation of such belief. There is no quarrel with this proposition here. Here, we are precisely concerned with whether or not such belief could have been formed on the basis of such material as was available with the Assessing Officer. In every State action or order submitted to judicial scrutiny, the matter is assessed from the point of view of Wednesbury unreasonableness. The focus of the scrutiny is, firstly, on whether the authority has kept itself within the four corners of law and, secondly, and even if it has so kept itself, whether it has nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. A reopening notice issued under section 148 of the Income-tax Act is no exception to this rule. The courts have made it clear time and again that belief under section 147 of the Act 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 is reasonably capable of formation of his belief that income has escaped assessment. As the Supreme Court observed in *ITO* v. *Lakhmani Mewal Das* [1976] 103 ITR 437 (SC), belief does not mean a purely subjective satisfaction on the part of the Income-tax Officer. It must be held in good faith ; it cannot be merely a pretence. It is open to the court to examine whether the reason has a rational connection with or relevant bearing on the formation of the belief ; it must not be extraneous or irrelevant for the purpose. In the present case, as we

have noted above, the reason has no such bearing or rational connection with the formation of the belief. It is purely speculative on the part of the Assessing Officer to form a belief of escapement of income from taxation simply on the basis of lesser export prices charged by the assessee. There is 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 is no legitimate reason to believe which can sustain the impugned notice issued by the Assessing Officer.

The other main objection of the assessee is that there was no belief on the part of the Assessing Officer that escapement of income had arisen by reason of any failure on the part of the assessee to make a return under section 139 or in response to a notice issued under subsection (1) of section 142 or section 148 or to disclose fully or truly all material facts necessary for the assessment. It is not good enough for the Assessing Officer to simply make a bald assertion that escapement of income is as a result of failure on the part of the assessee to fully and truly disclose all material facts. He must indicate, however briefly, what is it that was not disclosed and which gives the Assessing Officer reason to believe that income has escaped assessment. The entire case of the Revenue is founded on the so-called under-invoicing of exports. It is difficult to fathom what information or particulars was the assessee expected to disclose in its assessment in so far as the export prices charged by it are concerned and which is now available to the Assessing Officer so as to enable him to form a belief that income has indeed escaped assessment.

When we come to the third reason alleged by the Assessing Officer for reopening the case, namely, illegality of the business and taxation of income derived from it as income from other sources, the Department is on an even thinner ground. In the first place, when the income from the activity of mining and export of ore arose and also when it was assessed to tax, there was nothing to suggest that the activity was illegal. Six years later, when the Supreme Court decided the case of *Goa Foundation*, and declared that deemed mining leases had already expired and mining carried out thereafter was illegal, the question of illegality of the activity arose for the first time. But be that as it may, even if it is assumed that at all times the activity carried on by the assessee, through which income was said to have accrued to it, was in violation of law, that does not alter the character of the

activity. Income earned from the activity is still very much business income and any expenditure made for the activity is business expenditure. Section 37(1) of the Act refers to expenditure incurred by an assessee 'for any purpose which is an offence' or 'which is prohibited by law'. Such expenditure is not deemed to be incurred for the purpose of business and no deduction or allowance can be made in respect of such expenditure. This does not imply that the character of the very activity itself changes having regard to the legality or otherwise of the activity. It is submitted on behalf of the Revenue at the Bar that the mining activity itself being an illegal activity, expenditure incurred by the assessee for it is not deductible. There is no such ground alleged in the reopening notice or the reasons indicated in support of the notice. For the first time, a faint suggestion to this effect was made in the order passed by the Assessing Officer on the objections communicated by the assessee. As our court in the case of *Hindustan Lever Ltd.* v. *R. B. Wadkar, Asst. CIT (No. 1)* [2004] 268 ITR 332 (Bom) ; [2004] 137 Taxman 479 has made it clear, the reasons, with a view to assess their reasonableness, are required to be read as they are recorded by the Assessing Officer ; no substitution or deletion is permissible ; no addition can be made to those reasons ; and no inference can be allowed to be drawn based on these reasons which is not recorded. It is for the Assessing Officer to form an opinion as to whether there was escapement of income from assessment and whether such escapement occurred from failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year ; and it is for him to put his opinion on record in black and white. The reasons recorded must disclose his mind and they should be self-explanatory. The reasons recorded cannot be supplemented by the time the matter reaches the court by filing of any affidavit or making any oral submission. In the premises, it is not open to the Revenue to seek to sustain the reopening notice on a new reason, namely, disallowance of deduction of expenditure since the whole activity was illegal.

In the premises, the impugned notice issued by the Assessing Officer under section 148 of the Act cannot be sustained and must be set aside."

The material facts of the present case being identical inasmuch as the reopening, beyond any doubt or controversy, is entirely based on the hon'ble justice M. B. Shah Commission report, as in the case that the hon'ble Bombay High Court were dealing with, the ratio of the aforesaid **8**

judgment clearly applies on the facts of this case. As a plain look at the reasons recorded for reopening the assessment, as also for the approval by the Additional Commissioner of Income-tax, the only basis for reopening of the present assessment, as in the judgment cited above, was the report submitted by the hon'ble justice M. B. Shah Commission report. Respectfully following the binding judicial precedent, extracts from which are extensively reproduced above, we must hold that the initiation of reassessment proceeding itself, on the facts of this case as evidenced by the reasons recorded by the Assessing Officer, is unsustainable in law. We, therefore, quash the reassessment proceedings.

**9** Ground No. 1 is thus allowed.

**10** As reassessment proceedings stand quashed, all other issues raised in the appeal, with respect to the merits of the additions made in the course of reassessment proceedings, are entirely academic as on now, and do not call for any adjudication. We need not deal with these grievances at this stage.

**11** However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on February 19, 2020, this order thereon is being pronounced today on the . . . day of May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income-tax (Appellate Tribunal) Rules, 1963, which deals with pronouncement of orders, provides as follows :

> (5) The pronouncement may be in any of the following manners :
>
> (a) The Bench may pronounce the order immediately upon the conclusion of the hearing.
>
> (b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.
>
> (c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily (emphasis supplied by us now) be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.

Quite clearly, "ordinarily" the order on an appeal should be pronounced by the Bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression "ordinarily" has been used in the said rule itself. This rule was inserted as a result of directions of the hon'ble jurisdictional High Court in the case of *Shivsagar Veg. Restaurant* v. *Asst. CIT* [2009] 317 ITR 433 (Bom) wherein their Lordships had, inter alia, directed that "We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the apex court in the case of *Anil Rai* v. *State of Bihar* [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 rules so framed, as a result of these directions, the expression "ordinarily" has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any "extraordinary" circumstances. **12**

Let us in this light revert to the prevailing situation in the country. On March 24, 2020, the hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income-tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial work all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that the hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated May 6, 2020 read with order dated March 23, 2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that "In case the limitation has expired after March 15, 2020 then the period **13**

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.

**14** 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 Income-tax (Appellate Tribunal) Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the Benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalised, but then, in our considered view, no such exercise was required to be carried out on the facts of this case.

In the result, the appeal is allowed. 15

Pronounced in the open court today on the 27th day of May, 2020.

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**[2020] 81 ITR (Trib) 127 (Jaipur)**

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

**EID MOHAMMAD NIZAMUDDIN**

***v.***

**INCOME-TAX OFFICER (TDS)**

(and vice versa)

**SANDEEP GOSAIN *(Judicial Member)*** and
**VIKRAM SINGH YADAV *(Accountant Member)***

April 15, 2020.

**SS ▸ ITA 1961, s 206C**
**AY ▸ 2013-14 to 2015-16**
**HF ▸ Assessee**

COLLECTION OF TAX AT SOURCE—BUYERS MANUFACTURING BEEDIS FROM TENDU LEAVES SOLD BY ASSESSEE—LIABILITY OF ASSESSEE ONLY TO EXTENT OF TAX COLLECTION AT SOURCE ON SUCH SALES AND NOT ON WHOLE SALE AMOUNT—ASSESSING OFFICER TO VERIFY AND DETERMINE QUANTUM—INCOME-TAX ACT, 1961, S. 206C.

COLLECTION OF TAX AT SOURCE—BUYERS MANUFACTURING BEEDIS FROM TENDU LEAVES SOLD BY ASSESSEE—FAILURE TO COLLECT TAX—INTEREST—PROVISO TO SECTION 206C(7) WITH EFFECT FROM 1-7-2012—ASSESSEE LIABLE TO PAY INTEREST FROM DATE ON WHICH TAX COLLECTIBLE TO DATE OF FURNISHING OF RETURN BY RESPECTIVE BUYERS EXCLUDING PERIOD PRIOR TO 1-7-2012—ASSESSEE NOT REQUIRED TO DEPOSIT INTEREST AND GIVE DETAILS OF INTEREST DEPOSIT IN PRESCRIBED CERTIFICATES—INCOME-TAX ACT, 1961, S. 206C(7).

*The Assessing Officer, relying on survey proceedings and the statement of the partner of the assessee-firm, observed that the assessee had failed to collect tax at source from the buyers of tendu leaves and also failed to submit form 27C to the effect that the goods were to be utilised for the purpose of manufacturing, processing or producing articles or things and not for trading purposes, and accordingly, issued notice to the assessee to show cause why the assessee should not be considered as assessee in default for failure to collect tax at source on sale of tendu leaves amounting to Rs. 25,58,31,594 as the amount received from the buyers were in the nature of trading in tendu leaves. The Assessing Officer held that the products sold by the assessee fell under the category of "forest produce" and hence the assessee was required to collect tax at source under the provisions of section 206C of the Income-tax Act, 1961 which the assessee had failed to collect and the assessee was held to be an assessee in default and raised a demand of Rs. 1,93,86,906 on the assessee consisting of Rs. 1,28,01,338 towards tax collection at source under section 206C(6) and Rs. 65,85,568 towards interest payable under section 206C(7).*

Held, *that the amount of Rs. 1,77,360 represented the sale amount on which the tax collection at source was to be determined and it did not represent the amount of tax collection at source and therefore, the liability of the assessee was only to the extent of tax collection at source on such sales and not on the whole sale amount. The matter was accordingly set aside to the Assessing Officer to verify and determine the quantum of tax collection at source and consequent interest thereon which was payable by the assessee in relation to the transaction.*

*The Commissioner (Appeals) finding that the assessee in the case listed at 1 to 16 had filed all the details such as declaration, certificate and return. Therefore, the benefit could be given to the assessee. Thus, the assessee was entitled to the benefit to the extent of Rs. 25,82,64,467 and no tax collection at source could be recovered on this amount. In nine cases the assessee had filed the certificate in form 27BA but returns were not furnished. However*

*evidence of filing of return through the website was filed. Accordingly the Assessing Officer was directed to allow the benefit of Rs. 1,34,89,762 after making verification of the return filed by the respective parties and if the assessee had failed to do so, the liability of tax collection at source was on the assessee. Further in the case of party at Sl. No. 26 the assessee neither filed any declaration and certificate nor any return. Therefore, the assessee could not be allowed the benefit in these cases. He upheld the demand of tax collection at source and the interest thereon raised by the Assessing Officer to the extent of Rs. 1,77,360. So far as the charging of interest under section 206C(7), the Assessing Officer was directed to calculate the interest for the period of starting from the due date of deposit of tax collection at source after collection to the date of filing of the return by the respective parties. On appeal :*

Held, *(i) that the direction of the Commissioner (Appeals) was in consonance with the proviso to section 206C(7) wherein it had been provided that the interest shall be payable from the date on which such tax was collectible to the date of furnishing of return by the respective buyers. However, the proviso did not envisage a situation where the buyers had already paid the taxes by way of advance tax even before the date on which tax becomes collectible at source, interest should not be levied. Given that the proviso had been inserted with effect from July 1, 2012, the interest for the period prior to July 1, 2012 shall not be leviable. Therefore, the assessee shall be liable to pay interest from the date on which such tax was collectible to the date of furnishing of return by the respective buyers excluding the period prior to July 1, 2012 in respect of which no interest shall be leviable. Therefore, the findings of the Commissioner (Appeals) which were in consonance with the proviso to section 206C(7) were confirmed subject to the modification that no interest shall be leviable for the period prior to July 1, 2012 and to that extent, the assessee shall be eligible for relief.*

*(ii) That existing income-tax assessees who had filed their respective returns had filed their declaration in form 27BA. The assessee had submitted that similar declarations in form 27C had been obtained from the same parties for the financial years 2015-16, 2017-18 and 2018-19 and submitted before the Commissioner and which had been accepted and no demand had been raised by the Department. Therefore, where similar declarations had been obtained from the same set of buyers, who were engaged in manufacturing of beedis from the tendu leaves sold by the assessee, in the prescribed format and correlation between the goods sold and reflected in such certificates having been established, the genuineness of such certificates prima facie was not in*

*dispute. These certificates were vital and essential for the consideration of the subject matter of appeal as these certificates supported the contention of the assessee that the tendu leaves had been sold to manufacturers of beedis and the case of the assessee fell under section 206C(1A) and not under section 206C(1). At the same time, given that these certificates had been filed for the first time during the present proceedings, in the interest of justice and fair play, these certificates needed to be verified by the Assessing Officer and where on such verification, he was satisfied about the genuineness of such certificates, necessary relief under section 206C(1A) could be granted. The Assessing Officer was to verify the declarations filed by the assessee in form 27C and examine the claim of the assessee under section 206C(1A) afresh.*

*(iii) That at the time of submitting the certificates in form 27BA as required under the proviso to section 206C(6A), the assessee was not required to deposit interest and give details of such interest deposit in such certificates. There was no mandatory requirement to pay any interest under section 206C(7) as part of certification in form 27BA and where the assessee had already paid it, he had to specify that he had paid it and where he had not paid it, he had to specify accordingly. It was only an information seeking requirement and not a requirement the absence whereof would make the certification in form 27BA invalid where there was substantial compliance with the mandatory requirements of certification.*

Cases referred to :

Anaikar Trades and Estates (P.) Ltd. (No. 2) *v.* CIT [1990] 186 ITR 313 (Mad) (para 40)

Berger Paints India Ltd. *v.* CIT [2004] 266 ITR 99 (SC) (para 56)

Chandmal Sancheti *v.* ITO [2016] 181 TTJ 906 (Jaipur) (paras 26, 38)

Chaube Jagdish Prasad *v.* Ganga Prasad Chaturvedi [1959] AIR 1959 SC 492 (paras 9, 14)

CIT *v.* Adisankara Spinning Mills (P.) Ltd. [2014] 362 ITR 233 (Mad) (para 38)

CIT (TDS) *v.* Bharat Hotels Ltd. [2016] 384 ITR 77 (Karn) (para 26)

CIT (TDS) *v.* Chhaganbhai K Sanghani [2018] 94 taxmann.com 459 (Guj) (para 47)

CIT *v.* Satya Setia (Kum.) [1983] 143 ITR 486 (MP) (paras 39, 40)

CIT (TDS) *v.* Siyaram Metal Udyog (P.) Ltd. [2016] 71 taxmann.com 204 (Guj) (paras 38, 47)

CIT *v.* Valibhai Khanbhai Mankad [2013] 261 CTR 538 (Guj) (para 51)

Dass Muni Reddy (P.) *v.* Appa Rao (P.) [1974] AIR 1974 SC 2089 (paras 9, 14)

DIT (Dy.) (I. T) *v.* Thoresen Chartering Singapore (Pte.) Ltd. [2008] 15 DTR (A.T.) 395 (Mum) (para 57)

Eid Mohd. Nizamuddin *v.* ITO (TDS) (I. T. A. No. 394/Jaipur/2016 dated September 28, 2018) (para 70)

Hindustan Coca Cola Beverage P. Ltd. *v.* CIT [2007] 293 ITR 226 (SC) (paras 2, 50, 61)

ITO(TDS) *v.* Eid Mohd. Nizamuddin (I. T. A. No. 316/Jaipur/2018 dated August 29, 2018) (para 70)

Indo Java and Co. *v.* IAC [1989] 30 ITD 161 (Delhi) [SB] (para 39)

Kali Charan Ram Chander *v.* CIT [1978] 112 ITR 405 (Cal) (paras 39, 40)

Karnataka Forest Development Corporation Ltd. *v.* ITO [2015] ITL 1007 (Bang) (para 38)

Karwat Steel Traders *v.* ITO [2013] 37 taxmann.com 190 (Mum) (para 51)

Pari Mangaldas Girdhardas *v.* CIT [1977] CTR (Guj) 647 (para 40)

R. S. S. Shanmugham Pillai and Sons *v.* CIT [1974] 95 ITR 109 (Mad) (para 40)

Rajmoti Industries *v.* ITO [1995] 52 ITD 286 (Ahd) (para 40)

Ram Prasad Sharma *v.* CIT [1979] 119 ITR 867 (All) (para 39)

Raza Textiles Ltd. *v.* ITO [1973] 87 ITR 539 (SC) (paras 9, 14)

Sant Baba Mohan Singh *v.* CIT [1973] 90 ITR 197 (All) (paras 9, 14)

Sitaram Rathore *v.* CIT [1994] 77 Taxman 265 (MP) (paras 9, 14)

Solar Automobiles India (P.) Ltd. *v.* Dy. CIT [2011] 245 CTR 475 (Karn) (para 26)

Sree Manjunatha Wines *v.* CIT [2011] 202 Taxman 620 (Karn) (para 5)

State of Gujarat *v.* Rajesh Kumar Chimanlal Barot [1996] AIR 1996 SC 2664 (paras 9, 14)

Venkata Ramaiah (K.) *v.* Seetharama Reddy (A.) [1963] AIR 1963 SC 1526 (para 40)

Vipin P. Mehta *v.* ITO [2011] 46 SOT 71 (Mum) (para 51)

**I. T. A. Nos. 422 to 424 and 776 to 778/Jaipur/2018 (assessment years 2013-14 to 2015-16).**

*Mahendra Gargieya*, Advocate, for the assessee.

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

**ORDER**

The order of the Bench was pronounced by

1 VIKRAM SINGH YADAV ***(Accountant Member)***.—These are cross-appeals filed by the assessee and the Revenue against the respective orders of the learned Commissioner of Income-tax (Appeals)-3, Jaipur, dated March 5, 2018 for the assessment years 2013-14, 2014-15 and 2015-16 respectively. Since the common issues are involved, all these appeals were heard together and are being disposed of by this consolidated order.

2 With the consent of both the parties, the matter pertaining to the financial year 2012-13 relevant to the assessment year 2013-14 is taken as the lead case for the purposes of the present discussions wherein the respective grounds of appeal are as under :

*I. T. A. No. 422/Jaipur/18 (assessee's appeal)*

"1. The impugned order passed under section 206C(6) read with 206C(7) of the Act dated March 5, 2018 is bad in law and on facts of the case, for want of jurisdiction and for various other reasons and hence, the same kindly be quashed.

2. The learned Commissioner of Income-tax (Appeals)-III, Jaipur, erred in law as well as on the facts of the case in holding that the impugned order passed under section 206C(6) read with section 206C(7) of the Act dated March 6, 2017 by the Income-tax Officer, is not barred by limitation and therefore, erred in upholding the validity of the impugned order. The impugned order so passed on dated March 6, 2017 with reference to the financial year 2012-13 after a lapse of a long period, is contrary to the intention of the Legislature and to the various judicial pronouncements and hence, is certainly barred by limitation and therefore, the same kindly be quashed in lime line.

3.1 *Rs. 1,77,360* : The learned Commissioner of Income-tax (Appeals)-III, Jaipur, erred in law as well on the facts of the case in confirming the demand raised by the Income-tax Officer due to alleged non-collection of tax at source (TCS) under section 206C(6) of the Act which is the entire amount of sales itself and otherwise also is completely contrary to the provisions of law and facts inasmuch as Rs. 1,77,360 is gross amount of sales effected by the assessee and not merely five per cent. TCS thereon. Hence, the impugned demand kindly be quashed and deleted in full.

3.2 The learned Commissioner of Income-tax (Appeals)-III, Jaipur, further erred in law as well as on the facts of the case in raising

demand of interest in relation to the alleged non-collection of tax at source (TCS) under section 206C(7) of the Act which is completely contrary to the provisions of law and facts hence, kindly be quashed and deleted in full.

4. The learned Commissioner of Income-tax (Appeals)-III, Jaipur, further erred in law as well as on the facts of the case in not considering that the present case fall under section 206C(1A) read with rule 37C inasmuch as the entire subjected sales was made to the ultimate consumers for use in manufacturing, processing or producing and hence the provision of section 206C was not applicable."

*I. T. A. No. 778/Jaipur/18 (Revenue's appeal)*

"1. Whether on the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) is justified in allowing the relief on the basis of additional evidence without calling for remand report under rule 46A and enquiry under section 250(4) of the Income-tax Act, 1961.

2. Whether on the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) is justified in deleting the demand without appreciating the fact that the assessee deductor has failed to make payment of interest under section 206C(7) and not mentioning details of challans in the prescribed Form 27BA before submission with the claim of relief in view of the proviso to section 206C read with Notification No. 12/2016 dated December 8, 2016.

3. Whether on the facts and in the law, the learned Commissioner of Income-tax (Appeals) is justified in setting aside the issue to the Assessing Officer for verification and directed to allow relief on verification under section 250(1) as per the ratio of the judgment in the case of *Hindustan Coca Cola Beverage P. Ltd.* where the words 'he may set aside' have been omitted after amendment with effect from June 1, 2001.

4. Whether on the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) is justified in holding that there is no material difference in the provisions of tax deduction at source (TDS) under Chapter XVII-B and tax collection at source (TCS) under Chapter XVII-BB of the Income-tax Act, 1961 and the facts and the judgment held on the assessment proceedings under section 201(1)/201(1A) for default in the case of *Hindustan Coca Cola Beverage P. Ltd.* are squarely applicable in the case of the assessee for assessment proceedings under section 206C(6)/206C(7) of the Act for TCS defaults."

**3** Briefly stated, the facts of the case are that the assessee is a partnership firm engaged in the business of manufacturing and trading of bidi leaves at Tonk and Uniyara and in trading of tendu leaves, which are mainly effected in the States of Rajasthan, M. P. (Betul) and Maharashtra. A survey under section 133A(2A) was conducted on March 23, 2015 at the business premises of the assessee and during the course of survey proceedings, it was found that the assessee-firm has sold tendu leaves to various parties which falls under the category of forest produce and the assessee was required to collect tax at source as per the provisions of section 206C(1) of the Income-tax Act, 1961. During the course of survey, statement of Sh. Moinuddin, a partner of the assessee-firm was also recorded and the relevant contents of the statement, reproduced in the assessment order passed under section 206C(6)/206C(7) dated March 6, 2017, reads as under :

"प्रश्न–4 कृपया आप बताएं कि तेंदु पत्तें का व्यापार तथा बीड़ी बनाने की प्रक्रिया बताएं एवं किन–किन राज्यों के साथ तथा राज्यों का नाम भी बताए।

उत्तर – मैं बीड़ी तथा तेंदू पत्ते का व्यापार मैं. ईद मोहम्मद निजामुद्दीन फर्म के अन्तर्गत साझेदार के रूप में कार्य करता हूँ तथा तेंदू पत्ते का व्यापार राजस्थान, मध्यप्रदेश एवं महाराष्ट्र राज्यों के साथ करता हूँ तथा बीड़ी बनाने का कार्य उनियारा तथा टोंक में किया जाता है।

प्रश्न–7 सर्वे आयकर अधिनियम की धारा 133ए (2ए) की कार्यवाही के दौरान तथा बहीखातों के निरीक्षण करने पर पाया गया कि उपरोक्त फर्म राजस्थान, मध्यप्रदेश तथा महाराष्ट्र राज्यों के साथ तेंदु पत्ते की बिक्री पर उपरोक्त फर्म टी.सी.एस. का संग्रहण कर सरकारी खातें में धारा 206सी (1) के तहत 5 प्रतिशत की दर से जमा करवाती है या नही।

उत्तर– नही हमने तेंदू पत्तों की बिक्री पर कोई टी.सी.एस. संग्रहीत नहीं किया है।

प्रश्न–8 कृपया आप बताएं कि तेंदू पत्तों के व्यापार पर टी.सी.एस का संग्रहण करके जमा नहीं कराने की स्पष्टीकरण देवें।

उत्तर– तेंदू पत्तों के सभी खरीददार टेक्सपेयर है तथा बीड़ी निर्माता है, उन्होनें अपनी आयकर विवरणी में पत्ते खरीद रकम को बही खाते में इन्द्राज करके आयकर रिटर्न पेश कर दी है जिसमें पत्तों से बनी हुई बीड़ी के विक्रय के लाभ को आय में शामिल करके आयकर जमा करा दिया गया है यहां कर लगाना दोहरा कर लगाना होगा। कोई भी स्थानीय व्यापारी तथा राजस्थान एवं अन्य राज्यों के व्यापारी भी इस तरह का दोहरा कर (टी.सी.एस.) संग्रहण नहीं कर रहे है।

प्रश्न–9 आपका उत्तर नं.8 है कि तेंदु पत्ता के सभी खरीददार टेक्सपेयर है तो कृपया बताए कि आपने फॉर्म 27 जमा तथा डिक्लेरेशन सर्टीफिकेशन ऑफ बायर (Rule-37C) जमा करा रखा हैं या नही।

उत्तर – डिक्लेरेशन सर्टीफिकेशन आफ बायर (Rule 37C) के तहत फॉर्म 27 सी जमा नही कराया है। लेकिन हमने फॉरेस्ट विभाग से टैक्स देकर कच्चे पत्ते को प्रोसेस किया और उपरोक्त सर्टिफिकेट न लेने की स्थिति में जिन बायरस को पत्ता विक्रय किया है उनसे इस विषय का सर्टिफिकेट मंगवाने के लिये लिखा गया है और इस विषय में आपके कार्यालय को मय बायर के पूर्ण पते के सूचित कर दिया गया है और ऐसी स्थिति में विभिन्न उच्च न्यायालय में एवं उच्चतम न्यायलय के निर्णय है। आप इस बिन्दू पर कार्यवाही मात्र कुछ दिन पहले प्रारम्भ की गई है और हमारी ओर से दिनांक 10.03.2015 को निवेदन किया है कि सम्बन्धित निर्धारण अधिकारी द्वार मालूम करा लिया गया है कि उन्होनें पत्ता खरीद व विक्रय अथवा बीड़ी पर कर जमा करा दिया अथवा नही और ना ही हमारा केस धारा 206 की परिधी में नही आता है जिसका कोई उत्तर हमे आज तक नहीं दिया गया है और इसी विषय में दिनांक आज 23.03.2015 को पत्र प्रस्तुत किया है। आपकी इतने वर्षो की क्वेरी के लिए जबाब तैयार करने के लिए बहुत कम समय दिया गया है कृपया समय और दिया जाए।"

The Assessing Officer, relying on the aforesaid survey proceedings and **4**
the statement of the partner of the assessee's firm so recorded during the course of survey, observed that the assessee-firm has failed to collect tax at source from the buyers of tendu leaves and also failed to submit form No. 27C in the prescribed form to the effect that the goods are to be utilised for the purpose of manufacturing, processing or producing articles or thing and not for trading purposes and accordingly, a show-cause notice dated September 21, 2015 was issued to the assessee-firm as to why the assessee-firm should not be considered as an assessee in default for non-collection of TCS on sale of tendu leaves amounting to Rs. 25,58,31,594 as the amount received from the buyers are in the nature of trading in tendu leaves.

The assessee-firm, in response to the show-cause notice, submitted that **5**
the action on the part of the Assessing Officer is premature and without valid jurisdiction as the Assessing Officer, before invoking the provisions of section 206C(6) and 206C(7) has to satisfy himself that the concerned buyers to whom subjected sales has been made have already considered the subjected sales and paid tax thereon or not and without having fulfilled this condition or without having made such enquiries, the proceedings under section 206C(6) and 206C(7) of the Act cannot be initiated and in support, reliance was placed on the decision of the hon'ble Karnataka High Court in the case of *Sree Manjunatha Wines* v. *CIT* [2011] 202 Taxman 620 (Karn).

Further, during the assessment proceedings, the Assessing Officer asked **6**
the assessee-firm to reconcile the figures of turnover along with supporting documentary evidence and asked it to furnish form No. 27BA/ITR, if any, of all the parties. In response, the assessee-firm vide its submission dated February 13, 2017 submitted certificate/form No. 27BA from the parties/accountant as prescribed in the first proviso to section 206C(6A) of the Act.

The Assessing Officer, thereafter, referring to the statement of the part- **7**
ner of the assessee-firm recorded during the course of survey, held that nowhere in the statement, the assessee has accepted the default. Thereafter, referring to the provisions of section 206C, it was held by the Assessing Officer that the products sold by the assessee falls under the category of "forest produce" and hence, the assessee was required to collect tax at source as per the provisions of section 206C of the Act which the assessee has failed to collect.

Further, referring to the provisions of sub-sections (1A) and (1B) of sec- **8**
tion 206C of the Income-tax Act, 1961, the Assessing Officer held that the assessee-firm failed to obtain the requisite forms in form No. 27C from the buyers and submit the same to the learned Commissioner of Income-tax

(TDS) within the stipulated time. Regarding filing of form No. 27BA and the submission of the assessee-firm that the parties who have purchased the tendu leaves have duly recorded the same in their respective books of account and maximum number of buyers have furnished their return of income under section 139(1), it was observed by the Assessing Officer that he has gone through the documentation so submitted by the assessee-firm and on a perusal thereof, it is noticed that complete information in the form/certificate have not been given by the accountant/party as required by the Legislature and most of the columns are either not filled up as required or simply mentioned as per details/enclosure. Moreover, the accountant has signed the forms with conditional remarks "As certified by the buyer" whereas the forms should have been filled up and certified by the accountant itself on the basis of records. Further, some of the parties have not filed return on or before due dates prescribed under section 139 of the Income-tax Act, 1961. It was accordingly held by the Assessing Officer that the assessee-firm has failed to fulfil the condition laid down as prescribed in the first proviso to section 206C(6A) of the Act and the assessee was held to be an assessee in default and demand of Rs. 1,93,86,906 was raised on the assessee consisting of Rs. 1,28,01,338 towards TCS under section 206C(6) and Rs. 65,85,568 towards interest payable under section 206C(7) of the Act.

**9** Being aggrieved, the assessee carried the matter in appeal before the learned Commissioner of Income-tax (Appeals) and the submissions made before the Assessing Officer were reiterated. It was further submitted inter alia, as under :

> "3. Directly covered by the decision of the Commissioner of Income-tax (Appeals) in the assessment year 2008-09. Before proceeding further, at the outset it is submitted that all the contentions raised now were also raised in the assessment year 2008-09 where from this controversy arose from the first time and your learned predecessor had accepted the contentions and granted substantial relief in Appeal No. 46/2015-16 vide her order dated February 29, 2016 (refer paper book 102-131 in the assessment year 2010-11). The facts and circumstances being exactly identical in this year also, the same decision has to be applied. More particularly when the Department not having gone in further appeal, the said order had become final.
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> 4. Under this background, the assessee specifically agitated before the Income-tax Officer, the invoking of section 206C of the Act vide its letter dated January 25, 2017 stating that out of 26 parties, the maximum number of buyers are already (i) assessed to tax, (ii) have

already furnished their return of income under section 139(1) of the Act, (iii) they have already taken into account the cost of the purchases of tendu leaves made from the assessee-firm while computing the total income for the above return of income, and (iv) have already paid the income-tax due on the incomes declared in the said return of income. In most of the cases, PANs were also submitted to the Income-tax Officer vide the letter of the assessee filed on February 13, 2017. In support of the above facts, showing three categories of the buyer-payees, were also admittedly submitted. Category A : The names of 14 buyers and the respective amount of sales made to them totalling to Rs. 25,57,81,536 (who have already filed their ROI and paid the due tax) along with the copies of certificates as admitted by the learned Income-tax Officer at page 7 of the impugned order. Category B : The names of 11 buyers and the respective amount of sales made to them totalling to Rs. 1,59,72,693 along with copies of certificates (with PAN) as admitted by the learned Income-tax Officer at page 7 of the impugned order. Category C : For the remaining amount of the sales, the assessee was and is still in the process of collecting the requisite details and certificates on this aspect but their PAN were made available.

The Income-tax Officer did not deny from these facts but rather failed to rebut the same and rejected merely on suspicion on the ground that copies of the respective returns from those buyer parties were not submitted before him. The Income-tax Officer however, did not deny that no tax remained payable in the hands of the buyers. The Income-tax Officer having not satisfied this pre-requisite by making necessary enquiry to this effect, lacked jurisdiction and therefore, the impugned order deserves to be quashed in full.

5. Copy of Samman Patra dated July 25, 2002 issued by the Commissioner of Income-tax, Kota being the highest taxpayer award in income from the business category for the assessment year 1999-2000 in Additional Commissioner of Income-tax, Sawai Madhopur Range. This shows that the assessee is a law abiding respected citizen and also a respected taxpayer whose conduct is not contumacious which aspect, kindly be taken into consideration while deciding the present appeal.

6. Even after filing sufficient and voluminious evidence which clearly served the purpose in substance, the Income-tax Officer made various allegations which are more in the nature of suspicion and not

substantial, as submitted hereinbelow with reference to each allegation :

| *S. No.* | *ITOs comments* | *Assessee* |
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| 1. | Complete information in the forms/certificates have not been given by the accountant/party, as required by the legislature and most of the columns are either not filed up as required or simply mentioned as per details/enclosure | • It is a vague allegation and without giving specific details of the particular form/certificates lacking details. The Income-tax Officer has not pointed out specifically which column, details were not filled in. There may be some BSR code with reference to the payment of tax made by the buyer (tax-payee) and other some minor details but the learned Income-tax Officer has conveniently ignored the categorical certification given by the buyer payee reading as under :<br>'1. That we have furnished our return of income under section 139(1) of the Act for the above year.<br>2. That we have taken into account the cost of purchase of tendu leaves including CST of Rs. from M/s. Eid Mohammed Nizamuddin Tonk (Raj.) for computing the income in the above return.<br>3. That we have paid income-tax due on the income declared by us in the return.'<br>• A bare perusal of the said certificate make it clear that the assessee has fully complied with and established requirement of law in substance. When the payee has categorically confirmed the fact of inclusion of the purchases made in its account while preparing return of income and even confirmed having paid the tax thereon there remains nothing. The amendment in the law and the rule were prescribed keeping in mind the ratio laid by the hon'ble apex court in the case of *Hindustan Coca Cola Beverage P. Ltd.* (supra). The Income-tax Officer has not at all denied in the entire order that the appellant has not complied with the requirement prescribed in *Hindustan Coca Cola Beverage P. Ltd.* (supra), on the fulfilment of which, the assessee deducter was fully entitled to get the benefit of the proviso to section 206C(6A). |

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| | | • Even then, if the Income-tax Officer was still doubtful of the fact of the buyer-payee making the tax payment nothing prevented him to make enquires directly from his counter part, having the jurisdiction over that particular buyer payee-to bring the truth on surface. But without exercising these powers and by merely making and repeating allegations upon the assessee deductor (as if everything is to be done by the assessee deductor only whether he is capable of getting all the informations in absence of any legal power conferred upon it and in absence of suitable infrastructure). |
| 2. | Accountant has signed the forms with conditional remarks "As certified by the buyer" whereas the forms should have been filled up and certified by the accountant itself on the basis of records | It was the learned chartered accountant who signed the certificate is an expert upon which even the Legislature has reposed confidence. If the expert has certified certain facts in a particular manner it is for him and the assessee has no role to play.<br>Careful reading of the certificate show that the chartered accountant was required, only to certify the basic requirements of the proviso. The further details were to be mere filled up as supplied to him but was not required to be certified as wrongly understood.<br>Allegation is ignoring the fact that a substantive compliance was fully and duly made by the assessee inasmuch as such form was based on the certificates given by the concerned buyer duly signed.<br>If the Income-tax Officer was not satisfied he could have directly enquired the learned chartered accountant to get a confirmation of the fact certified by him. Needless to say that this is a case very similar to a case where the Income-tax Officer has made some disallowance or addition which is totally contrary to the provision of law, the only remedy left with the poor assessee is to file an appeal, but the assessee could not have stopped the Income-tax Officer from doing his job whether right or wrong. Similarly, so far as the assessee is concerned, he discharged his duty by pressing a certificate of an expert and unless contrary evidence is brought on record by the Income-tax Officer as regards proving the incorrectness of the fact certified by the expert, the Income-tax Officer was bound to have accepted the certificate of the |

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| | | expert. As stated, the Income-tax Officer chose not to make any inquiry to prove the incorrectness in the certificate of the expert. Hence he is not entitled to make an allegation of this type, which is prayed to be ignored altogether.<br>• There is nothing to show that the accountant himself has not filed up and certified such certificates. In absence of any contrary evidence such certificate could not have been doubted. |
| 3. | The accountant has also ignored the vital facts that some of the parties have not filed return on or before due dates prescribed under section 139 of the Income-tax Act, 1961. | • It is absolutely incorrect allegation that the chartered accountant has ignored the vital fact of non-filing of the return of income by some of the parties on/before the due date inasmuch as in all the certificates, the fact of filing of return of income in due time has been stated. The learned Income-tax Officer has not at all, especially pointed out such cases. But even otherwise, the substantive fact is that the buyer-payee assessee have filed their return of income and paid the tax thereon. If there is a delay in filing return of income, the amount of interest chargeable may increase, but the benefit cannot be denied.<br>• Buyers PAN and TAN was also mentioned in form 27BA. Needless to say that all such details were already available online and it was within the reach of the Income-tax Officer himself to verify the details online. |
| 4. | The assessee has claimed earlier that the parties/purchasers are scattered at distant and remote places of Rajasthan, M. P., and Maharashtra, whereas all forms 27BA has been signed by same accountant on a single date. | How the learned chartered accountant that is the expert could sign the certificate on a single date. Firstly, does not reduces the evidently value thereof which is binding even upon the Income-tax Officer and if, the Income-tax Officer was having the suspicion, he must have brought contrary facts on record to negate the claimed state of affairs. |
| 5. | The Legislature has introduced the proviso to end the litigation for non-collection of TCS on payment of interest as per proviso, whereas the deductor has opted both option of litigation, i. e., challenging the liability of interest on TCS | Such allegation is beyond understanding. An assessee has got all the right to challenge the proceedings from all angles/aspects and to avail of all the remedies available and there cannot by any prohibition thereon. |

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| | on the sale of tendu leaves before the appellate authorities in the earlier years and other way it has claimed benefit for proviso without paying or agreeing to pay the interest as per the first proviso to section 206C(6A) of the Income-tax Act, 1961. | |
| 6. | Further that the certificates were signed on a single day. | Nothing more than a suspicion. If it was manageable for the chartered accountant to have discharge his job on one day, which is quite possible looking to the nature and quantum of the work, there was nothing wrong. |

Unfortunately, the learned Income-tax Officer instead of admitting these certificates which are binding upon him being filed as required by the law and finding that there was no escape from accepting what the assessee has said and granting relief is trying to run away on one pretense or the other, which was not fair on his part.

Thus, there is absolutely no substance in the allegations of the observations of the Income-tax Officer (TDS)-3 and deserves to be ignored. He completely failed to disprove the various facts, figures evidences brought on record proving the compliance with the law to get the benefit.

6.1 It is further pertinent to note that the certificates and declaration are being filed in similar method and manner/ similar type right since beginning, however, no such objection was raised in the past. In the financial year 2007-08, when additional evidence filed, the learned Income-tax Officer in the remand report did not raise any such objection and the matter stood accepted by the learned Commissioner of Income-tax (Appeals) also in Appeal No. 46/JPR/15-16 dated February 29, 2016 (assessment year 2013-14). Similarly in the financial year 2008-09 also, the concerned Income-tax Officer (TDS) also accepted the certificate of chartered accountant which were prepared in the similar manner. Kindly refer order dated in Appeal No. 46/2015-16 vide her order dated February 29, 2016 in the assessment year 2010-11. But when in the past Department itself has accepted, there appear no reasons as to why they should not accept the certificates in this year in the absence of any change in the facts and circumstances of the case. Thus, the allegations of the Income-tax

Officer are nothing but mere suspicion and a pretence not to give the benefit to the assessee to which, it otherwise deserved.

6.2 The Income-tax Officer (TDS) has completely failed to understand that in the matter of TDS and TCS, it is tax of a third party and not of the assessee. So far as the assessee is concerned it has declared the income earned by it and paid a huge tax and it cannot be denied that the assessee is amongst one of the highest tax payers (was a warded earlier) also. Simply, minor defect/deficiencies, if any, and that too while deducting the TCS (being the tax liability of third party) the assessee cannot be penalised and this behaviour of the Department is nothing sort of harassment of an honest taxpayer citizen of the country. We have already submitted that despite repeated request the predecessor learned Income-tax Officer had started proceedings of all the year and/pressed for the submissions of the details, making for the assessee almost difficult even to carry out its day-to-day business even though such proceedings were not getting time barred and there were no saving compulsion upon the officer.

7. The learned Income-tax Officer at page 6 has narrated the fact of granting opportunities to the assessee however, he has conveniently ignored the request of the assessee (though reproduced in the impugned order itself at page 5) that the order of the learned Commissioner of Income-tax (Appeals) in the first year, i. e., financial year 2007-08 was pending decision before the learned Commissioner of Income-tax (Appeals) and it was proper to wait for the decision which could be taken as a guidance for the later years. Moreover, details were to be obtained from various parties/purchasers scattered at distant and remote places of Rajasthan, M. P., and Maharashtra. It cannot be denied that the assessee was dependent upon those parties who are having their upper hand and were not obliged to act upon the direction of the assessee. On the contrary and unfortunately, it was an attempt on the part of the Income-tax Officer to harass the assessee by deciding various years in a haste and then to create huge demands which was avoidable without any loss to the Revenue because those orders were not getting barred by limitation. It is under this background the assessee had to make request seeking time but in any case finally, as the Income-tax Officer has also agreed at page 7, that a letter dated January 25, 2017. (paper book 130) was filed on February 13, 2017 along with the various certificates/form 27BA as prescribed in first proviso to section 206C(6A). Hence such a discussion was irrelevant and in any case was without judiciously appreciating the facts.

Lastly, all such certificates were certified in the same manner and method as was done in the financial year 2007-08 (assessment year 2008-09) which has already decided by the learned Predecessor as submitted in para 3. Therefore, there is no substance in these allegations and hence have to be ignored altogether.

8. The impugned order was passed without having jurisdiction: It is submitted that the jurisdiction over the assessee under TAN as per section 124(1) rested with the Income-tax Officer, TDS, Kota with whom the TDS returned were being regularly filed by the assessee. This fact is evident from the e-filling website of the Income-tax Department which also shows the Income-tax Officer (TDS), Kota having a territorial jurisdiction over Tonk, District wherein the assessee situated.

But surprisingly, the impugned orders for the assessment years 2009-10 to 2015-16 were passed by the present Income-tax Officer, TDS-3, Jaipur on December 22, 2016 and March 6, 2017 is lacking jurisdiction and hence void ab initio and liable to be quashed. Kindly refer *State of Gujarat* v. *Rajesh Kumar Chimanlal Barot*, AIR 1996 SC 2664, *Raza Textiles Ltd.* v. *ITO* [1973] 87 ITR 539 (SC), *Chaube Jagdish Prasad* v. *Ganga Prasad Chaturvedi*, AIR 1959 SC 492, *P. Dass Muni Reddy* v. *P. Appa Rao*, AIR 1974 SC 2089, *Sant Baba Mohan Singh* v. *CIT* [1973] 90 ITR 197 (All) and *Sitaram Rathore* v. *CIT* [1994] 77 Taxman 265 (MP).

Hence, the impugned demand so raised kindly be quashed in full or in the alternate the benefit of the proviso to section 206C(6A) be given."

The learned Commissioner of Income-tax (Appeals) after considering 10
the findings of the Assessing Officer and the submission so filed by the assessee and other material on record has recorded his finding which are contained at para 5.3 of his order and we deem it appropriate to reproduce the same in verbatim as under :

5.3 I have carefully considered the rival contentions raised by the parties. The Income-tax Officer contended that the provision of TCS are not similar to the TDS provisions and therefore, the decision in *Hindustan Coca Cola Beverage P. Ltd.* (supra) should not be applied in this case. Though he agreed that the object of deduction/collection of TDS/TCS is the same but the liability imposed upon the assessee under the TCS provisions under section 206C is far different from the liability imposed under the TDS provisions under section 201. In his view, under TCS, the assessee is not deemed to be the assessee in

default but is made liable to pay TCS amount and the entire liability in respect of TCS is fastened upon him irrespective of the fact whether he has collected the TCS or not which is in contrast with the provisions of section 201(1).

The Assessing Officer admitted that the very object of the provisions relating to TDS and TCS are the same. These provisions falls under the Chapter XVII and provide a method of collection and recovery of tax at source. The object behind the deduction/collection of TDS/TCS is the same, i. e., to ensure the advance recovery of the taxes from the concerned payer/seller to be credited to the account of the concerned recipient/buyer. The non-compliance with the provisions, i. e., non-deduction/non-collection, in both the cases, make the person responsible, liable to pay the amount of TDS/TCS in one way or the other. Whereas in the case of TCS, such demand is created under section 206C(6), in the case of TDS, such demand is created under section 201(1) and is recovered in both the cases from the person responsible unless he satisfies the conditions of exemptions provided there under. Similarly the interest for the delayed collection and deposit of TDS/TCS has also been provided under section 201(1A) and 206C(7) of the Act respectively. Both the provisions lose the rigour and allow exemption from the collection and deposit of TDS/TCS inasmuch as the first proviso to section 206C(6A) provides that by filing the declarations and the certification in the prescribed form 27BA. Similarly, the first proviso to section 201(1) provides such immunity on filing of declarations and certification in prescribed form. Further the use of the word "shall" under section 206C(6) in contrast of section 201(1) does not make much difference inasmuch as the responsibility of making TDS/TCS is mandatory under both the provisions. Also further differentiation sought by the Assessing Officer that in the case of TDS, the subjected amount becomes the receipt in the hands of the recipient whereas in the case of the TCS, the subject amount of sale become the expenditure in the hands of the buyer, is not a material difference as such. Therefore, it is held that there is no substantive difference at all between the provisions relating to TDS or TCS as contented by the Assessing Officer for the above reasons. Therefore, he further contentions of the non-applicability of the decision of *Hindustan Coca Cola* (supra) is hereby rejected.

Having held that there is no material difference between the provision of TCS and TDS, I now proceed to considered the facts of the case, submission of the appellant filed time to time, finding recorded

in the order and the contentions raised by the Assessing Officer in the remand report. Before that, I may clarify that there is no dispute on the application of section 206C relating to the provisions of tax collection at source, so far as the sales made by the assessee of Rs. 26 crores (approx.) of tendu patta to different buyer, is concerned. Though in the impugned order the Assessing Officer TDS has mentioned the figure of the sales of Rs. 25,58,31,594. However, the learned authorised representative pointed out in its submission that the correct figure otherwise is Rs. 27,19,31,589 which fact, is not disputed by the Assessing Officer.

Based on the copies of the certificates by the chartered accountant and the declarations by the partner of the appellant-firm in the prescribed form 27BA copies of the acknowledgments of filing of return of income/return filing details as also copies taken from the official website, the following position emerges :

M/s. EID MOHAMMAD NIZAMUDDIN, TONK PAN : AAAFI4581L

CHART OF YEAR-WISE SALES OF TENDU-LEAVES AND DECLARATION OF INCOME BY THE BUYERS

| *S. No.* | *Name of buyer* | *PAN* | *Amount in FY 2012-13* | *Remarks* |
|---|---|---|---|---|
| A | Cases where declaration and certificate in form 27BA and return of income filed. | | | |
| 1. | M/s. Manga lore Ganesh Beedi Works Mysore (Karnataka) | AAAAM1342G | 6,84,21,238 | ROI filed enclosed |
| 2. | M/s. Gujarath Tobacco Company Mysore (Karnataka) | AFJPP1330G | 15,88,890 | ROI filed enclosed |
| 3. | M/s. Pannalal Premraf Khatri Sawai Modhopur (Raj.) | AADFP3174F | 45,38,765 | ROI filed enclosed |
| 4. | M/s. Anand Tobacco Products Mangalore (Karnataka) | AAFFA4744G | 9,67,200 | ROI filed enclosed |
| 5. | M/s. Prakash Bidies Limited Mangalore (Karnataka) | AABCP9885E | 95,03,876 | ROI filed enclosed |
| 6. | M/s. P and J Tobacco Products Company Gopal Nagar Distt. Murs | AACFP2000R | 35,71,350 | ROI filed enclosed |
| 7. | M/s. SJ and SP Family Trust Jagtial Distt. Karimnagar (A. P.) | AAATS5877R | 4,41,64,013 | ROI filed enclosed |
| 8. | M/s. JP Tobacco Products Pvt. Ltd. Damoh (M.P.) | AAACJ7141G | 1,15,91,849 | ROI filed enclosed |

| | | | | |
|---|---|---|---|---|
| 9. | Parbhudas Kishordas Tobacco Products Pvt. Ltd. Nizamabad | AABCP1495Q | 1,02,33,471 | ROI filed enclosed |
| 10. | Parbhudas Kishordas Tobacco Products Pvt. Ltd. Damoh (MP,) | AABCP1495Q | 3,22,13,394 | ROI filed enclosed |
| 11. | M/s. Hyderabad Bidi Manufactures Hyderabad | AABFH1252J | 60,50,190 | ROI filed enclosed |
| 12. | M/s. Arshad and Company Hyderabad | AAFFA0570N | 23,55,870 | ROI filed enclosed |
| 13. | M/s. Shaz Enterprises Hyderabad | AJBPK1293R | 44,48,515 | ROI filed enclosed |
| 14. | M/s. Char Bhai Bidi Works Hyderabad | AABFC0789P | 5,61,32,915 | ROI filed enclosed |
| 15. | M/s. Shaheen Traders Mysore (Karnataka) | ADSPB5725E | 9,20,315 | ROI filed enclosed |
| 16. | M/s. Star Traders Tanda (U. P.) | ACCPS9843D | 15,62,616 | ROI filed enclosed |
| | | Total (A) (Rs.) | 25,82,64,467 | |
| B | Declaration in form 27BA available but return of income not filed (only Assessing Officer details given.) | | | |
| 17. | M/s. M. P. Traders Bangalore (Karnataka) | AFLPP4547H | 11,94,765 | A chart showing ROI filling details and copy of website filed. |
| 18. | M/s. S. M. Traders Tumkur (Karnataka) | ABCPY5783B | 9,14,625 | A chart showing ROI filling details and copy of website filed. |
| 19. | M/s. Babu Bhaf Rashid Bhai Karaull (Rajasthan) | ACAPA0895P | 23,90,012 | A chart showing ROI filling details and of website filed. |
| 20. | M/s. Shivam Trading Company Amroha (U. P.) | CVKPK2262H | 11,15,200 | A chart showing ROI filling details and copy of website filed. |
| 21. | M/s. Mehboob Bidi Factory Amroha J . P. Nagar (U. P.) | AAWFM0254A | 56,65,360 | A chart showing ROI filling details and copy of website filed. |

| | | | | |
|---|---|---|---|---|
| 22. | M/s. Harfom Traders Bhiwani (Mumbai) | AGCPY4276C | 1,62,142 | A chart showing ROI filling details and copy of |
| 23. | M/s. Shankara Traders Amroha (U. P.) | AGDPA5730H | 6,22,890 | A chart showing ROI filling details and |
| 24. | M/s. Afrfn Traders Beedi Merchants Sfra (Karnataka) | ALIPM9963H | 10,78,688 | A chart showing ROI filling details and |
| 25. | J. G. and Sons Kourtla | ACGPL9235D | 3,46,080 | A chart showing ROI filling details and |
| | | Total (B) (Rs.) | 1,34,89,762 | |
| C | Cases where certificate/return of income not filed | | | |
| 26. | Ramesh S/o Nathu, M. P. | | 1,77,360 | Certificate available but return not filed |
| | | Total (B) (Rs.) | 1,77,360 | |
| | | Grand total | 27,19,31,589 | |

It is evident from the table above that the assessee in the case listed at 1 to 16 has filed all the details like declaration, certificate and return of income. Therefore, this benefit as per the ratio laid down in *Hindustan Coca Cola* (supra) could be given to the assessee. Thus, the appellant is entitled to the benefit to the extent of Rs. 25,82,64,467 and no TCS can be recovered on this amount.

In nine cases at serial Nos. 17 to 25 the assessee has filed the certificate in form 27BA but return of income were not furnished. However evidence of filing of return through website was filed.

Accordingly, the Assessing Officer is directed to allow the benefit of Rs. 1,34,89,762 as per the ratio laid down by the hon'ble apex court in *Hindustan Coca Cola* (supra) only after making verification of the return of income filed by the respective parties' case the appellant failed to do so, the liability of TCS is on the appellant.

Further, in the case of party at serial No. 26 the assessee neither filed any declaration and certificate nor any return of income. Therefore, the assessee cannot be allowed the benefit of the decision *Hindustan Coca Cola* (supra) in these cases. The demand of TCS and the interest thereon, raised by the Income-tax Officer to the extent of Rs. 1,77,360 is upheld being justified.

So far as the charging of interest under section 206C(7) is concerned, the Assessing Officer is directed to calculate the interest for period of starting from the due date of deposit of TCS after collection to the date of filing of the return by respective parties. Accordingly this ground is partly allowed."

**11** Against the aforesaid findings of the learned Commissioner of Income-tax (Appeals), both the parties are in appeal before us.

**12** Firstly, we take up the grounds of the assessee's appeal. In ground No. 1, the assessee has challenged the order passed by the Assessing Officer for want of requisite jurisdiction.

**13** In this regard, the learned authorised representative submitted that the assessee-firm has been allotted TAN No. JDHI01315G and the said TAN comes under the territorial jurisdiction of the Income-tax Officer (TDS), Kota bearing Code No. RJN-WT-850-3 as per section 124(1) with whom the TDS returns were being regularly filed. However, the impugned survey under section 133A(2A) was conducted on March 23, 2015 by the Income-tax Officer, TDS-3, Jaipur and thereafter the impugned order for the assessment year 2013-14 was passed by the Income-tax Officer, TDS-3, Jaipur without having valid jurisdiction.

**14** It was submitted that the said ground was also taken before the learned Commissioner of Income-tax (Appeals). However, it appears that this ground has escaped his attention and remain to be decided and therefore, this issue may be restored to the file of the learned Commissioner of Income-tax (Appeals) to be decided after providing opportunity to the assessee. Further, the learned authorised representative reiterated the submissions made before the learned Commissioner of Income-tax (Appeals) which read as under :

"The impugned order was passed without having jurisdiction : It is submitted that the jurisdiction over the assessee under TAN as per section 124(1) rested with the Income-tax Officer, TDS, Kota with whom the TDS returned were being regularly filed by the assessee. This fact is evident from the e-filling website of the Income-tax Department which also shows the Income-tax Officer (TDS), Kota having territorial jurisdiction over Tonk, District wherein the assessee situated.

But surprisingly, the impugned orders for the assessment years 2009-10 to 2015-16 were passed by the present Income-tax Officer, TDS-3, Jaipur, on December 22, 2016 and March 6, 2017 is lacking jurisdiction and hence void ab initio and liable to be quashed. Kindly refer *State of Gujarat* v. *Rajesh Kumar Chimanlal Barot*, AIR 1996 SC

2664, *Raza Textiles Ltd.* v. *ITO* [1973] 87 ITR 539 (SC), *Chaube Jagdish Prasad* v. *Ganga Prasad Chaturvedi*, AIR 1959 SC 492, *P. Dass Muni Reddy* v. *P. Appa Rao*, AIR 1974 SC 2089, *Sant Baba Mohan Singh* v. *CIT* [1973] 90 ITR 197 (All) and *Sitaram Rathore* v. *CIT* [1994] 77 Taxman 265 (MP).

Hence, the impugned demand so raised kindly be quashed in full or in the alternate the benefit of the proviso to section 206C(6A) be given."

15 Per contra, the learned Departmental representative drawn our reference to the order of the learned Commissioner of Income-tax (Appeals) and submitted that the ground of appeal though taken by the assessee-firm before the learned Commissioner of Income-tax (Appeals), however, since the same was not pressed during the course of hearing, the ground was not allowed and dismissed by the learned Commissioner of Income-tax (Appeals).

16 We have heard the rival contentions and perused the material available on record. We find that the assessee has raised a ground of appeal (ground No. 1) before the learned Commissioner of Income-tax (Appeals) and challenged the order passed under section 206C(6) read with section 206C(7) dated March 6, 2017 for want of requisite jurisdiction with the Income-tax Officer, Jaipur and thereafter, in ground No. 2, has challenged the order so passed by the Income-tax Officer, Jaipur as barred by limitation. The learned Commissioner of Income-tax (Appeals) while referring to both these grounds of appeal has apparently read and understood both these grounds as relating to limitation as apparent from reading of para 4 of his order and thereafter, in para 4.1, has held that these grounds were not pressed by the learned authorised representative of the appellant and therefore, these grounds are not allowed. During the course of hearing, the learned authorised representative stated at the Bar that only ground relating to limitation was not pressed before the learned Commissioner of Income-tax (Appeals). We therefore find that the ground relating to challenging the order passed by the Assessing Officer for want of jurisdiction was taken before the learned Commissioner of Income-tax (Appeals), however, it appears that the learned Commissioner of Income-tax (Appeals) has wrongly read the ground relating to jurisdiction and limitation together and has dismissed both these grounds as not pressed. Given that this ground was taken by the assessee before the learned Commissioner of Income-tax (Appeals) and not adjudicated upon, the matter deserve to be set aside to the file of the learned Commissioner of Income-tax (Appeals) to adjudicate the said ground of appeal after providing

reasonable opportunity to the assessee. In the result, ground No. 1 is allowed for statistical purposes.

**17** In ground No. 2, the assessee has challenged the order passed by the Assessing Officer as barred by limitation. During the course of hearing, the same was not pressed by the learned authorised representative on behalf of the assessee, hence, the same is dismissed as not pressed.

**18** In ground No. 3.1, the assessee has challenged the confirmation of demand towards TCS amounting to Rs. 1,77,360.

**19** In this regard, the learned authorised representative submitted that the total amount of sale of tendu leaves worth Rs. 27,19,31,589 consisted of different categories (A, B and C) of buyers (categorised based on documentation on record) which have been examined by the Commissioner of Income-tax (Appeals) as stated at pages 14 to 16 of his order and accordingly, feeling satisfied with the contentions of the assessee and submissions/documentation in support thereof, held that the assessee was not in default to the extent of the sales totalling to Rs. 25,82,64,467 and Rs. 1,34,89,762 (as per list A and B). However, with regard to the third type of categories (list C) for the cases listed from S. No. 26, showing sales of Rs. 1,77,360, the learned Commissioner of Income-tax (Appeals) held that the benefit of the decision of the hon'ble Supreme Court in the case of *Hindustan Coca Cola* could not be applied in this case and held as under :

> "Further, in the case of party at Sl. No. 26 the assessee neither filed any declaration and certificate nor any return of income. Therefore, the assessee cannot be allowed the benefit of the decision *Hindustan Coca Cola* (supra) in these cases. The demand of TCS and the interest thereon, raised by the Income-tax Officer to the extent of Rs. 1,77,360 is upheld being justified."

Accordingly, he confirmed the order of the learned Assessing Officer to that extent. However, while concluding, he observed as under :

> ". . . The demand of TCS and the interest thereon, raised by the Income-tax Officer to the extent of Rs. 1,77,360 is upheld being justified."

**20** In this regard, it was submitted by the learned authorised representative that the demand of TCS under section 206C(6) and demand of consequent interest thereon under section 206C(7) can only be the demand of TCS and not of the entire sale. It appears that the learned Commissioner of Income-tax (Appeals) has perhaps mistakenly understood the total amount of the sale of Rs. 1,77,360 to be the amount of the TCS whereas the amount of TCS is only at five per cent. which comes to Rs. 10,047 only, (i. e., at 5.665

per cent. of Rs. 1,77,360) and not the entire sales amount. Though this appears only to be a typographical or clerical mistake yet however, since this formed part of the order of the appellate authority which has not been rectified yet, hence, this ground has been taken and prayed for appropriate relief.

The learned Departmental representative is heard who has relied on the **21** order of the lower authorities and submitted that the learned Commissioner of Income-tax (Appeals) has rightly upheld the levy of TCS in the absence of any documentation, however, as far as the quantum of TCS is concerned, he has no objection where the matter is set aside for necessary verification.

We have heard the rival contentions and pursued the material available **22** on record. Prima facie, looking at the other entries where the learned Commissioner of Income-tax (Appeals) has allowed the relief to the assessee-firm, we find merit in the contention of the learned authorised representative that the amount of Rs. 1,77,360 represents the sale amount on which the TCS is to be determined and it does not represent the amount of TCS and, therefore, the liability of the assessee is only to the extent of TCS on such sales and not on the whole sale amount. The matter is accordingly set aside to the file of the Assessing Officer to verify the same and determine the quantum of TCS and consequent interest thereon which is payable by the assessee in relation to the impugned transaction. The ground of appeal is thus allowed for statistical purposes.

In ground No. 3.2, the assessee has challenged the findings of the **23** learned Commissioner of Income-tax (Appeals) relating to charging of interest under section 206C(7) of the Act.

During the course of hearing, the learned authorised representative sub- **24** mitted that the Assessing Officer had charged interest under section 206C(7) of the Income-tax Act, 1961 on the entire amount of short/non-collection of tax at source under section 206C(6) alleging that the assessee has committed a clear default of non-collection of TCS with reference to sale amount of Rs. 25,58,31,594 (correct sale amount is Rs. 27,19,31,589) and in the first appeal, the learned Commissioner of Income-tax (Appeals) has directed the Assessing Officer as under :

> "So far as the charging of interest under section 206C(7) is concerned, the Assessing Officer is directed to calculate the interest for the period of starting from the due date of deposit of TCS after collection to the date of filing of the return by the respective parties. Accordingly, this ground is partly allowed."

**25** In this regard, it was submitted by the learned authorised representative that no interest is leviable and permissible to be charged in a case where buyers have already paid advance taxes and having refund. It was submitted that there may be situations where the amount of prepaid taxes, (i. e., by way of TDS/TCS or advance tax) were paid by the buyer towards his income-tax liability even before the date on which such amount of TCS became collectible by the assessee seller, in such a case no interest can be charged because the amount of tax already stands paid in the exchequer by the buyer himself. In some of the cases, such payment of prepaid taxes may be by way of prepayment of instalments of advance tax on different dates during the relevant financial year. Hence depending upon the due date of the collection of TCS by the assessee-seller vis-a-vis the different dates of prepayment of taxes (as stated above), interest has to be computed but it is not that the interest becomes chargeable on the entire amount for the entire period by taking a literal interpretation of the proviso to section 201(1A). Here, in various cases, the buyers have claimed refund.

**26** In support of his contentions, the learned authorised representative has placed reliance on the co-ordinate Bench decision in the case of *Chandmal Sancheti* v. *ITO* [2016] 181 TTJ 906 (Jaipur). It was submitted that the principle propounded in this decision has attained finality for want of further challenge before the hon'ble Rajasthan High Court inasmuch as no appeal has been filed by the Revenue. Further, reliance was placed on the decision of the hon'ble Karnataka High Court in the case of *CIT (TDS)* v. *Bharat Hotels Ltd.* [2016] 384 ITR 77 (Karn) ; [2016] 288 CTR 682 (Karn) and *Solar Automobiles India (P.) Ltd.* v. *Dy. CIT* [2011] 245 CTR 475 (Karn).

**27** Per contra, the learned Departmental representative is heard who drawn our reference to the proviso to section 206C(7) inserted by the Finance Act, 2012 with effect from July 1, 2012 which provides that the interest shall be payable from the date on which such tax was collectible to the date of furnishing of return of income by such buyer. He accordingly relied on the findings of the learned Commissioner of Income-tax (Appeals) and submitted that there is no infirmity in the said findings and the same should be confirmed.

**28** We have heard the rival contentions and pursued the material available on record. The relevant provisions of section 206C(7) which are under consideration reads as under :

> "(7) Without prejudice to the provisions of sub-section (6), if the person responsible for collecting tax does not collect the tax or after collecting the tax fails to pay it as required under this section, he shall be liable to pay simple interest at the rate of one per cent. per month

or part thereof on the amount of such tax from the date on which such tax was collectible to the date on which the tax was actually paid and such interest shall be paid before furnishing the quarterly statement for each quarter in accordance with the provisions of sub-section (3) :

Provided that in the case any person responsible for collecting tax in accordance with the provisions of this section, fails to collect the whole or any part of the tax on the amount received from a buyer or licensee or lessee or on the amount debited to the account of the buyer or licensee or lessee but is not deemed to be an assessee in default under the first proviso to sub-section (6A), the interest shall be payable from the date on which such tax was collectible to the date of furnishing of return of income by such buyer or licensee or lessee."

29 A bare reading of the aforesaid provisions provides that where the person responsible for collecting tax does not collect the tax or after collecting the tax fails to pay it, he shall be liable to pay simple interest at the prescribed rate from the date on which such tax was collectible to the date on which the tax was actually paid. Further, a proviso has been inserted by the Finance Act, 2012 with effect from July 1, 2012 which provides that where such person is not deemed to be an assessee in default under the first proviso to sub-section (6A), the interest shall be payable from the date on which such tax was collectible to the date of furnishing of return of income by such buyer.

30 The first proviso to sub-section (6A) has simultaneously been introduced in the statute by the Finance Act, 2012 with effect from July 1, 2012 which reads as under :

"(6A) If any person responsible for collecting tax in accordance with the provisions of this section does not collect the whole or any part of the tax or after collecting, fails to pay the tax as required by or under this Act, he shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of the tax :

Provided that any person responsible for collecting tax in accordance with the provisions of this section, who fails to collect the whole or any part of the tax on the amount received from a buyer or licensee or lessee or on the amount debited to the account of the buyer or licensee or lessee shall not be deemed to be an assessee in default in respect of such tax if such buyer or licensee or lessee—

(i) has furnished his return of income under section 139 ;

(ii) has taken into account such amount for computing income in such return of income ; and

(iii) has paid the tax due on the income declared by him in such return of income, and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed."

**31** We now refer to the findings of the learned Commissioner of Income-tax (Appeals) which read as under :

"It is evident from the table above that the assessee in the case listed at 1 to 16 has filed all the details like declaration, certificate and return of income. Therefore, this benefit as per the ratio laid down in *Hindustan Coca Cola* (supra) could be given to the assessee. Thus, the appellant is entitled to the benefit to the extent of Rs. 25,82,64,467 and no TCS can be recovered on this amount.

In nine cases at Sl. Nos. 17 to 25 the assessee has filed the certificate in form 27BA but return of income were not furnished. However evidence of filing of return through website was filed.

Accordingly, the Assessing Officer is directed to allow the benefit of Rs. 1,34,89,762 as per the ratio laid down by the hon'ble apex court in *Hindustan Coca Cola* (supra) only after making verification of the return of income filed by the respective parties' case the appellant failed to do so, the liability of TCS is on the appellant.

Further, in the case of party at Sl. No. 26 the assessee neither filed any declaration and certificate nor any return of income. Therefore, the assessee cannot be allowed the benefit of the decision *Hindustan Coca Cola* (supra) in these cases. The demand of TCS and the interest thereon, raised by the Income-tax Officer to the extent of Rs. 1,77,360 is upheld being justified.

So far as the charging of interest under section 206C(7) is concerned, the Assessing Officer is directed to calculate the interest for the period of starting from the due date of deposit of TCS after collection to the date of filing of the return by respective parties. Accordingly this ground is partly allowed."

**32** We therefore find that the assessee-firm has been allowed the benefit to the extent of sales of Rs. 25,82,64,467 in respect of cases listed at S. Nos. 1 to 16 where the buyers have filed their respective returns of income wherein it has been directed by the learned Commissioner of Income-tax (Appeals) that no TCS can be recovered on this amount following the ratio laid down in *Hindustan Coca Cola*. Similarly, following the said legal proposition, in respect of transactions listed at item Nos. 17 to 25, the learned

Commissioner of Income-tax (Appeals) has directed the Assessing Officer to allow the benefit of Rs. 1,34,89,762 only after making verification of the return of income filed by the respective buyers as the assessee has filed the certificate in form No. 27BA but the copy of return of income were not furnished by the assessee though evidence of filing of return through website was filed. However, as far as charging of interest is concerned, in respect of all these transactions listed at 1-25, the learned Commissioner of Income-tax (Appeals) has directed to calculate the interest for period starting from the due date of deposit of TCS after collection to the date of filing of the return by respective parties. We therefore find that the said direction of the learned Commissioner of Income-tax (Appeals) is in consonance with the proviso to section 206C(7) wherein it has been provided that the interest shall be payable from the date on which such tax was collectible to the date of furnishing of return of income by the respective buyers. The said proviso has however not envisaged the situation, as contended by the learned authorised representative, where the buyers have already paid the taxes by advance tax even before the date on which TCS becomes collectible, interest should not be levied. Given that the said proviso has been inserted with effect from July 1, 2012, the interest for the period prior to July 1, 2012 shall not be leviable. Therefore, going by the plain language as so provided in the proviso to section 206C(7) as it stood today and applicable in the instant case, the assessee-firm shall be liable to pay interest from the date on which such tax was collectible to the date of furnishing of return of income by the respective buyers excluding the period prior to July 1, 2012 in respect of which no interest shall be leviable. The decision of the co-ordinate Bench in the case of *Chandmal Sancheti* (supra), the decision of the hon'ble Karnataka Court in the case of *Bharat Hotels* (supra) and *Solar Automobiles* (supra) were rendered for the period prior to the amendment brought in by the Finance Act, 2012 whereby the proviso to section 206C(7) has been inserted with effect from July 1, 2012, have not considered the said provisions as amended and are therefore, distinguishable and does not support the case of the assessee-firm. Therefore, the findings of the learned Commissioner of Income-tax (Appeals) which are in consonance with the proviso to section 206C(7) are hereby confirmed subject to the modification that no interest shall be leviable for the period prior to July 1, 2012 and to that extent, the assessee shall be eligible for relief. The ground of appeal is thus partly allowed.

In ground No. 4, the assessee-firm has challenged the action of the **33** learned Commissioner of Income-tax (Appeals) in not considering that the case fall under section 206C(1A) read with rule 37C inasmuch as the entire

subjected sales of tendu leaves was made to the ultimate consumers for use in manufacturing, processing or producing of beedis and hence the provision of section 206C was not applicable and have been wrongly invoked by the Assessing Officer.

**34** In this regard, it was submitted that the provision contained under section 206C(1A), in a mandatory term, provides that the assessee seller will be under no obligation to collect tax at source overriding the provisions of section 206C(1). Though the substantive provision of law nowhere provides any time-limit up to which the seller should have collected the declaration or the buyer should have furnished the same to the seller. However, no collection of tax shall be made in the case of a buyer where the goods (subjected to TCS) are to be utilised for the purposes of manufacturing, processing or producing articles and things or for the purposes of generation of power and not for trading purposes.

**35** It was submitted that the assessee-firm has obtained declarations in form 27C furnished by a few buyers to establish that the assessee seller is not at all liable to collect TCS from the concerned buyer inasmuch as the subjected sales was made to the ultimate consumers for use in manufacturing, processing or producing of beedis and hence the provisions of section 206C was not applicable. It was submitted that these declarations in form No. 27C were furnished by the few buyers in the recent past only and hence, the assessee-firm has furnished the same along with the application under rule 29 filed on June 4, 2018 though strictly and legally speaking, such declaration are not additional evidence in nature being the later developments.

**36** Further, our reference was drawn to the provisions of section 206C(1A) which reads as under :

> "(1A) Notwithstanding anything contained in sub-section (1), no collection of tax shall be made in the case of a buyer, who is resident in India, if such buyer furnishes to the person responsible for collecting tax, a declaration in writing in duplicate in the prescribed form and verified in the prescribed manner to the effect that the goods referred to in column (2) of the aforesaid Table are to be utilised for the purposes of manufacturing, processing or producing articles or things or for the purposes of generation of power and not for trading purposes."

**37** It was further submitted that rule 37C, however, provides that such declaration is to be filed on or before seven days of the next following month in which the declaration is furnished to the seller. In the cases of the delayed filing however, no consequence has been provided neither under section 206C(1A) nor under rule 37C. It is submitted that filing of such

declaration is a mere procedural requirement and therefore even if, such declaration are furnished at the appellate stage, the same deserves acceptance. This contention is also for the reason that the appeal is the continuation of the assessment proceedings only and, therefore, even if a plea taken before the appellate court or the declarations are filed, the courts may admit the same in the larger interest of justice.

38 It was submitted that under similar circumstances, the Tribunal in the case of *Chandmal Sancheti* v. *ITO* [2016] 181 TTJ 906 (Jaipur) have remitted the matter back to the Income-tax Officer to consider the declaration filed in form 27C belatedly by the assessee. Reliance was also placed on the Tribunal decision in the case of *Karnataka Forest Development Corporation Ltd.* v. *ITO* (TDS) [2015] ITL 1007 (Bang) wherein the Tribunal has remanded the matter back to the Assessing Officer for proper verification and thereafter readjudication of the issues involved in accordance with law. Further, reliance was placed on the hon'ble Gujarat High Court decision in the case of *CIT (TDS)* v. *Siyaram Metal Udyog (P.) Ltd.* [2016] ITL 4028 (Guj.) and the hon'ble Madras High Court decision in the case of *CIT* v. *Adisankara Spinning Mills (P.) Ltd.* [2014] 362 ITR 233 (Mad) ; 226 Taxman 44 (Mad) (Mag).

39 It was further submitted that in the instant case, although a ground was taken before the learned Commissioner of Income-tax (Appeals) however declarations could not be filed for the genuine difficulties and the existence of sufficient cause has been explained in the application filed by the assessee under rule 29. It was submitted that the Tribunal which is meant to provide substantial justice should not indulge in technicality of law and the procedures and it should entertain an issue not agitated before the Assessing Officer or the Commissioner of Income-tax (Appeals), if it is a question of law or if facts are already on records. in case the facts need ascertainment, the Tribunal should not hesitate in remanding to the lower authorities to decide in accordance with law and after opportunity to the other side. In *Indo Java and Co.* v. *IAC* [1989] 30 ITD 161 (Delhi) [SB], the Special Bench has held that point which can be agitated in appeal before Tribunal by an appellant may also include points impinge on computation of income as shown by the assessee himself by mistake or otherwise and even agitated before the Income-tax Officer or the Appellate Assistant Commissioner. In support, reliance was also placed on the decision of the hon'ble Madhya Pradesh High Court in the case of *CIT* v. *Kum. Satya Setia* [1983] 143 ITR 486 (MP) wherein it was held as under :

> "Rule 29 is in pari materia with order 41, rule 27 of the Code of Civil Procedure. It is within the discretion of the appellate authority to

allow production of additional evidence if the said authority requires any document to enable it to pass orders or for any other substantial cause. Therefore, even if the assessee had failed to file the agreement before the Income-tax Officer and the Appellate Assistant Commissioner, the Tribunal had the jurisdiction in the interest of justice to allow production of a crucial document. The Tribunal is the final fact-finding body under the scheme of the Income-tax Act. Powers, therefore, have necessarily to be exercised by it for deciding the questions of fact and while exercising its powers, if the Tribunal is of opinion that additional evidence is material in the interest of justice for deciding the particular issue, its discretion cannot be interfered with unless it has been exercised on non-existing or imaginary grounds. Therefore, the Tribunal was correct in law in admitting fresh evidence in the form of the subsequent agreement even though this document was not produced before the lower authorities and in further holding that it did not appear to be a fabricated document.—*Kali Charan Ram Chander* v. *CIT* [1978] 112 ITR 405 (Cal) ; TC 8R. 1090 *relied on* ; *Ram Prasad Sharma* v. *CIT* [1979] 119 ITR 867 (All) ; TC 8R. 1096 *distinguished*. (paras 6 to 9)"

40 Further, reliance was placed on the Tribunal decision in the case of *Rajmoti Industries* v. *ITO* [1995] 52 ITD 286 (Ahd) wherein it was held as under :

"The Tribunal, under the scheme of the Income-tax Act, 1961, is a final fact finding authority and in order to enable it to decide disputes brought before it by way of second appeal in a lawful, fair and judicious manner it has necessarily to look into and consider such evidence and other material having a nexus and bearing on the subject matter of the appeal, viz., the dispute involved. Even according to the provisions of rule 29 of the Income-tax (Appellate Tribunal) Rules, the Tribunal is empowered to receive and admit additional evidence for any other substantial cause. It is amply settled and clear that this Tribunal can admit additional evidence in terms of rule 29 of the receipt or admission of additional evidence is vital and essential for the purpose of consideration of the subject matter of the appeal and arrive at a final and ultimate decision. The Tribunal, therefore, has also power to admit additional evidence in the interest of justice or if there exists substantial cause. The assessee having lost in first appeal and in order to get a fair deal and substantial justice from this Tribunal for deletion of the addition made by the Assessing Officer in respect of the loans and interest thereon has mustered relevant

additional evidence and compiled it into two paper books. In order to do substantial justice to the appellant-assessee the additional evidence as compiled in the paper books has to be admitted in terms of rule 29 of the Income-tax (Appellate Tribunal) Rules and, therefore, it is admitted.—*Pari Mangaldas Girdhardas* v. *CIT* [1977] CTR (Guj) 647 *followed* ; *K. Venkata Ramaiah* v. *A. Seetharama Reddy,* AIR 1963 SC 1526, *Kali Charan Ram Chander* v. *CIT* [1978] 112 ITR 405 (Cal), *CIT* v. *Kum. Satya Setia* [1983] 143 ITR 486 (MP) ; [1983] 37 CTR 66 (MP), *R. S. S. Shanmugham Pillai and Sons* v. *CIT* [1974] 95 ITR 109 (Mad) and *Anaikar Trades and Estates (P.) Ltd. (No. 2)* v. *CIT* [1990] 186 ITR 313 (Mad) ; [1990] 82 CTR 110 (Mad) *relied on*. (paras 12, 15 and 18)"

**41** It was further submitted that in the latter years as and when, declaration in form 27C by the ultimate consumer-manufacturer was obtained, the same was filed in form 27C read with rule 37C read with section 206C(1A) proviso which the Department has accepted and no demand has been raised. In support of the said contention, it was submitted that as desired and directed by the Bench during the course of hearing to submit the copies of declarations filed in some of the parties who are common with these years, copy of letters addressed to the learned Commissioner of Income-tax (TDS), Jaipur for the financial years 2015-16, 2017-18 and 2018-19 (assessment years 2016-17 and 2018-19 to 2019-20) along with declarations in form 27C are filed and placed on record. It was submitted that no demand with reference to these parties has been raised by the Department and these are the same parties with whom the transactions were undertaken during the impugned assessment years.

**42** It was further submitted that even for the earlier assessment years, i. e., in the assessment years 2010-11 to 2012-13, a similar fact pattern exist and the transactions were made with the same parties and the assessee had raised a similar ground of appeal claiming the benefit of section 206C(1A) read with rule 37C and declarations in form 27C from the various buyers were submitted. However, given that the learned Commissioner of Income-tax (Appeals) had quashed the orders passed under section 206C(6)/(7) on ground of limitation, he did not decide the said ground of appeal.

**43** It was further submitted that it is a consistent factual position and submission of the assessee right from the beginning when the statement of the partner of the assessee's firm was recorded during the TDS survey on March 23, 2015 and reproduced in the assessment orders passed under section 206C(6)/(7) for all these years that sale of tendu leaves have been

made to the manufacturers of beedis and although no declaration under rule 37C in form 27C was received from such buyers, however, the assessee had written/requested to the concerned buyers to send the declaration/certificates and the office of the Income-tax Officer was also been duly informed on this subject along with the address of such buyers. It was accordingly submitted that the provisions of section 206C(1A) are clearly attracted, declarations in form 27C may be admitted as prayed in application filed under rule 29 and the assessee-firm may be granted the necessary relief and the matter may be remanded to the file of the Assessing Officer for necessary verification.

**44** The learned Departmental representative is heard who has submitted that the provisions of section 206C(1A) can be invoked only in a scenario where the declarations from the buyers have been submitted in the prescribed form and verified in the prescribed manner to the effect that the goods are to be utilised for the purposes of manufacturing, processing or producing articles or things or for the purposes of generation of power and not for trading purposes. Drawing our reference to the findings of the Assessing Officer, it was submitted by the learned Departmental representative that the Assessing Officer has clearly held that the assessee-firm had failed to obtain the requisite forms in form No. 27C from the buyers and submit the same to the learned Commissioner of Income-tax (TDS) within the stipulated time. It was submitted that given that the assessee has not submitted the declarations in form 27C either before the Assessing Officer or even before the learned Commissioner of Income-tax (Appeals), there is no infirmity in the order of the Assessing Officer and the learned Commissioner of Income-tax (Appeals) in denying the same claim to the assessee. It was further submitted that the assessee's prayer under rule 29 to admit such declarations in form 27C therefore cannot be accepted at this stage as the same are in nature of additional evidence and the assessee has failed to show any reasonable cause which prevented him from obtaining such declarations in form 27C for the instant year when the same were duly obtained for the earlier years as so claimed by it.

**45** We have heard the rival contentions and pursued the material available on record. The provisions of section 206C(1A) which are under consideration reads as under :

> "(1A) Notwithstanding anything contained in sub-section (1), no collection of tax shall be made in the case of a buyer, who is resident in India, if such buyer furnishes to the person responsible for collecting tax, a declaration in writing in duplicate in the prescribed form and verified in the prescribed manner to the effect that the goods

referred to in column (2) of the aforesaid Table are to be utilised for the purposes of manufacturing, processing or producing articles or things or for the purposes of generation of power and not for trading purposes."

46 The hon'ble Gujarat High Court had an occasion to examine the aforesaid provisions in the case of *CIT (TDS)* v. *Siyaram Metal Udyog (P.) Ltd.* (supra). In that case, the Assessing Officer had made additions on the ground that the respondent-assessee had breached section 206C of the Income-tax Act, 1961 in case of sale of scrap, on the ground that the assessee had not submitted form 27C comprising of the buyer's declaration to the Commissioner of Income-tax in time. The assessee on the other hand had contended that he was not a trader of scrap and therefore, the provisions of section 206C did not apply at all. The Assessing Officer turned down his contention and proceed to make the additions. Eventually, when the issue reached the Tribunal, the Tribunal relying on earlier decision in the case of *Bharti Metals* held that the items in question were scrap. However, in view of the fact that the assessee had admittedly filed a declaration in form 27C collected from the buyers and given that there was no dispute about the genuineness of the contents thereof ruled in favour of the assessee. In that factual background, the hon'ble High Court has held as under :

"6. Section 206C of the Act pertains to profits and gains from the business of trading in alcoholic liquor, forest produce, scrap, etc. Sub-section (1) of section 206C provides that every person being a seller shall at the time of debiting of the amount payable by the buyer collect from the buyer of any of the goods specified in column (2) of the table, a sum equal to the percentage specified in the corresponding entry of the table as income-tax. Clause (aa) of the *Explanation* to section 206C, inter alia, provides that buyer with respect to sub-section (1) means a person who obtains in sale by way of auction, tender or any other mode, goods of the nature specified in the table or the right to receive any such goods but does not include a buyer in the retail sale of such goods purchased by him for personal consumption.

7. In the context of this exclusion clause contained in *Explanation* of the term 'buyer, sub-section (1A) of section 206C provides as under :

'(1A) Notwithstanding anything contained in sub-section (1), no collection of tax shall be made in the case of a buyer, who is resident in India, if such buyer furnishes to the person responsible for collecting tax, a declaration in writing in duplicate in the prescribed form and verified in the prescribed manner to the effect that the goods

referred to in column (2) of the aforesaid Table are to be utilised for the purposes of manufacturing, processing or producing articles or things or for the purposes of generation of power and not for trading purposes.'

8. Thus, in terms of the *Explanation* clause (aa) any person who purchases the goods in retail sale for personal consumption would not be included within the definition of the term 'buyer'. It is therefore, that under sub-section (1A) of section 206C, calculation of tax under sub-section (1) would not be made, if the buyer furnishes to the person responsible for the tax a declaration in writing in the prescribed form declaring that the goods in question are to be utilised for the purposes of manufacturing process or producing articles or things or for the purpose of generation of power and not for trading purposes. The declaration to be made in sub-section (1A) of section 206C thus would enable the Revenue authorities to, as and when the need so arises make proper verifications. This sub-section itself does not provide for any time-limit within which, such declaration is to be made. The time-limit, of course, would be found in rule 37C of the Income-tax Rules, 1962. The main thrust of sub-section (1A) of section 206C thus is to make a declaration as prescribed, upon which, the liability to collect tax at source under sub-section (1) would not apply. When there was no dispute about such a declaration being filed in a prescribed format and there was no dispute about the genuineness of such declaration, mere minor delay in filing the said declaration would not defeat the very claim. The Tribunal therefore, viewed such delay liberally and in essence held that there was substantial compliance with the requirement of filing the declaration."

**47** Subsequently, the hon'ble Gujarat High Court had an occasion to examine the aforesaid provisions again in the case of *CIT (TDS)* v. *Chhaganbhai K Sanghani* [2018] 94 taxmann.com 459 (Guj). In that case, the respondent-assessee was a dealer in scrap. During the period relevant to the assessment year 2011-12, he had sold scrap of Rs. 12.72 crores on which he was required to collect tax at source in terms of section 206C(1) of the Income-tax Act, 1961 unless the buyers had provided him necessary certificates referred to in sub-section (1A) thereof. Before the Assessing Officer, the assessee produced no such certificates. The Assessing Officer therefore, in terms of sub-section (7) of section 206C, levied tax and interest. In appeal before the Commissioner, the assessee produced necessary certificates issued by the buyers. The Commissioner, however, ignored such certificates and confirmed the order of the Assessing Officer, upon

which, the assessee approached the Tribunal. The Tribunal allowed the assessee's appeal observing that the Revenue had no dispute with respect to genuineness or co-relation between the sale and purchases covered under such certificates. In that factual background, the hon'ble High Court has held as under :

"4. Having heard the learned advocates for the Revenue, we noticed that in terms of sub-section (1) of section 206C of the Act, every seller would have to collect tax at source at the time of sale of goods at the prescribed percentage and deposit the same with the Government revenue unless in terms of sub-section (1A) thereof, the buyer has furnished to such seller, declaration in writing in a prescribed form and fulfilled in prescribed manner that the goods are to be utilised for the purpose of manufacturing, processing or producing articles or things, or for the purpose of generation of power and not for trading purpose. Sub-section (1) of section 206C is thus a substantive requirement of collection of tax at source and depositing of the same with the Revenue. Sub-section (1A) refers to a situation under which collection under sub-section (1) would not have to be made. These are substantive provisions. Requirements of sub-section (1A) are that the buyers should provide to the seller, a declaration in the prescribed form, verified in the prescribed manner. Such prescriptions are to be found in rule 37C of the Income-tax Rules, 1962. Sub-section (1) thereof provides that declaration under sub-section 206C shall be in form 27C and shall be verified in the manner indicated therein. Sub-rule (2) of rule 37C requires that the declaration referred to in sub-section (1) shall be furnished in duplicate to the person responsible for collecting tax. Under sub-rule (3), such person would deliver to the Chief Commissioner or the Commissioner, one copy of such declaration on or before the seventh day of the month, next following the month in each declaration is issued.

5. Thus, rule 37C in addition to prescribing the form for grant of declaration and the manner the same should be verified, impose two additional requirements, viz., (i) that such declaration shall be furnished in duplicate to the person responsible for collecting the tax and that such person would deliver a copy thereof to the Commissioner within the time prescribed. Sub-section (1) of section 206C does not refer to any such time-limit. Clearly therefore, the legislative intent was not to make this time-limit mandatory or a pre-condition for availing of the benefit of not deducting tax at the time of sale of goods aimed for specified purpose. This court in the case of *CIT*

*(TDS)* v. *Siyaram Metal Udyog (P.) Ltd.* [2016] 71 taxmann.com 204 (Guj.) ; 240 Taxman 578 (Guj) had dealt with somewhat a similar situation, wherein the following observations have been made."

**48** The legal position which is thus laid down by the courts as per the aforesaid decisions is that sub-section (1) of section 206C is a substantive provision for collection of tax at source and depositing of the same with the Revenue. Sub-section (1A) is again a substantive provision which refers to a situation under which collection under sub-section (1) would not have to be made at first place. The requirements of sub-section (1A) are that the buyers should provide to the seller, a declaration in the prescribed form, verified in the prescribed manner. The main thrust of sub-section (1A) of section 206C is thus to make a declaration as prescribed, upon which, the liability to collect tax at source under sub-section (1) would not apply. Sub-section (1A) of section 206C does not refer to any time limits for furnishing such declarations and therefore, the legislative intent was not to make the time-limit mandatory or a pre-condition for availing of the benefit of not collecting tax at the time of sale of goods aimed for specified purposes. When there was no dispute about such a declaration being filed in a prescribed format and there was no dispute about the genuineness of such declaration and co-relation between the goods sold, the delay in filing such declaration should be construed liberally and would not defeat the very claim where there is a substantial compliance with the requirement of filing the declaration.

**49** In the present case, we find that the assessee-firm has made the said claim under section 206C(1A) right at the time of survey proceedings where the statement of one of its partners was recorded on March 23, 2015 and again during the course of assessment proceedings stating that the sale of tendu leaves have been made to the persons/entities which are existing taxpayers and who are engaged in manufacture of beedis (refer response to question No. 8) though it was also submitted that the declarations in form 27C have not been submitted but at the same time, the assessee has written and requested the buyers to whom the tendu leaves have been sold to send the declaration in form 27C and the office of the Income-tax Officer also been duly informed on this subject along with the address of such buyers (refer response to question No. 9). It is also a fact that these declarations in form 27C could not be submitted either before the Assessing Officer or during the appellate proceedings before the learned Commissioner of Income-tax (Appeals) and have now been submitted by the assessee-firm before us in respect of seven parties to whom the tendu leaves have been sold during the year as per the particulars below :

| *Sl. No.* | *Particulars* | *Amount (Rs.)* | *PB* |
|---|---|---|---|
| 1. | S. J. and S. P. Family Trust, Karimnagar (M. P.) | 4,41,64,013 | 1-2 |
| 2. | JP Tobacco Products Pvt. Ltd., Damoh (M. P.) | 1,15,91,849 | 3-4 |
| 3. | P and J Tobacco Products Company, Murshidabad (W. B.) | 35,71,350 | 5-6 |
| 4. | Prabhudas Kishoredas Tobacco Products Pvt. Ltd., Nizamabad (A. P.) | 1,02,33,471 | 7-8 |
| 5. | Prabhudas Kishoredas Tobacco Products Pvt. Ltd., Damoh (M. P.) | 3,22,13,394 | 9-10 |
| 6. | Star Traders, Tanda (U. P.) | 15,62,616 | 11 |
| 7. | Mangalore Ganesh Beedi Works, Mysore (Kar) | 6,84,21,238 | 12-13 |

On a prima facie perusal of these certificates, we find that all these parties are involved in manufacturing of beedis and uses tendu leaves for manufacturing such beedis. The sales amount mentioned in these certificates matches with the sales amount as reflected and examined by the learned Commissioner of Income-tax (Appeals) as apparent from findings in his order (para 5.3, pages 14-15) :

| *S. No.* | *Name of buyer* | *PAN* | *Amount in FY 2012-13* | *Remarks* |
|---|---|---|---|---|
| A | Cases where declaration and certificate in form 27BA and return of income filed. | | | |
| 1. | M/s. Mangalore Ganesh Beedi Works Mysore (Karnataka) | AAAAM1342G | 6,84,21,238 | ROI filed enclosed |
| 2. | M/s. Gujarath Tobacco Company Mysore (Karnataka) | AFJPP1330G | 15,88,890 | ROI filed enclosed |
| 3. | M/s. Pannalal Premrai Khatri Sawai Modhopur (Raj.) | AADFP3174F | 45,38,765 | ROI filed enclosed |
| 4. | M/s. Anand Tobacco Products Mangalore (Karnataka) | AAFFA4744G | 9,67,200 | ROI filed enclosed |
| 5. | M/s. Prakash Bidies Limited Mangalore (Karnataka) | AABCP9885E | 95,03,876 | ROI filed enclosed |
| 6. | M/s. P and J Tobacco Products Company Gopal Nagar Distt. Murs | AACFP2000R | 35,71,350 | ROI filed enclosed |
| 7. | M/s. SJ and SP Famlly Trust Jagtial Distt. Karimnagar (A. P.) | AAATS5877R | 4,41,64,013 | ROI filed enclosed |
| 8. | M/s. JP Tobacco Products Pvt. Ltd. Damoh (M. P.) | AAACJ7141G | 1,15,91,849 | ROI filed enclosed |

| | | | | |
|---|---|---|---|---|
| 9. | Parbhudas Kishordas Tobacco Products Pvt. Ltd. Nizamabad | AABCP1495Q | 1,02,33,471 | ROI filed enclosed |
| 10. | Parbhudas Kishordas Tobacco Products Pvt. Ltd. Damoh (MP) | AABCP1495Q | 3,22,13,394 | ROI filed enclosed |
| 11. | M/s. Hyderabad Bidi Manufactures Hyderabad | AABFH1252J | 60,50,190 | ROI filed enclosed |
| 12. | M/s. Arshad and Company Hyderabad | AAFFA0570N | 23,55,870 | ROI filed enclosed |
| 13. | M/s. Shaz Enterprises Hyderabad | AJBPK1293R | 44,48,515 | ROI filed enclosed |
| 14. | M/s. Char Bhai Bidi Works Hyderabad | AABFC0789P | 5,61,32,915 | ROI filed enclosed |
| 15. | M/s. Shaheen Traders Mysore (Karnataka) | ADSPB5725E | 9,20,315 | ROI filed enclosed |
| 16. | M/s. Star Traders Tanda (UP) | ACCPS9843D | 15,62,616 | ROI filed enclosed |
| | | Total (A) (Rs.) | 25,82,64,467 | |

These are therefore, existing income-tax assessees who have filed their respective return of income and have also filed their declaration in form 27BA. The assessee has also submitted that similar declarations in form 27C have been obtained from the same parties for the financial years 2015-16, 2017-18 and 2018-19 and submitted before the learned Commissioner of Income-tax (TDS) and which have been accepted and no demand has been raised by the Revenue. Therefore, in the instant case, we find that where similar declarations have been obtained from the same set of buyers, who are engaged in manufacturing of beedis from the tendu leaves so sold by the assessee, in the prescribed format and co-relation between the goods sold and reflected in such certificates having been established, the genuineness of such certificates prima facie does not seems to be in dispute. In our view, these certificates are vital and essential for the consideration of the subject matter of appeal as these certificates support the contention of the assessee that the tendu leaves have been sold to the manufacturers of beedis and the case of the assessee falls under section 206C(1A) and not under section 206C(1). At the same time, given that these certificates have been filed for the first time during the present proceedings, in the interest of justice and fair play, these certificates needs to be verified by the Assessing Officer and where on such verification, the Assessing Officer is satisfied about the genuineness of such certificates,

necessary relief under section 206C(1A) can be granted and bestowed on the assessee-firm.

Having said that, the fact remains that there has been a delay in obtaining such certificates which have now being filed for the first time by way of additional evidence under rule 29. The question therefore, is whether there is a reasonable cause for such delay in furnishing such certificates and the delay can be condoned and such certificates can be taken on record and admitted under rule 29. In its application filed under rule 29, the assessee has submitted that its tax affairs were handled by Shri Sitaram Agarwal, advocate who was an aged person and was suffering from various ailments at the relevant point in time and subsequently, he had expired. The assessee-firm acted on his advice and assistance from time to time. The late Shri Sitaram Agarwal was of the belief and understanding that collection of tax from the buyers would amount to double taxation as the assessee-firm has already paid the taxes to the Forest Department while purchasing the tendu leaves. Similarly, he was also of the belief and understanding that where the buyers have filed their respective returns of income and paid taxes, following the proposition laid down by the hon'ble Supreme Court in the case of *Hindustan Coca Cola Beverage P. Ltd.* v. *CIT* [2007] 293 ITR 226 (SC), there remains nothing to be recovered by way of TCS. The assessee accordingly carried the same belief and understanding and acted ignorantly because of lack of proper guidance by his advocate. Subsequently, when the Assessing Officer took up the matter for scrutiny for the assessment year 2008-09 and passed the order in the month of March 2015, the assessee realised its mistake and started making efforts by way of reaching out to these buyers so that necessary declarations can be obtained and furnished before the learned Commissioner of Income-tax (TDS). However, the assessee again faced resistance from such buyers as they have already made the payment and does not want to be bothered with additional paperwork especially where no other supplier was asking for such declaration. However, with great efforts and persistence, these buyers have agreed to file their respective declarations and which have not being filed before us. We, therefore, find that the assessee has all along acted diligently and taken action basis the advice and assistance sought from its legal counsel. It was initially advised not to collect TCS as taxes were already paid while procuring the tendu leaves from the Forest Department and, secondly, the buyers would be filing their return of income wherein they will be paying taxes and hence, there was no action required at its end. However, due to subsequent developments wherein the matter was taken up by the Revenue for the first time in the month of March, 2015 and

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it came to know that such declarations are required to be obtained and filed with the Revenue authorities to absolve it from its TCS obligation, it started chasing these buyers and with lot of efforts, some of these buyers have finally submitted their declarations in the month of November, 2017. We, therefore, find there is no culpable negligence or mala fide on the part of the assessee in not obtaining these declarations and the assessee cannot be penalised where all along it acted diligently based on the advice of his counsel and subsequently, when the Revenue made it aware of its obligation to obtain such declarations, it made necessary efforts and finally got these declarations. As held by the courts, where substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. The delay in filing such declarations being a technical breach is thus condoned and the same are being admitted as there is substantial compliance with the requirement of filing the declarations. We find that similar view has been taken by the co-ordinate Bench in the case of *Chandmal Sancheti* v. *ITO* (supra) where it was held as under :

> "10. We have heard the rival contentions of both the parties and perused the material available on the record. In our view, the appeal is continuation of the assessment proceedings and even if the declaration is filed by the assessee at the appellate stage in the prescribed format by disclosing all information as contemplated under form 27 read with rule 37 of the Rules, the benefit of declaration should be given to the assessee. The learned Assessing Officer/Commissioner of Income-tax (Appeals) should extend the benefit of declaration to the assessee. Rule 27 though is couched in the mandatory language by using the word 'shall' but rule 37 has not given the consequences of not filing the declaration within time. In our view, the consequences of failure to file the declaration in the requisite format as mentioned in the Rules should be provided by the Income-tax Act and not by the Rules. The Rules, in our opinion, cannot extend or restrict the provisions of the parent Act. The Rules are framed by the Legislature by exercising its power under the Act and therefore, if any penalty provision by way of the exclusion of declaration benefit and submission of the declaration belatedly should be provided by the Act and the rules. The provision of sub-section (1A) of section 206C, in our view, do not provide the consequences of the delayed filing of the declaration. Though it provides that it is to be filed on or before the 7th day of the next following month in which declaration is furnished to him.

Therefore, though there is a delay in issuing the declaration by the buyer, the assessee cannot be penalised or deprived from the benefit of the declaration given by the buyer. The only duty cast upon the seller to submit declaration in the following month in which the declaration received. No time-limit has been provided by the statute on the buyer to submit the declaration in form 27. In view thereof, the ground is required to be allowed. In the light of the above, we deem it appropriate to remand the matter back to the file of the Assessing Officer with a direction to verify whether the declaration has been filed by the assessee in the requisite form and what will the effect of filing of this declaration on the calculation of the TCS under section 206 of the Act. It is, however, again clarified that the delay in filing the declaration shall not be a ground to the Assessing Officer to deny the benefit of the declaration to the assessee. In view thereof, ground No. 2 of the appeal is allowed for the statistical purposes only."

Similarly, in the case of *Karnataka Forest Development Corporation Ltd.* **51**
v. *ITO* (supra), the co-ordinate Bench has held as under :

"15. We find that section 206C(1A) reads as under :

'Notwithstanding anything contained in sub-section (1), no collection of tax shall be made in the case of a buyer, who is resident in India, if such buyer furnishes to the person responsible for collecting tax, a declaration in writing in duplicate in the prescribed form and verified in the prescribed manner to the effect that the goods referred to in column (2) of the aforesaid table are to be utilised for the purposes of manufacturing, processing or producing articles or things or for the purposes of generation of power and not for trading purposes.'

A perusal of the aforesaid provision shows that the assessee is not legally obliged to collect the TCS from a buyer who furnishes a declaration to the assessee to the effect that the purchases made by such buyer are to be utilised for the purposes of manufacturing, processing or producing articles or things or for purposes or generation of power and not for trading purposes. Thus, in a case where such a declaration is furnished by the buyer to the seller, the seller is not obliged to collect TCS from such buyer and consequently the seller assessee cannot be treated as an assessee in default in respect of not collecting TCS from such buyer. We find that the Commissioner of Income-tax (Appeals) upheld the treatment of the assessee as assessee in default in respect of those parties from whom the assessee a ready received declaration in form 27C on the ground that such declaration was not

furnished by the assessee to the Chief commissioner or the Commissioner as required by the provisions of section 206C(1B) of the Act.

16. We find force in the contention of the assessee that once the declaration referred to in section 206C(1A) was received by the assessee, then thereafter the assessee could not legally collect the TCS from such buyers and consequently the assessee cannot be treated as an assessee in default for not collecting TCS from such buyers. The above view finds support from the decision of the hon'ble Gujarat High Court in the case of *CIT* v. *Valibhai Khanbhai Mankad* [2013] 261 CTR 538 (Guj) wherein it has been held that, 'Once the conditions of section 194C(3) were satisfied, the liability of the payer to deduct tax at source would cease. The requirement of such payer to furnish details to the income-tax authority in the prescribed form within prescribed time would arise later and any infraction in such a requirement would not make the requIrement of deduction at source applicable'.

Our view also finds support from the decision of the Mumbai Bench of the Tribunal in the case of *Karwat Steel Traders* v. *ITO* [2013] 37 taxmann.com 190 (Mum) wherein it was held that, 'Where declaration in form 15G/15H were received by the person responsible to deduct tax, there was no liabIlity on him to deduct TDS. Since separate provisions were prescribed on default for non-filing or delayed filing of form 15G/15H to the Commissioner, non-filing of such form would not invoke disallowance under section 40(a)(ia) of the Act'.

We also find support from the decision of the Mumbai Bench of the Tribunal in the case of *Vipin P. Mehta* v. *ITO* [2011] 46 SOT 71 (Mum) wherein it was held that, 'sub-section (1A) of section 197A of the Act merely requires the declaration to be filed by the payee of interest and once it is filed, the payer of interest has no choice except to desist from deducting tax on interest'.

17. In our considered view, the assessee cannot be treated as assessee in default for not collecting TCS from such buyers from whom the assessee received declaration as per the provisions of section 206C(1A) of the Act.

18. We find that in the instant case, the assessee has not filed a copy of declaration received by it under section 206C(1A) of the Act before the Assessing Officer for his verification. Therefore, in our considered view, it shall be just and fair to restore this part of the ground of appeal back to the file of the Assessing Officer for proper verification and thereafter readjudication of the issue as per law in the right

of the discussion made hereinabove after allowing the assessee a reasonable opportunity of hearing."

52 In the light of the aforesaid discussions, in the entirety of facts and circumstances of the case and respectfully following the decisions of the hon'ble Gujarat High Court (supra) as well as of the co-ordinate Benches (supra), the matter is set aside to the file of the Assessing Officer for verification of declarations so filed by the assessee in form 27C and examination of claim of the assessee under section 206C(1A) afresh in accordance with law. The ground of appeal is thus allowed for statistical purposes.

53 In the result, the appeal of the assessee is disposed of in the light of the aforesaid directions.

*I. T. A. No. 778/Jaipur/2018*

54 We now refer to the Revenue's appeal. In ground No. 1, the Revenue has challenged the action of the learned Commissioner of Income-tax (Appeals) in allowing relief to the assessee-firm on the basis of additional evidence without calling for remand report under rule 46A and enquiry under section 250(4) of the Income-tax Act, 1961.

55 In this regard, the learned Departmental representative referred to the order of the learned Commissioner of Income-tax (Appeals) and submitted that during the course of appellate proceedings, the assessee has submitted additional evidence in terms of certificates/declarations in Form 27BA and the same have been admitted by the learned Commissioner of Income-tax (Appeals) without calling for a remand report from the Assessing Officer.

56 Per contra, the learned authorised representative at the outset raised a preliminary objection and submitted that the present appeal filed by the Department is not maintainable inasmuch as on exactly identical facts and circumstances in the case of the same assessee, i. e., in the assessment year 2008-09 also (as admitted by the Income-tax Officer in the facts of the case), the assessee was held liable to TCS but the learned Commissioner of Income-tax (Appeals) classified the sale transactions of tendu patta/leaves in three categories and prepared three tables, namely, A, B and C and accordingly, complete relief with respect to the sale made under tables A and B was granted and in a few cases, the further relief was granted subject to verification by the Assessing Officer. There also, in third category, i. e., table C, the demand of TCS and interest thereon was confirmed vide her order dated February 29, 2016 in Appeal No. 46/Jaipur/2015-16. The Revenue, however, did not challenge the said order in further appeal and therefore, the finding of the Commissioner of Income-tax (Appeals) has become final. It cannot be denied that the assessee submitted the certificates and declarations in form 27BA exactly in the same manner but the

Department did not feel aggrieved in that year. Therefore, now filing the appeal on the same issue when the legal and factual position is admittedly the same and without bringing out any material change in the facts of the legal position, the Department cannot be permitted to agitate the same issue in a later year. This contention is fully supported by the various decisions of the hon'ble Supreme Court and particularly in the case of *Berger Paints India Ltd.* v. *CIT* [2004] 266 ITR 99 (SC).

**57** On the merits, the learned authorised representative submitted that such a ground taken by the Revenue appears to be misconceived based on incorrect fact inasmuch as before the learned Commissioner of Income-tax (Appeals) also, all those documents, which were filed before the Income-tax Officer (TDS), Jaipur, were only filed. No additional evidence was filed before the learned Commissioner of Income-tax (Appeals) nor so pointed out by the Revenue. All the papers or the information contained therein were already available before the Income-tax Officer, which fact is notably admitted by the Income-tax Officer himself at pages 7, 11 and 12 of the assessment order. Further, evidently, the learned Commissioner of Income-tax (Appeals) has made his own enquiry from the website of the Department for his satisfaction, which he is empowered to make under section 250(4) read with rule 46A(4) without even confronting the Income-tax Officer. Reliance was placed on the decision in the case of *Dy. DIT (I.T)* v. *Thoresen Chartering Singapore (Pte.) Ltd.* [2008] 15 DTR (A. T.) 395 (Mum) wherein it was held that : "where the assessee under direction of the Commissioner (Appeals) files additional evidence before him, there is no requirement for confronting the Assessing Officer documents/evidence entertained by the Commissioner (Appeals) at the first appellate stage under rule 6A(4)". Thus there was no requirement under rule 46A. It was further submitted that it only appears because of a typographical inadvertent mistake of the learned Commissioner of Income-tax (Appeals)-III that the words "remand report" was mentioned in his order. Therefore, the learned Commissioner of Income-tax (Appeals)-III has recently passed a corrigendum order (page 13 line 27), copy of which has already been filed with the Registry and with the learned Departmental representative vide letter dated September 5, 2018, wherein the appellate order line No. 27g now reads "impugned order" in place of "remand report". In view of this corrigendum order, the ground taken by the Revenue has become infructuous and deserves to be dismissed as such and also on the merits.

**58** We have heard the rival contentions and pursued the material available on record and find that the certificates in form 27BA from the chartered accountant and related declarations from the buyers were filed before the

Assessing Officer during the course of assessment proceedings as per the submissions dated February 13, 2017 and the same have been taken on record and examined by the Assessing Officer. It was observed by the Assessing Officer that he has gone through the documentation so submitted by the assessee-firm and on a perusal thereof, he noticed that complete information in the form/certificate have not been given by the accountant/party as required by the Legislature and most of the columns are either not filled up as required or simply mentioned as per the details/enclosure. Moreover, the accountant has signed the forms with conditional remarks "As certified by the buyer" whereas the forms should have been filled up and certified by the accountant itself on the basis of records. Further, some of the parties have not filed the return on or before due dates prescribed under section 139 of the Income-tax Act, 1961. Further, on appeal, we find that these certificates in form 27BA from the chartered accountant and related declarations from the buyers have again been considered and examined by the learned Commissioner of Income-tax (Appeals) and the observations of the Assessing Officer regarding these certificates were not found tenable by the learned Commissioner of Income-tax (Appeals) and basis his independent review and examination, the relief has been provided to the assessee-firm as per his findings in para 5.3 of his order which we have reproduced supra. The Revenue has not pointed out what further evidence by way of additional evidence has been filed by the assessee during the appellate proceedings before the learned Commissioner of Income-tax (Appeals). Therefore, the ground so taken by the Revenue is hereby dismissed.

In ground No. 2, the Revenue has challenged the action of the learned **59** Commissioner of Income-tax (Appeals) in deleting the demand raised by the Assessing Officer without appreciating the fact that the assessee deductor has failed to make payment of interest under section 206C(7) and not mentioning details of challans in the prescribed form 27BA before submission with the claim of relief in view of the proviso to section 206C read with Notification No. 12 of 2016 dated December 8, 2016.

The learned Departmental representative is heard who has taken us **60** through the certificates in form 27BA filed by the assessee and submitted that while filing such certificates, the assessee has not paid interest under section 206C(7) and has not provided the challan details and which has not been appreciated by the learned Commissioner of Income-tax (Appeals) and the relief has wrongly been allowed to the assessee.

Per contra, the learned authorised representative submitted that the **61** Revenue's ground appears to be misconceived so far as it alleges the

deficiency in form 27BA inasmuch as to avail of the benefit of the proviso to section 206C(6A), there is no mandatory pre-condition to make the payment of interest under section 206C(7) and hence the benefit cannot be denied. Moreover, giving the details of interest and details of challans in form 27BA is optional. Thus, where the assessee has paid the interest, the relevant details may be filled in form 27BA, but not required otherwise. What all is required is that the assessee should furnish a certificate from the chartered accountant in the prescribed form to the effect that they are (i) assessed to tax, (ii) have already furnished their return of income under section 139(1) of the Act for the relevant year, i. e., the assessment year 2009-10, (iii) have already taken into account the cost of the purchases of tendu leaves made from the assessee-firm while computing the total income for the above return of income, and (iv) have already paid the income-tax due on the incomes declared in the respective returns of income, which compliance the assessee has already made in this case as admitted by the Income-tax Officer himself in principle and the learned Commissioner of Income-tax (Appeals) therefore rightly granted relief. It was further submitted that in view of the decision in the case of *Hindustan Coca Cola Beverage P. Ltd.* v. *CIT* [2007] 293 ITR 226 (SC), the assessee was required to establish that the payees (buyers) have already taken into account the subjected transactions while computing the total income and have already paid the tax due on the incomes so declared. It is not disputed that the substantive compliance to this effect was already made by the assessee. Therefore, the assessee cannot be burdened with detailed minute technical requirement while filling form 27BA and the Income-tax Officer could not have found fault on this aspect. Though, notably in this case there is no such alleged deficiency either in the declaration or in the chartered accountant certificate.

**62** We have heard the rival contentions and pursued the material available on record. The limited issue under consideration is whether at the time of submitting the certificates in form 27BA as required under the proviso to section 206C(6A), the assessee is required to deposit interest and give details of such interest deposit in such certificates. Firstly, on reading of the provisions of the proviso to section 206C(6A), we find that there is no requirement as such which has been specified in the statute. All it requires is that the accountant should certify as to whether the buyer has furnished his return of income, has taken into account such amount for computing income in such return of income and has paid taxes due on the income declared by him in such return of income or not. Further, on a perusal of form 27BA, we find that besides such certification, it contains a statement

whether the assessee has to specify whether it has paid any interest under section 206C(7) or not for non-collection or short collection of taxes. Thus, there is no mandatory requirement to pay any interest under section 206C(7) as part of certification in form 27BA and where the assessee has already paid, he has to specify that he has paid and where he has not paid, he has to specify accordingly. It is only an information seeking requirement and not a requirement in the absence thereof which will make the certification in form 27BA invalid where there is substantial compliance as to the mandatory requirements of certification. In the result, the ground so taken by the Revenue is dismissed.

**63** In ground No. 3, the Revenue has challenged the action of the learned Commissioner of Income-tax (Appeals) where he has set aside the issue to the Assessing Officer for verification and directed to allow relief on verification under section 250(1) as per the ratio of the judgment in the case of *Hindustan Coca Cola (P.) Ltd.* where the words "he may set aside" have been omitted after the amendment with effect from June 1, 2001.

**64** The learned Departmental representative referred to the findings of the learned Commissioner of Income-tax (Appeals) at page 17 of his order where he has directed the Assessing Officer to allow the benefit after making verification of the return of income filed by the respective assessees and submitted that the learned Commissioner of Income-tax (Appeals) has erred by setting aside the matter to the Assessing Officer where he has so such powers to set aside the matter to the Assessing Officer.

**65** Per contra, the learned authorised representative submitted that there appears to be a complete misreading of the order of the learned Commissioner of Income-tax (Appeals) inasmuch as he merely directed the Assessing Officer to verify the fact of filing of ROI. He did not set aside the matter to be adjudicated afresh by the Assessing Officer. Therefore, there was no setting aside by the Commissioner of Income-tax (Appeals) to the Assessing Officer as wrongly contented. Otherwise also, the issue involved is directly covered inasmuch as in the assessment year 2008-09, the Commissioner of Income-tax (Appeals) similarly directed the Income-tax Officer to verify the fact of ROI filing, against which the Department not having gone in appeal, such an issue has already become final. Notably, thereafter the Income-tax Officer has given effect to the Commissioner of Income-tax (Appeals)'s order vide his order dated March 22, 2019 under section 206C/250. Hence, this ground of appeal deserves to be dismissed.

**66** We have heard the rival contentions and pursued the material available on record. The relevant findings of the learned Commissioner of Income-tax (Appeals) which are under dispute reads as under :

"Accordingly, the Assessing Officer is directed to allow the benefit of Rs. 1,34,89,762 as per the ratio laid down by the hon'ble apex court in *Hindustan Coca Cola* (supra) only after making verification of the return of income filed by the respective parties case the appellant failed to do so, the liability of TCS is on the appellant."

**67** On a perusal of the aforesaid findings, we find that the learned Commissioner of Income-tax (Appeals) has clearly held and directed the Assessing Officer to allow the benefit to the assessee in the light of the hon'ble Supreme Court decision in the case of *Hindustan Coca Cola* which he has discussed at length in the earlier part of the order and held that the ratio of the said decision clearly applies in the instant case as there is no substantive difference in the provisions relating to TDS and TCS. However, such direction was subject to verification by the Assessing Officer as to the filing of the return of income by the respective buyers and where it was found by the Assessing Officer that the return of income has been filed, relief was directed to be allowed to the assessee and where such return of income has not been filed, no relief was directed to be allowed. We find that such direction by the learned Commissioner of Income-tax (Appeals) is well within his powers and jurisdiction under section 250(1) and does not result in setting aside the matter to the file of the Assessing Officer for making a fresh assessment and adjudication afresh. In the result, the ground of appeal so taken by the Revenue is dismissed.

**68** In ground No. 4, the Revenue has challenged the findings of the learned Commissioner of Income-tax (Appeals) where he has held that there is no material difference in the provisions of tax deduction at source (TDS) under Chapter XVII-B and tax collection at source (TCS) under Chapter XVII-BB of the Income-tax Act, 1961 and the facts and the judgment held in the assessment proceedings under section 201(1)/201(1A) for default in the case of *Hindustan Coca Cola (P.) Ltd.* are squarely applicable in the case of the assessee for the assessment proceedings under section 206C(6)/206C(7) of the Act for TCS defaults.

**69** The learned Departmental representative relied on the findings of the Assessing Officer and submitted that there are specific provisions contained in section 206C in respect of tax collection at source and the liability of the assessee should therefore be governed by such provisions and not in terms of the decision of the hon'ble Supreme Court in the case of *Hindustan Coca Cola (P.) Ltd.* rendered in the context of tax deduction at source.

**70** Per contra, the learned authorised representative supported the findings of the learned Commissioner of Income-tax (Appeals) and submitted that the issue involved is directly covered inasmuch as in the assessment year

2008-09 and onwards till the assessment year 2012-13, the Commissioner of Income-tax (Appeals) had already held that the TDS and the TCS provisions are principally the same and against which the Department not having gone in appeal, such an issue has already become final. Even the Tribunal in I. T. A. No. 316/Jaipur/2018 vide its order dated August 29, 2018 for the assessment year 2009-10 and again in I. T. A. No. 394/Jaipur/2016 vide its order dated September 28, 2018 for the assessment year 2008-09 has held that there is no material difference between the provisions of the TDS and TCS and they are principally the same. Hence, this ground of appeal also deserves to be dismissed.

We have heard the rival contentions and pursued the material available **71** on record. In the assessee's appeal for the assessment year 2009-10, the co-ordinate Bench has held that the provisions of section 206C are analogous and a measure for compliance with collection of tax at source as a similar measure for compliance with deduction of tax at source is provided under section 201 of the Act. Regarding the decision of the hon'ble Supreme Court in the case of *Hindustan Coca Cola (P.) Ltd.*, we find that the ratio so laid down therein has been subsequently brought on the statute books by way of proviso to sub-section (6A) of section 206C of the Act. Therefore, where the specific amendment has been brought in by the Legislature accepting the ratio so laid down by the hon'ble Supreme Court, we see no infirmity in the findings of the learned Commissioner of Income-tax (Appeals) where he has held that the ratio so laid down continues to apply in the context of collection of taxes at source. In the result, the ground so taken by the Revenue is hereby dismissed.

In the result, the appeal of the Revenue is dismissed. **72**

Now, coming to the cross-appeals in I. T. A. Nos. 423/Jaipur/2018 and **73** 776/Jaipur/2018 for the assessment year 2014-15 and I. T. A. Nos. 424/Jaipur/2018 and 777/Jaipur/2018 for the assessment year 2014-15, both the parties fairly submitted that the facts and circumstances of the case are exactly identical as in I. T. A. Nos. 422/Jaipur/2018 and 778/Jaipur/2018 for the assessment year 2013-14 and similar contentions have been advanced by both the parties, therefore, our findings and directions contained in I.T.A. Nos. 422/Jaipur/2018 and 778/Jaipur/2018 shall apply mutatis mutandis to these cross-appeals.

In the result, all the cross-appeals filed by the assessee and the Revenue **74** for the respective assessment years are disposed of in the light of the aforesaid directions.

Order pronounced in the open court on April 15, 2020.

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**[2020] 81 ITR (Trib) 178 Delhi)**

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

## DEV MILK FOODS PVT. LTD.

*v.*

## ADDITIONAL COMMISSIONER OF INCOME-TAX

**SUDHANSHU SRIVASTAVA *(Judicial Member)*** and
**PRASHANT MAHARISHI *(Accountant Member)***

June 12, 2020.

**SS ▸ ITA 1961, s 143(3)**
**AY ▸ 2015-16**
**HF ▸ Assessee**

ASSESSMENT—CONVERSION OF LIMITED SCRUTINY INTO COMPLETE SCRUTINY—NO COGENT MATERIAL MENTIONED BY ASSESSING OFFICER FOR CONVERSION—ASSESSEE REQUESTING ASSESSING OFFICER FOR OPPORTUNITY TO CROSS-EXAMINE PERSONS ON WHOSE STATEMENTS HE PROPOSED TO RELY ON BUT CROSS-EXAMINATION NOT ALLOWED—PROPOSAL OF CONVERTING LIMITED SCRUTINY TO COMPLETE SCRUTINY MERELY AIMED AT MAKING FISHING ENQUIRIES—PRINCIPAL COMMISSIONER ACCORDING APPROVAL IN A MECHANISED MANNER—CONVERSION VIOLATION OF INSTRUCTION—INCOME-TAX ACT, 1961, S. 143(3)—INSTRUCTION NO. 5 OF 2016 DATED 14-7-2016[1].

CENTRAL BOARD OF DIRECT TAXES—INSTRUCTIONS—INCOME-TAX DEPARTMENT—ASSESSMENT—BOARD INSTRUCTIONS ON CONVERSION OF LIMITED SCRUTINY ASSESSMENT TO FULL SCRUTINY—ASSESSING AUTHORITIES MUST FOLLOW CONSISTENTLY AND NOT SELECTIVELY—INSTRUCTION NO. 5 OF 2016 DATED 14-7-2016[1].

*The assessee's case was selected for limited scrutiny with respect to long-term capital gains but the Assessing Officer noticed that the assessee had claimed a short-term capital loss of Rs. 4,20,94,764 which had been adjusted against the long-term capital gains. According to him, the loss claimed by the assessee was suspicious in nature primarily because the loss could possibly have been created to reduce the incidence of tax on long-term capital gains shown by the assessee. In order to verify this aspect, he obtained approval of the Principal Commissioner to convert the case from limited scrutiny to complete scrutiny and the assessee was intimated about the change in the status of the case. The statement of the director of the company to the effect that the assessee had purchased shares from four brokers was recorded. Since all these*

1. See [2016] 385 ITR (St.) 56.

*brokers were Kolkata based and since there was detailed investigation by the Investigation Wing in the cases of entry operators and shares brokers and since the assessee had purchased shares from the brokers under investigation and the shares pertained to companies under investigation, a further questionnaire was issued to the assessee in which the assessee was confronted on the issue on non-genuine capital loss. The assessee responded to the questionnaire and, thereafter, further queries were again raised by issuing another questionnaire which was also responded to by the assessee. The assessee requested the Assessing Officer for an opportunity to cross-examine those persons on whose statements the Assessing Officer was proposing to rely and conclude that the short-term capital loss was not genuine. However, the Assessing Officer noted that such an opportunity was not to be given. He held that the purchase of shares did not take place and the transactions were sham in view of the documentary evidence, circumstantial evidence, human conduct and preponderance of probabilities. The entire exercise was a device to avoid tax. The Assessing Officer completed the assessment making an addition of Rs. 4,20,94,764 on account of disallowance of short-term capital loss, Rs. 8,41,895 for the unexplained expenditure on commission and Rs. 1,93,20,000 on account difference in computation of long-term capital gains. The Commissioner (Appeals) confirmed the allowance of short-term capital gains of Rs. 4,20,94,764 and the addition of Rs. 8,41,895 made on account of the unexplained commission expenditure. However, he deleted the addition of Rs. 1,93,20,000 on account of long-term capital gains on the ground that this was based on incorrect computation. On appeal :*

Held, *that there was no cogent material mentioned by the Assessing Officer which enabled him to have reached the conclusion that the assessee's case was a fit case for conversion from limited scrutiny to complete scrutiny. The statement of the assessee's director recorded after the conversion of the case showed nothing adverse vis-a-vis the transactions. In the proposal of the Assessing Officer and the approval of the Principal Commissioner no reasonable view was formed as mandated in Central Board of Direct Taxes Instruction No. 5 of 2016 dated July 14, 2016*[1] *in an objective manner and merely suspicion and inference was the foundation of the view of the Assessing Officer. There was no direct nexus brought on record by the Assessing Officer in the proposal and, therefore, the proposal for converting the limited scrutiny to complete scrutiny was merely aimed at making fishing enquiries. The Principal Commissioner had accorded the approval in a mechanical manner which was in clear violation of the Instruction No. 20 of 2015*[2]*. Thus*

1. See [2016] 385 ITR (St.) 56.

*the conversion of the case from limited scrutiny to complete scrutiny could not be upheld.*

AMAL KUMAR GHOSH *v.* ASST. CIT [2014] 361 ITR 458 (Cal) *and* PAYAL KUMARI (MRS.) *v.* ITO (I. T. A. No. 23/Chd/2011 dated February 24, 2011) *followed*.

*The Department cannot be permitted to selectively apply the standards set by themselves for their own conduct. If this type of deviation is permitted, the consequences will be that floodgates of corruption will be opened which it is not desirable to encourage. When the Department has set down a standard for itself, the Department is bound by that standard and cannot act with discrimination.*

AMAL KUMAR GHOSH *v.* ASST. CIT [2014] 361 ITR 458 (Cal) (para 6) *and* PAYAL KUMARI (MRS.) *v.* ITO (I. T. A. No. 23/Chd/2011 dated February 24, 2011) (para 6) *referred to* .

**I. T. A. No. 6767/Delhi/2019 (assessment year 2015-16).**

*Kapil Goel*, Advocate, for the assessee.

*S. N. Meena*, Senior Departmental representative, for the Department.

**ORDER**

1 The order of the Bench was pronounced buy

SUDHANSHU SRIVASTAVA ***(Judicial Member)***.—This appeal is preferred by the assessee against the order dated June 18, 2019 passed by the learned Commissioner of Income-tax (Appeals)-34, New Delhi (CIT(A)) for the assessment year 2015-16.

2 The brief facts of the case are that the assessee-company is engaged in manufacturing, marketing and transportation of milk and dairy products. As per the records, during the year under consideration, the main source of income was freight income and long-term capital gains. The return of income was filed declaring a total income of Rs. 19,44,88,700. The case was selected for limited scrutiny through CASS.

2.1 In the assessment order, the Assessing Officer noted that the assessee's case was selected for limited scrutiny with respect to long-term capital gains but it was noticed that the assessee had claimed a short-term capital loss of Rs. 4,20,94,764 which had been adjusted against the long-term capital gains. As per the Assessing Officer, the loss claimed by the assessee appeared to be suspicious in nature primarily due to the reason that the loss could possibly have been created to reduce the incidence of

2. See [2016] 380 ITR (St.) 36

tax on long-term capital gains shown by the assessee. The Assessing Officer further stated in the assessment order that in order to verify this aspect, approval of the learned Principal Commissioner of Income-tax (PCIT) was taken to convert the case from limited scrutiny to complete scrutiny and that the assessee was also intimated about the change in the status of the case. As noted in the assessment order, the statement of Shri Rohit Verma, director of the company was recorded under section 131 of the Act on November 27, 2017 wherein Shri Rohit Verma is said to have stated that the assessee-company had purchased shares from four brokers, namely, M/s. Rochak Vinimay Pvt. Ltd., Ekaparnik Vintrade Pvt. Ltd, Rochi Dealcom Pvt. Ltd. and Duari Marketing Pvt. Ltd. As per the Assessing Officer, since all these brokers were Kolkata based and since there was detailed investigation by the Investigation Wing of the Income-tax Department in the cases of entry operators/shares brokers and since the assessee-company had purchased shares from the brokers under investigation and the shares pertained to companies under investigation, a further questionnaire was issued to the assessee in which the assessee was confronted on the issue on non-genuine capital loss. The assessee responded to the questionnaire and, thereafter, further queries were again raised by issuing another questionnaire which was also responded to by the assessee. The assessee requested the Assessing Officer to be given an opportunity to cross-examine those persons on whose statements the Assessing Officer was proposing to rely and conclude that the short-term capital loss was not genuine. However, the Assessing Officer noted that such an opportunity was not to be given.

2.2 The Assessing Officer went on to hold that the purchase of shares did not take place and the transactions were sham in view of the documentary evidence, circumstantial evidence, human conduct and preponderance of probabilities. The Assessing Officer observed that the entire exercise was a device to avoid tax. The Assessing Officer (AO) completed the assessment under section 143(3) of the Income-tax Act, 1961 (hereinafter called as "the Act") after making an addition of Rs. 4,20,94,764 on account of disallowance of short-term capital loss, Rs. 8,41,895 for the alleged unexplained expenditure on commission and Rs. 1,93,20,000 on account difference in computation of long-term capital gains. Thus, the total income was computed at Rs. 25,67,43,360 by the Assessing Officer.

2.3 Aggrieved, the assessee approached the learned first appellate authority. The learned Commissioner of Income-tax (Appeals) was of the opinion that the evidence furnished by the assessee with respect to the short-term capital loss of Rs. 4,20,94,764 could not be accepted as genuine

as it had been established by the Investigation Wing of the Department, after making detailed enquiries, that the brokers through whom the assessee had purchased shares were involved in business of providing accommodation entries and that the shares purchased by the assessee were in the nature of penny stock. The learned Commissioner of Income-tax (Appeals) also held that the Assessing Officer was right in denying the assessee's request for cross-examination of those persons on whose statements the Department had relied upon in this respect. Thus, the allowance of short-term capital gains of Rs. 4,20,94,764 was upheld along with the addition of Rs. 8,41,895 made on account of the alleged unexplained commission expenditure. However, the learned Commissioner of Income-tax (Appeals) deleted the addition of Rs.1,93,20,000 on account of long-term capital gains as the same was based on incorrect computation.

2.4 Now, the assessee has approached this Tribunal challenging the order of the learned Commissioner of Income-tax (Appeals) and has raised the following grounds of appeal :

"1. That the order passed by the learned Assessing Officer dated December 30, 2017 and further order passed by the learned Commissioner of Income-tax (Appeals) dated June 18, 2019 are bad in law inasmuch as mechanical notice under section 143(2) on the basis of CASS is not in accordance with jurisdictional conditions stipulated under the Act so it shows grave and patent non-application of mind on the part of the learned Assessing Officer in issuing notice under section 143(2) and accordingly all subsequent proceeding including the orders passed by the learned Assessing Officer and the learned Commissioner of Income-tax (Appeals) are void ab initio.

2. That the order passed by the learned Assessing Officer dated December 30, 2017 and further order passed by the learned Commissioner of Income-tax (Appeals) dated June 18, 2019 are bad in law inasmuch as admitted from para 3 of the assessment order that the case was primarily selected for limited scrutiny only on limited issue of long-term capital gains (LTCG) on which aspect as per the learned Commissioner of Income-tax (Appeals) order there remains no existing addition and conversion of limited scrutiny to complete scrutiny on mere suspicion only and for verification only, on the basis of invalid approval of the Principal Commissioner of Income-tax-3, the entire addition on account of disallowance, of short-term capital loss of Rs. 420,94,764 and Rs. 8,41,895 as alleged unexplained commission expense is not as per the Central Board of Direct Taxes instructions (refer instructions No 19 and 20/2015 of December 29, 2015) on the

subject and ergo ultra vires the provisions of the Act. Other grounds on merits qua the disallowance of short-term capital loss (STCL) of Rs. 420,94,764 and addition for Rs. 8,41,895 as alleged unexplained commission expense (Rs. 4,29,36,659).

3. That the order passed by the learned Assessing Officer dated December 30, 2017 and further order passed by the learned Commissioner of Income-tax (Appeals) dated June 18, 2019 are bad in law inasmuch as the disallowance of Rs. 4,29,36,659 (break up disallowance on account of short-term capital loss on share sale of Rs. 420,94,764 and Rs. 8,41,895 as alleged unexplained commission expense) is made in most perfunctory and light hearted manner which is highlighted elaborately in the next ground by outlining striking features of the extant case.

4. That the order passed by the learned Assessing Officer dated December 30, 2017 and further order passed by the learned Commissioner of Income-tax (Appeals) dated June 18, 2019 are bad in law inasmuch as the addition of Rs. 4,29,36,659 (break up : disallowance on account of short-term capital loss on share sale of Rs. 420,94,764) is made without appreciating that :

(i) Firstly, nowhere it is brought on records by reference to any particular material that cash has been received back by the assessee from the concerned parties after making purchases and similarly there is no evidence to prove that the assessee has passed on cash to the concerned parties after receiving the sale proceeds of shares in its bank account through proper banking channels.

(ii) Secondly nowhere the assessee's audited books under section 145 are doubted and so loss emerging therefrom can also not be subject matter of doubt/debate.

(iii) thirdly principle that "The commercial expediency of the contract is to be adjudged by the contracting, parties as to its terms": which directly answers the basis taken by the learned Assessing Officer/Commissioner of Income-tax (Appeals) in drawing adverse inference.

(iv) fourthly neither there is any collusion being established on records by any cogent material nor is it the case of the learned Assessing Officer/Commissioner of Income-tax (Appeals) that transaction done are at variance with price on given date on stock exchange.

(v) fifthly the case set up by the learned Assessing Officer/Commissioner of Income-tax (Appeals) to disallow stated loss on ground of probability, suspicion, would fall the fowl of test of live nexus where there is no live nexus between inference of accommodation entry and disallowance loss vis-a-vis sale/purchase of shares.

(vi) sixthly no material worth name in the form of statement implicating the assessee or its transaction in question has been confronted/cross-examined to the assessee in manner known to law except general allegations being made.

(vii) lastly no case specific and transaction specific material is brought on records to dislodge evidence of genuine share sale loss claim of the assessee.

In view of the above we pray for outright disallowance of loss as made by the learned Assessing Officer and as mechanically sustained by the learned Commissioner of Income-tax (Appeals) where the learned Commissioner of Income-tax (Appeals) has just mechanically applied general sermons without giving any specific finding on our assail lodged before him.

5. That on the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in sustaining the action of the learned Assessing Officer in making loss disallowance of Rs. 4,29,36,659 without appreciating that burden to prove that transaction is bogus/sham has remained, undischarged from the side of the Revenue.

6. That on the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in sustaining the action of the learned Assessing Officer in making addition of Rs. 4,29,36,659 without appreciating that basis of the findings of the lower authorities is "suspicion" and "human probabilities" only which is never converted to reliable and trustworthy material and entire assessment order is passed on the sole basis of "borrowed satisfaction" and without any independent application of mind (like a rubber stamp order).

7. That on the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in sustaining the action of the learned Assessing Officer in making addition of Rs. 4,29,36,659 without appreciating that no opportunity is given to the assessee to be confronted with back material relied extensively in the impugned orders like the Investigation Wing report, etc., and no opportunity to cross-examine the Revenue's witness was given

despite specific written request in this regard made to the learned Assessing Officer/Commissioner of Income-tax (Appeals).

8. That on the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in sustaining the action of the learned Assessing Officer in making the addition of Rs. 4,29,36,659 without appreciating that in identical facts in various orders relief has been granted to the assessee accepting loss claimed as genuine.

9. That the appellant craves leave to add/alter any/all grounds of appeal before or at the time of hearing of the appeal.

*Humble prayer*

(i) To delete the addition of Rs. 4,29,36,659 on account of the alleged bogus loss resulting from, innocuous share sale.

(ii) To quash the assessment order and the learned Commissioner of Income-tax (Appeals) order for being passed in serious violation of audi alteram partem.

(iii) To quash the assessment order and the learned Commissioner of Income-tax (Appeals) order for being passed in serious violation of the Central Board of Direct Taxes instructions on the aspect of limited scrutiny issue.

(iv) To restore the returned income.

(v) Any other appropriate relief.

**3** The learned authorised representative submitted that he may be given the opportunity to first argue ground Nos. 1 and 2 which were legal grounds challenging the validity of notice issued under section 143(2) of the Act and that if the Bench is satisfied with the arguments on these two grounds and hold them in favour of the assessee, then the other grounds would became academic in nature. The learned senior Departmental representative agreed to the proposal of the learned authorised representative. Therefore, we are proceeding to hear both the parties initially on ground Nos. 1 and 2.

**4** The learned authorised representative submitted that the assessment order passed by the Assessing Officer was bad in law because admittedly, the case was selected for limited scrutiny on the limited issue of long-term capital gains and it was converted to a complete scrutiny only on a mere suspicion and for the purposes of verification only on the basis of an invalid approval by the learned Principal Commissioner of Income-tax. It was submitted that the conversion from limited scrutiny to complete scrutiny in the instant case was not as per the instructions issued by the Central Board of

Direct Taxes, viz., Instruction Nos. 19 and 20 of 2015 dated December 29, 2015 and, therefore, the entire assessment was void ab initio. The learned authorised representative vehemently argued that the conversion from limited scrutiny to complete scrutiny was itself bad in law. The learned authorised representative drew our attention to the notice issued by the Department dated April 11, 2016 for limited scrutiny and also letter dated October 17, 2017 issued by the Department informing the assessee of converting the limited scrutiny into complete scrutiny. The learned authorised representative also drew our attention to the computation of income by the assessee and submitted that it was evident from the computation that nowhere was the details of the loss incurred in shares disclosed company-wise. It was submitted that the details of the companies in which the assessee had incurred loss in the shares transaction was communicated only by the assessee at the time of the assessment proceedings and also in the statement recorded by the Assessing Officer of the assessee-company's director. The learned authorised representative submitted that, thus, it was very much apparent that the Department had converted the limited scrutiny into complete scrutiny only for making roving enquiries and that the Department did not have a reasonable view as mandated in the Central Board of Direct Taxes Instruction No. 5 of 2016 dated July 14, 2016 and, thus, there was inherent weakness and deficiency in the action to convert the limited scrutiny into full scrutiny.

4.1 It was also pointed out that admittedly, there was no adverse inference with respect to long-term capital gains as the entire long-term capital gains had been offered to tax. The learned authorised representative drew our attention to the aforesaid Central Board of Direct Taxes Instruction wherein it has been stated that while forming the reasonable view, the Assessing Officer has to ensure that there existed credible material or information available on record for forming such view and that the reasonable view should not be based on mere suspicion or conjecture and that there must be a direct nexus between the available material and formation of such view. The learned authorised representative submitted that in the present case there was no direct nexus demonstrated between the material available and the formation of such view as no such material is stated in the proposal itself. He drew our attention to the proposal wherein it has been stated that there is a possibility of under assessment of income if the case is not examined under complete scrutiny.

4.2 The learned authorised representative argued that the proposal and the approval both were completely non-descriptive as even the basic details required for forming a reasonable view were completely missing.

The learned authorised representative placed reliance on numerous judicial precedents wherein it had been held that the violation of the Central Board of Direct Taxes Instruction governing the scrutiny under section 143(2) of the Act would lead to the invalidation of the entire assessment.

4.3 The learned authorised representative also submitted that the impugned addition had been made only by making some reference of the report of the Investigation Wing which the assessee was not confronted with and further the assessee's prayer for granting opportunity for cross-examining those persons on whose statements the Department had relied upon was also denied. It was argued that it was apparent that de hors the material relied upon by the Department, the addition had no feet to stand. In this regard also, the learned authorised representative placed reliance on numerous judicial precedents and submitted that where there was no material available with the Department except the so called investigation report, the Department cannot be allowed to improve upon the reasoning of the Assessing Officer and the learned Commissioner of Income-tax (Appeals).

4.4 The learned authorised representative also submitted that there was an inordinate delay in getting the case converted to complete scrutiny which was evident from the fact that information dated August, 2015 of the Investigation Wing is purportedly made the basis of conversion of the case from limited scrutiny to complete scrutiny in October, 2017 whereas the case was selected for scrutiny in April, 2016. Therefore, it was apparent that this conversion was not within the spirit and meaning of the Central Board of Direct Taxes Instructions Nos. 20 of 2015 and 5 of 2016.

In response the learned senior Departmental representative submitted 5
that the Department had followed the Central Board of Direct Taxes Instructions in letter in spirit while converting this case from limited scrutiny to complete scrutiny. The learned senior Departmental representative, while referring to the contents of the proposal dated October 5, 2017 and approval dated October 10, 2017, submitted that there was nothing wrong with them and that they satisfied the conditions laid down in the Central Board of Direct Taxes instructions. The learned senior Departmental representative also defended the action of the lower authorities in not allowing cross-examination of the persons whose statements had been relied upon and placed reliance on certain judicial precedents for the same. The learned senior Departmental representative submitted that quasi-judicial adjudications do not require any opportunity to provide cross-examination or opportunity to lead evidence. The learned senior Department representative also argued that the Investigation Wing is a part of the Depart-

ment itself and not a third party and, therefore, the Assessing Officer was completely justified in relying on the report of the Investigation Wing while converting the case of limited scrutiny to complete scrutiny. The learned senior Departmental representative argued that the case of the assessee should not be decided on the legal ground and the merits of the case also should also be considered.

**6** We have heard the rival submissions and have also perused the material on record. After considering the entire factual matrix we first deal with the primary arguments of the learned authorised representative that the conversion of the case from limited scrutiny to complete scrutiny was not legally valid. The subject of conversion of the case from limited scrutiny to complete scrutiny has been dealt with in the Central Board of Direct Taxes Instruction No. 5 of 2016[1] which is being reproduced hereunder for the sake of convenience :

> "2. In order to ensure that maximum objectivity is maintained in converting a case falling under 'limited scrutiny' into a 'complete scrutiny' case, the matter has been further examined and in partial modification to para 3(d) of the earlier order dated December 29, 2015, the Board hereby lays down that while proposing to take up 'complete scrutiny' in a case which was originally earmarked for 'limited scrutiny', the Assessing Officer ('AO') shall be required to form a reasonable view that there is possibility of under assessment of income if the case is not examined under 'complete scrutiny'. In this regard, the monetary limits and requirement of administrative approval from Principal Commissioner of Income-tax/Commissioner/ the Principal Director of Income-tax/Director of Income-tax, as prescribed in para 3(d) of earlier Instruction dated December 29, 2015, shall continue to remain applicable.
>
> 3. Further, while forming the reasonable view, the Assessing Officer would ensure that :
>
> (a) there exists credible material or information available on record for forming such view ;
>
> (b) this reasonable view should not be based on mere suspicion, conjecture or unreliable source ; and
>
> (c) there must be a direct nexus between the available material and formation of such view. . . .
>
> 6. To ensure proper monitoring in cases which have been converted from 'limited scrutiny' to 'complete scrutiny', it is suggested,

1. See [2016] 385 ITR (St.) 56.

that the provisions of section 144A of the Act may be invoked in suitable cases. To prevent possibility of fishing and roving enquiries in such cases, it is desirable that these cases should invariably be picked up while conducting review or inspection by the administrative authorities.

7. The above Instruction shall be applicable from the date of its issue and would cover the cases selected under CASS 2015 which are pending scrutiny cases as well as cases selected/being selected under the CASS 2016."

6.1 Earlier preceding instruction in this regard was 20 of 2015[1] which states as under :

"Instruction No. 20 of 2015

Government of India

Ministry of Finance

Department of Revenue

Central Board of Direct Taxes

North Block, New Delhi, the 29th of December, 2015

*Subject* : Scrutiny assessments—Some important issues and scope of scrutiny in cases selected through computer aided scrutiny selection ('CASS')—regarding

The Central Board of Direct Taxes ('CBDT'), vide Instruction No. 7/2014 dated September 26, 2014 had clarified the extent of enquiry in certain category of cases specified therein, which are selected for scrutiny through CASS. Further clarifications have been sought regarding the scope and applicability of the aforesaid Instruction to cases being scrutinised.

2. In order to facilitate the conduct of scrutiny assessments and to bring further clarity on some of the issues emerging from the aforesaid Instruction, the following clarifications are being made.

(i) *Year of applicability* : As stated in the Instruction No. 7 of 2014, the said Instruction is applicable only in respect of the cases selected for scrutiny through CASS-2014.

(ii) *Whether the said Instruction is applicable to all cases selected under CASS* : The said Instruction is applicable where the case is selected for scrutiny under CASS only on the parameter(s) of AIR/CIB/26AS data . If a case has been selected under CASS for any other

1. See [2016] 380 ITR (St.) 36.

reason(s)/parameter (s) besides the AIR /CIB/26AS data, then the said Instruction would not apply.

(iii) *Scope of enquiry* : Specific issue based enquiry is to be conducted only in those scrutiny cases which have been selected on the parameter(s) of AIR/CIB/26AS data. In such cases, the Assessing Officer, shall also confine the questionnaire only to the specific issues pertaining to AIR/CIB/26AS data. Wider scrutiny in these cases can only be conducted as per the guidelines and procedures stated in Instruction No. 7 of 2014.

(iv) *Reason for selection* : In cases under scrutiny for verification of AIR/CIB/26AS data, the Assessing Officer has to intimate the reason for selection of case for scrutiny to the assessee concerned.

3. As far as the returns selected for scrutiny through CASS-2015 are concerned, two types of cases have been selected for scrutiny in the current financial year—one is 'limited scrutiny' and other is 'complete scrutiny'. The assessees concerned have duly been intimated about their cases falling either in 'limited scrutiny' or 'complete scrutiny' through notices issued under section 143(2) of the Income-tax Act, 1961 ('Act'). The procedure for handling 'limited scrutiny' cases shall be as under :

(a) In 'limited scrutiny' cases, the reasons/issues shall be forthwith communicated to the assessee concerned.

(b) The questionnaire under section 142(1) of the Act in 'limited scrutiny' cases shall remain confined only to the specific reasons/issues for which case has been picked up for scrutiny. Further, the scope of enquiry shall be restricted to the 'limited scrutiny' issues.

(c) These cases shall be completed expeditiously in a limited number of hearings.

(d) During the course of assessment proceedings in 'limited scrutiny' cases, if it comes to the notice of the Assessing Officer that there is potential escapement of income exceeding Rs. five lakhs (for metro charges, the monetary limit shall be Rs. ten lakhs) requiring substantial verification on any other issue(s), then, the case may be taken up for 'complete scrutiny' with the approval of the Principal Commissioner of Income-tax/Commissioner concerned. However, such an approval shall be accorded by the Principal Commissioner of Income-tax/Commissioner in writing after being satisfied about the merits of the issue(s) necessitating 'complete scrutiny' in that particular case. Such cases shall be monitored by the range head concerned. The procedure indicated at points (a), (b) and (c) above shall no longer

remain binding in such cases. (For the present purpose, 'metro charges' would mean Delhi, Mumbai, Chennai, Kolkata, Bengaluru, Hyderabad and Ahmedabad).

4. The Board further desires that in all cases under scrutiny, where the Assessing Officer proposes to make additions or disallowances, the assessee would be given a fair opportunity to explain his position on the proposed additions/disallowances in accordance with the principles of natural justice. In this regard, the Assessing Officer shall issue an appropriate show-cause notice duly indicating the reasons for the proposed additions/disallowances along with necessary evidences/reasons forming the basis of the same. Before passing the final order against the proposed additions/disallowances due consideration shall be given to the submissions made by the assessee in response to the show-cause notice.

5. The contents of this Instruction should be immediately brought to the notice of all concerned for strict compliance.

6. Hindi version to follow."

6.2 We have also gone through the Central Board of Direct Taxes letter bearing No. DGIT VIF/HQ SI/2017-18 dated November 30, 2017 which states that the idea behind such stipulation was to enforce checks and balances upon the power of the Assessing Officer to do fishing and roving enquiries in cases selected for limited scrutiny, etc. In this very letter, the Central Board of Direct Taxes has also highlighted the aspect of cryptic order-sheet entries which according to the Central Board of Direct Taxes shows irresponsible, ad hoc and indisciplined working of an officer of the Department. A perusal of the aforesaid instructions would show that the objective behind the issuance of these instructions is (i) to prevent possibility of fishing and roving enquiries ; (ii) ensure maximum objectivity ; and (iii) to enforce checks and balances upon the powers of an Assessing Officer.

6.3 We have also gone through the proposal drafted by the Assessing Officer on October 5, 2017 for converting the case from limited scrutiny to complete scrutiny. This reads as under :

". . . 4. In this regard it may be mentioned here that the assessee has shown a short-term capital loss on sale of shares purchased on July 9, 2014 and sold on February 15, 2015. The purchase price of these shares has been stated at Rs. 499,98,440 and sale price has been mentioned at Rs. 79,03,676. The resultant loss of Rs. 420,94,764 has been set off by the assessee against long-term capital gains. This transaction appears to be suspicious in nature and probably this loss

has been created to reduce the incidence of tax on long-term capital gains discussed in para 3. This issue needs to be thoroughly examined to ascertain the genuineness of this loss."

6.4 We have also through the original order-sheet entries, as were present in the assessment records and which had been submitted for our perusal by the learned senior Departmental representative under our directions and it shows that there is not an iota of any cogent material mentioned by the Assessing Officer which enabled him to have reached the conclusion that this case was a fit case for conversion from limited scrutiny to complete scrutiny. We have also gone through the statement of the assessee's director Mr. Rohit Verma which was recorded on July 18, 2017, i.e., after the conversion of the case and even in his statement nothing adverse is coming out vis-a-vis. the impugned transactions. If the proposal of the Assessing Officer dated October 5, 2017 and the approval of the learned Principal Commissioner of Income-tax dated October 10, 2017 are examined on the anvil of paragraph 3 of the Central Board of Direct Taxes Instruction No. 5 of 2016, it is very much clear that no reasonable view is formed as mandated in the said Central Board of Direct Taxes Instruction No. 5 of 2016 in an objective manner and, secondly, merely suspicion and inference is the foundation of the view of the Assessing Officer. We also note that there is no direct nexus brought on record by the Assessing Officer in the said proposal and, therefore, it is very much apparent that the proposal of converting the limited scrutiny to complete scrutiny was merely aimed at making fishing enquiries. We also note that the learned Principal Commissioner of Income-tax has accorded the approval in a mere mechanical manner which is in clear violation of the Central Board of Direct Taxes Instructions No. 20 of 2015.

6.5 The hon'ble Calcutta High Court in the case of *Amal Kumar Ghosh* v. *Asst. CIT* reported in [2014] 361 ITR 458 (Cal) discussed the purpose behind the Central Board of Direct Taxes Circulars. The relevant observations of the hon'ble Calcutta High Court are as under (page 462) :

"Mrs. Gutgutia, the learned advocate submitted that the circulars are not meant for the purpose of permitting the unscrupulous assessees from evading tax. Even assuming, that to be so, it cannot be said that the Department, which is State, can be permitted to selectively apply the standards set by themselves for their own conduct. If this type of deviation is permitted, the consequences will be that floodgate of corruption will be opened which it is not desirable to encourage. When the Department has set down a standard for itself, the Department is bound by that standard and cannot act with discrimination. In

case, it does that, the act of the Department is bound to be struck down under article 14 of the Constitution. In the facts of the case, it is not necessary for us to decide whether the intention of the Central Board of Direct Taxes was to restrict the period of issuance of notice from the date of filing the return laid down under section 143(2) of the Income-tax Act."

6.6 The co-ordinate Bench of the Income-tax Appellate Tribunal at Chandigarh in the case of *Mrs. Payal Kumari* v. *ITO* (I. T. A. No. 23/Chd/2011, vide order dated February 24, 2011) has held that even section 292BB of the Act cannot save the infirmity arising from infraction of the Central Board of Direct Taxes Instructions dealing with the subject of scrutiny assessments where assessment has been framed in direct conflict with the guidelines issued by the Central Board of Direct Taxes.

6.7 Therefore, on an overall view of the factual matrix as well as settled judicial position, we are of the considered opinion that the instant conversion of the case from limited scrutiny to complete scrutiny cannot be upheld as the same is found to be in total violation of the Central Board of Direct Taxes Instruction No. 5 of 2016. Accordingly, it is our considered opinion that the entire assessment proceedings do not have any feet to stand on. Therefore, we hold the assessment order to be nullity and we quash the same.

6.8 Since we have quashed the assessment order as being nullity, the other grounds raised by the assessee became academic in nature and are not being addressed to.

In the final result, the appeal of the assessee stands allowed. 7

Order pronounced on June 12, 2020.

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**[2020] 81 ITR (Trib) 194 (Lucknow)**

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

**SHRI RAM MURTI SMARAK TRUST**

***v.***

**ASSISTANT COMMISSIONER OF INCOME-TAX**

(and vice versa)

———

**DEV MURTI**

***v.***

**ASSISTANT COMMISSIONER OF INCOME-TAX**

**A. D. JAIN *(Vice-President)*** and
**DR. B. R. R. KUMAR *(Accountant Member)***

June 25, 2020.

**SS ▸ ITA 1961, ss 69A, 69B, 153A**
**AY ▸ 2009-10 to 2015-16**
**HF ▸ Assessee**

SEARCH AND SEIZURE—ASSESSMENT IN SEARCH CASES—MEDICAL COLLEGE AND HOSPITALS—CAPITATION FEE—WITHOUT WORKING OUT OF BASIC PARAMETERS REGARDING OWNERSHIP OF TRANSACTIONS—PRESUMPTIVE CLAUSES IN PROVISION HAD NO APPLICATION—NO EXAMINATION OF STUDENTS FROM WHOM AMOUNTS PURPORTEDLY RECEIVED TO PROVE RECEIPT OF DONATION—NO PRIMARY EVIDENCE AVAILABLE WITH DEPARTMENT EXTRAPOLATING AMOUNT TO WORK OUT DONATION PURPORTEDLY RECEIVED—NO ADDITION COULD BE MADE—INCOME-TAX ACT, 1961, S. 153A.

SEARCH AND SEIZURE—UNEXPLAINED CASH—MEDICAL COLLEGE AND HOSPITALS—FACTS OR EXPLANATION GIVEN BY ASSESSEE NOT EXAMINED BY DEPARTMENT IN RIGHT PERSPECTIVE TO DETERMINE ACCOUNTABILITY OF AMOUNTS IN REGULAR BOOKS OR NOT—ASSESSING OFFICER TO VERIFY CASH BALANCES WITH REGULAR BOOKS OF ACCOUNT FILED BY ASSESSEE AS WELL AS WITH BALANCE-SHEETS AND INCOME AND EXPENDITURE ACCOUNTS AVAILABLE WITH DEPARTMENT WITH RETURNS AND BOOKS OF ACCOUNT AVAILABLE IN SEIZED MATERIAL—INCOME-TAX ACT, 1961, S. 69A.

UNDISCLOSED INVESTMENT—VALUATION OF BUILDINGS—DIFFERENCE BETWEEN VALUE ESTIMATED BY VALUATION OFFICER AND THAT STATED BY ASSESSEE BEING LESS THAN 15 PER CENT.—NO ADDITION COULD BE MADE—INCOME-TAX ACT, 1961, S. 69B.

*A search and seizure operation under section 132 of the Income tax Act, 1961 was carried out at the institutions, medical colleges and hospitals run by the assessee-trust. During the search operation, several loose papers, registers and diaries of incriminating nature and cash were seized from the residence of the trustee and the chairman of the trust. From the bedroom of the son of the trustee in his residential premises incriminating documents inventorised was found and seized. Similarly incriminating documents found and impounded from the medical college, indicated that the trust was charging substantial amounts as capitation fees from students over the years which were not being accounted for in the accounts of the trust. The son of the trustee denied knowledge about the two names of the students. From the findings of the party at the medical college it was gathered that one of the students was an undergraduate admitted to the medical college in the academic session 2013-14. His record showed that Rs. 9,08,500 was paid as fee and other charges during the admission. Similarly the case records of another student was found and impounded by the party. From the record it was evident that the student was a post graduate (MD) of the medical college admitted for the session 2013-14. An amount of Rs. 18,94,940 was paid for admission towards fee and other charges. The Assessing Officer held that the amount of Rs. 50 lakhs as found written on the seized paper was nothing but proof of capitation fees charged by the trust for ensuring his admission for the post-graduate course. He held that Rs. 23 lakhs represented cash donation being taken by the assessee for admission in the undergraduate medical course while it was Rs. 50 lakhs for the post-graduate course. Further it was found that Rs. 11.25 lakhs was paid by a student during the time of admission for the course while the scribbling on the page an amount Rs. 40 lakhs was mentioned and based on these noting, the Assessing Officer treated this as capitation fees charged by the trust for admission in the medical college. The Assessing Officer made addition of an amount spread over the seven years of the assessment under section 153A. Further, the Assessing Officer held that since this amount charged from the students was neither in the nature of the voluntary contribution nor derived from any property held under trust, and lost the character of income qualifying for exemption under the provisions of sections 11 and 12. The Commissioner (Appeals) held that the assessee had charged capitation fees, over and above the admission fees charged for the graduate and under graduate courses for the instant year and upheld the addition of Rs. 8 crores made by the Assessing Officer on account of undisclosed receipts of capitation fees on the basis of the comparable case. On appeal :*

Held, *that in the absence of working out of the basic parameters regarding the ownership of transactions the Assessing Officer could not culminate into the determination of concealed income, the presumptive clauses provided under section 132(4A) and could not be invoked in the instant case. There had been a sequence of admission of the two students to the medical courses. No examination of the students from whom the amounts purportedly had been received had been undertaken by the Department to prove receipt of donation. The writings on the empty envelopes had not been examined. Other than the loose papers, there was no evidence corroborating receipt of the amounts from these two students to the tune of Rs. 73 lakhs. No primary evidence was available with the Department extrapolating the amount to work out the donation purportedly received. The addition of Rs. 29.30 crores made on the strength of the two papers wherein the amount of Rs. 65 lakhs had been purportedly written could not be held to be valid.*

*During the course of search a total amount of Rs. 7,30,53,000 was found in the residential premises belonging to the assessee which was also the registered office of the assessee and the head office of the assessee. The statement of the trustee had been recorded during the search as well as the post-search proceedings, who stated that the amount of Rs. 7.53 lakhs belonged to him and the rest of the amount of Rs. 6,22,47,000 belonged to the assessee. The Department made a substantive addition on account of unexplained cash in the hands of the trustee for the assessment year 2015-16 and on protective basis in the hands of the assessee. The Commissioner (Appeals) upheld the addition of Rs. 7,30,53,000 in the case of the trustee holding that the cash belonged to the trustee and confirmed the addition and deleted in the hands of the assessee. On appeal :*

Held, *that the books of account as on the date of search had been seized and impounded by the Department by way of computer backups and hard discs. The cash deposited in the bank account could be examined from the bank statement, which was to the tune of Rs. 3,70,25,184. An amount of Rs. 4,83,18,695 had been spent but not accounted for. The receipts have been shown as registration fee received and to be accounted, students fee received and to be accounted. Further, it had shown to have been received on account of hospital revenue. The expenses consisted of petty cash expenses, hospital revenue deposited in bank, fee received in cash, expenses incurred in construction and expenses of the assessee, diagnostic centre. Based on these facts, the cash had to be assessed in the hands of the trust. The reconciliation statement had been rejected en bloc by the Department. The facts or the explanation given by the assessee had not been examined by the Department in the*

*right perspective to determine the accountability of these amounts in the regular books. Hence, the matter was remanded to the Assessing Officer for the limited purpose of verifying the cash balances with the regular books of account filed by the assessee as well as with the balance-sheets and income and expenditure accounts available with the Department along with the returns and the books of account available in the seized material.*

*During the course of assessment proceedings, the valuation of buildings of various institutions of the assessee was referred to the valuation cell. The assessee was confronted with the report of the Valuation Officer. Since the Valuation Officer had worked out the difference of Rs. 4,03,72,178 up to the assessment year 2013-14 in his report, the Assessing Officer added the difference in the assessment year 2013-14 under section 69B. The Commissioner (Appeals) deleted the addition as the difference between the actual investment, shown by the assessee and estimated by the Valuation Officer was only 9.86 per cent. which was less than 15 per cent. On appeal :*

Held, *that during the arguments the Department could not controvert the factual findings. Hence, the addition made on account of the difference of the investment and as estimated by the Valuation Officer being less than 15 per cent. the addition was deleted.*

P. R. METRANI *v.* CIT [2006] 287 ITR 209 (SC) (para 30) *and* DY. CIT *v.* JSW LTD. [2020] 79 ITR (Trib) 585 (Mum) (para 48) *referred to.*

**I. T. (SS) A. Nos. 293 to 299 and 437, 438 and 300/Lucknow/2019 (assessment years 2009-10 to 2015-16.**

*Ved Jain*, Advocate and *Ravindra Kumar Agarwal*, Chartered Accountant, for the assesses.

*S. K. Madhuk*, Commissioner of Income-tax-Departmental representative, for the Department.

**ORDER**

The order deals with the following appeals. 1

1. I. T. (SS)A. No. 293/Lkw/2019 – assessment year 2009-10.
2. I. T. (SS)A. No. 294/Lkw/2019 – assessment year 2010-11.
3. I. T. (SS)A. No. 295/Lkw/2019 – assessment year 2011-12.
4. I. T. (SS)A. No. 296/Lkw/2019 – assessment year 2012-13.
5. I. T. (SS)A. No. 297/Lkw/2019 – assessment year 2013-14.
6. I. T. (SS)A. No. 298/Lkw/2019 – assessment year 2014-15.
7. I. T. (SS)A. No. 299/Lkw/2019 – assessment year 2015-16.
8. I. T. (SS)A. No. 437/Lkw/2019 – assessment year 2013-14.

9. I. T. (SS)A. No. 438/Lkw/2019 – assessment year 2015-16.

10. I. T. A. No. 300/Lkw/2019 – assessment year 2015-16.

In all the appeals the assessees have raised as many as 13 grounds of similar nature, consisting of legality of the assessment conducted under section 153A of the Income-tax Act, 1961 and denial of exemption under section 11 of the Act. Owing to the similarity in the grounds raised, they are being adjudicated together.

**2** The facts of the cases in brief, are that a search and seizure operation under section 132 of the Income-tax Act, 1961 was carried out in this case along with all the institutions/medical colleges and hospitals run by the assessee-trust on September 18, 2014 at the head office of Sri Ram Murti Smarak Trust at 4, LA Place, Lucknow and registered office of Sri Ram Murti Smarak Trust N-3, and 4, Murti Bhawan, Rampur Garden, Civil Lines, Bareilly, (U. P.)-243001.

**3** The trust, as part of its educational activity, runs :

(I) Shri Ram Murti Smarak Institute of Medical Science. (SRMS-IMS), 13 kilometres on Bareilly Nainital Road, Bhojipura, Bareilly.

(II) Shri Ram Murti Smarak School of Nursing 13 kilometres on Bareilly Nainital Road, Bhojipura, Bareilly.

(III) Shri Ram Murti Smarak Institute of Paramedical Science, 13 kilometres on Bareilly Nainital Road, Bhojipura, Bareilly 13 kilometres on Bareilly Nainital Road, Bhojipura, Bareilly.

(IV) Shri Ram Murti Smarak Super Speciality Hospital and Trauma Centre, 13 kilometres on Bareilly Nainital Road, Bhojipura, Bareilly.

(V) Shri R. R. Cancer Institute and Research Centre.

(VI) Shri Ram Murti Smarak College of Engineering and Technology, 13 kilometres on Bareilly Nainital Road, Bhojipura, Bareilly.

(VII) Sri Ram Murti Smarak College of Pharmacy, 13 kilometres on Barilly Nainital Road, Bhojipura, Bareilly.

(VIII) Shri Ram Murti Smarak Women's College of Engineering and Tecnology, 13 kilometres on Bareilly Nainital Road, Bhojipura, Bareilly and

(IX) City Centre Clinic, N-5, Rampur Garden, Bareilly.

**4** Shri Dev Murti is the main trustee and chairman of the trust while his spouse Smt. Asha Murti is also a trustee. Shri Aditya Murti is the son of the main trustee Shri Dev Murti and looks after the management of the hospital and medical college of the trust.

**5** During the search operation, many loose papers, registers and diaries of incriminating nature and cash were seized from the residence of Shri Dev

Murti at 4, La-Place, Shahnajaf Road, Lucknow (which is also used as the head office of the trust), residence of Shri Dev Murti at N-3,4, Murti Bhawan, Rampur garden, Bareilly which is also registered office of the trust and from the premises of M/s. SRMS Institute of Medical Science, M/s. SRMS Institution of Paramedical Science and SRMS College of Engineering and Technology, 13 kms on Bareilly-Nainital Road, Bhojipura, Bareilly.

*Issue of capitation fees*

During the course of search of bedroom of Shri Aditya Murti in the residential premises, situated at Rampur Garden, Bareilly incriminating documents inventorised as annexure LP-1 was found and seized. Similarly incriminating documents found and impounded as annexure LP-6 from the medical college, incriminating documents found and impounded as annexure LP-7 were also found which indicated that the SRMS Trust was charging substantial amount in the nature of capitation fees from the students over the years which were not being accounted for in the accounts of the trust. **6**

During the search Shri Aditya Murti was confronted with the contents of annexure LP-1 containing pages 1 to 27 particularly page No. 27 of this annexure which was found from his bedroom and the following was found written on it : **7**

| | |
|---|---|
| (1) Shobhit Pal | 23,00,000 |
| (2) Anuj Agrawal | 50,00,000 |
| | 73,00,000 |
| C A Sir | 7,50,000 |
| | 65,00,000 |
| Cash deposit | |
| 1,000 × 2,500 | 25,00,000 |
| 500 × 8,100 | 40,50,000 |
| | 65,00,000 |

Shri Aditya Murti denied having any knowledge about these two names though the page was found from his bedroom.

From the findings of the party MM-5 at the medical college it was gathered that Shri Shobhit Pal was an undergraduate student admitted to the medical college in the academic session 2013-14. His records were also impounded as annexure LP-6 from the medical college. His record showed that Rs. 9,08,500 was paid as fee and other charges during admission. Hence, the Assessing Officer held that the amount of Rs. 23,00,000, as **8**

mentioned on the seized paper, is a clear-cut evidence of acceptance of capitation fee over and above the usual fee for the said course.

9 Similarly the case records of Shri Anuj Agarwal was found and impounded by the party-MM-5 as annexure LP-7. From the record it is evident that Shri Anuj Agarwal is a post-graduate (MD) student of the medical college admitted for session 2013-14. An amount of Rs. 18,94,940 was paid for admission towards fee and other charges. The Assessing Officer held that the amount of Rs. 50,00,000 as found written on the seized paper is nothing but the proof of capitation fee charged by the trust for ensuring his admission for the post-graduate course.

10 When Shri Aditya Murti was confronted that these papers indicated towards the capitation fee in cash, over and above the normal fee of Rs. 8.5 lakh per annum, taken by the trust from these students for the admission, he again denied of having any knowledge about the noting on the page 27 and stated that no capitation fee was charged for admitting any student.

11 Shri Dev Murti was also confronted on this issue during operation of restrained order at his residence at Lucknow on October 15, 2014. He also denied having any idea about these two names and the nature of transaction inscribed on the page No. 27.

12 The Assessing Officer held that in page No. 27 of LP-1 is clear cut evidence of the system of acceptance of capitation fee/donation in cash for admission to the medical college. It was held that the finding gets substantiated by the annexure LP-6 and P-7.

13 The Assessing Officer came to the conclusion based on the seized material that Rs. 23,00,000 represents cash donation being taken by the SRMS Trust for admission in the undergraduate (MBBS) medical course while it is Rs.50,00,000 for the post-graduate course (MD/MS).

14 Further, the paper recovered from the Sri Ram Murti Smarak College of Engineering and Technology, Bareilly by the party ME-10, marked as page No. 26 in annexure LP-2 mentioned the name Ms. Ambika Mittal D/o Anil Kumar Mittal, Udham Singh Nagar against which an amount of Rs. 40,00,000 was written. The record of Ms. Ambika Mittal was found and impounded by the party MM-5 as annexure LP-8. The records showed that Ms. Ambika Mittal had been admitted for the MS in Ophthalmology course for the academic session 2014-15 in the SRMS-Institute of Medical Sciences, Bareilly. It was revealed that Rs. 11,25,000 was paid by her during the time of admission for the course while the scribbling on page No. 26 an amount Rs. 40,00,000 mentioned and based on these noting, the Assessing Officer treated this as capitation fee by Sri Ram Murti Smarak Trust for admission in the medical college.

Shri Dev Murti was confronted on this issue during the operation of **15** restrained order placed at residence at Lucknow on October 15, 2014. He denied having any idea about Ms. Ambika Mittal and stated that the amount written on the paper is just a rough calculation done at the accounts section. The Assessing Officer held that the seized paper is one more evidence for acceptance of capitation fee/donation, over and above the normal fee for the course, by the Sri Ram Murti Trust while admitting students to the medical college.

During the course of assessment proceedings the assessee-trust was **16** again confronted on this point vide point No. 11 of the questionnaire dated November 7, 2006 reproduced below :

> "1. Please go through page No. 27 of annexure LP-1 seized documents from the Bareilly residence of Shri Dev Murti and family (party MR-1), containing page numbers 1 to 27, on which the following two students' name were found :

| | |
|---|---|
| (1) Shobhit Pal | 23,00,000 |
| (2) Anuj Agrawal | 50,00,000 |
| | 73,00,000 |
| C A Sir | 7,50,000 |
| | 65,00,000 |
| Cash deposit | |
| 1,000 × 2,500 | 25,00,000 |
| 500 × 8,100 | 40,50,000 |
| | 65,00,000 |

> . . . Records of Shobhit Pal and Anuj Agrawal found and impounded as annexure-LP- 6 and LP-7 respectively from SRMS Medical College, Bareilly (party-MM-5) shows that in Shobhit Pal's case only Rs. 9,08,500 was paid as fee and other charges during admission. Similarly a piece of paper was received from Shri Ram Murti Smarak College of Engineering and Technology, Bareilly by party ME-10 where on page No. 26 of annexure A, LP-2 it is written in hand writing the name Ms. Ambika Mittal D/o Anil Kumar Mittal, Udhamsingh Nagar, in which an amount of Rs. 40 lakhs is written whereas from the records of Ms. Ambika Mittal found and impounded by the party MM-5 as annexure-LP-8 shows that she had been admitted for the MS in ophthalmology course for the academic session 2014-15 in the SRMS Institute of Medical Science Bareilly. It also reveals that only Rs. 11,25,000 was paid by her during the time of

admission for course. Further, there was seizure of two envelops marked as annexure A-ll, on first envelop cash denomination '1000×2500' dated April 18, 2014 was mentioned while on the second envelop cash denomination '1000×2000' was written. Shri Aditya Murti and Dev Murti could not explain the same. From the above seized documents mentioning specific amounts against the specific students these are clear cut evidences of acceptance of capital fees received from the students over and above the regular/usual fees taken from the students at the time of admission in your medical/ engineering college."

**17** To the query, the assessee-trust submitted its reply dated November 30, 2016 as under :

"This is a rough paper having no specific date sign or any other particulars on it. It is reiterated that whatever amount is received from students, the same is duly recorded in the books of account of the trust. As your goodself has complete file of the student, direct confirmation may also be obtained in this regard. The subsequent para of the notice of your goodself regarding LP-6 and LP-7 is reproduction of contents or records of the college. We have verified the records of the college and confirm that Shobhit Pal and Anuj Agarwal are the students in the college run by the trust. Page 26 of annexure A, LP-2 of part ME-10 at SRMS GET is reproduced below. . .On a perusal of the same your goodself will find that it is as introductory slip and appears to have been written by the student at the time of visit to the chairman and its contents are in congruity with the visitors slip used at the trust whose specimen is reproduced below. . . while the slip in question was lying there some rough calculation appears to have been done on its back. On verification of the front and back of the said your goodself will find that on both sides even writing is different. Further, rough calculation is in two different hand writings. Thus, on a small piece of paper three different hand writings are there. In case of any doubt direct confirmation may be obtained from the student by sending notice under section 133(6), as no capitation is received by the trust, whatever fee is received the same is duly recorded in the books of account."

**18** The Assessing Officer held that these documents cannot be termed as dumb documents. Based on these facts as emerging out of the seized/ impounded documents the Assessing Officer held that it may be reasonably inferred that the SRMS Trust had been taking Rs. 25,00,000 as capitation fees on an average per student for admission in the MBBS course

and Rs. 75,00,000 for MD/MS course. Holding thus the Assessing Officer made addition of an amounts spread over the 7 years of assessment under section 153A. The details are as under :

Table A

| *Batch* | *Range (Rs.)* | *Average* |
|---|---|---|
| 2008 | 5,00,000 to 7,00,000 | 6,00,000 |
| 2009 | 7,50,000 to 8,50,000 | 8,00,000 |
| 2010 | 8,50,000 to 10,00,000 | 9,25,000 |
| 2011 | 10,00,000 to 12,00,000 | 11,00,000 |
| 2012 | 11,00,000 to 14,00,000 | 12,50,000 |
| 2013 | 12,00,000 to 17,50,000 | 14,75,000 |
| 2014 | 23,00,000 to 25,00,000 | 24,00,000 |

*MD/MS post-graduate course Table B*

| *Course/Course name* | *Year 2014* | *Year 2013* | *Year 2012* | *Year 2011* |
|---|---|---|---|---|
| MD/Dermo Skin/VD | 1,10,00,000 | 90,00,000 | 30,00,000 | |
| MD (TB and Chest) | 51,00,000 | 45,00,000 | — | — |
| MS (Surgery) | 51,00,000 | 35,00,000 | — | — |
| MD (Anesthesia) | 30,00,000 | 35,00,000 and 37,50,000 | 49,50,000 | |
| MD (Medicine) | 90,00,000 and 1,25,00,000 | 90,00,000 and 80,00,000 | 80,00,000 | |
| MD (Pethology) | 21,00,000 | — | — | 24,00,000 |
| MS (ENT) | 40,00,000 and 57,00,000 | 45,00,000 | 45,00,000 | |
| MS (Ophthalmology) | | | 14,00,000 and 18,00,000 | |
| MD (Radiology) | | 1,40,00,000 | | |
| MS (Ortho) | 1,40,00,000 | 73,00,000 | | 47,00,000 |

On the basis of the data depicted in tables A and B the year-wise capitation fees for different years for MBBS courses has been worked out as under :

Table C

| *Assessment year* | *No. of seats* | *Average capitation fees (Rs.)* | *Total amount of capitation fees (Rs.)* |
|---|---|---|---|
| 2009-10 | 100 | 6,00,000 | 6,00,00,000 |
| 2010-11 | 100 | 8,00,000 | 8,00,00,000 |

| | | | |
|---|---|---|---|
| 2011-12 | 100 | 9,25,000 | 9,25,00,000 |
| 2012-13 | 100 | 11,00,000 | 11,00,00,000 |
| 2013-14 | 100 | 12,50,000 | 12,50,00,000 |
| 2014-15 | 100 | 14,75,000 | 14,75,00,000 |
| 2015-16 | 100 | 24,00,000 | 24,00,00,000 |

**19** Further, the Assessing Officer held that since this donation/capitation fee amount charged from the students is neither in the nature of the voluntary contribution nor found to have been derived from any property held under trust, it loses the character of being in the nature of income qualifying for any exemption under the provisions of sections 11 and 12 of the Income-tax Act.

**20** The Assessing Officer while making the addition relied on the judgment in the case of Rohilkhand Educational and Charitable Trust, who is also in the similar line of activity of imparting medical education through its various institutions.

**21** Aggrieved with the addition, the assessee filed an appeal before the learned Commissioner of Income-tax (Appeals)-3, Lucknow. The observation of the learned Commissioner of Income-tax (Appeals), while confirming the addition, is reproduced as under :

> "I have examined the facts and circumstances of the case. I have considered the finding of the Assessing Officer in the assessment order and the submissions of the appellant made during the appellate proceedings. The Assessing Officer has noted that during the course of search at the premises situated at Rampur Garden, Bareilly, incriminating documents annexure LP1- page 1 to 27, was found and seized from the room of Shri Aditya Murti on which name of two persons Shobhit Pal, Anuj Agarwal and amounts was found to be written, details of which are given as under :

| | |
|---|---|
| (1) Shobhit Pal | 23,00,000 |
| (2) Anuj Agrawal | 50,00,000 |
| | 73,00,000 |
| C A Sir | 7,50,000 |
| | 65,00,000 |
| Cash deposit | |
| 1,000 × 2,500 | 25,00,000 |
| 500 × 8,100 | 40,50,000 |
| | 65,00,000 |

. . . Further it was noted by the Assessing Officer that Shri Shobhit Pal was the under-graduate student at the medical college admitted for the academic session 2013-14 which is based on the records impounded as annexure LP-6 from the medical college and had paid Rs. 9,08,500 as fees and other charges. Similarly the case records of Shri Anuj Agarwal found and impounded as annexure LP-7 shows he was admitted as post-graduate student in the medical college for session 2013-14 and had paid Rs. 18,94,940 as admission fees and other charges. The Assessing Officer held that Rs. 23,00,000 and Rs. 50,00,000 written on the paper against the above students showed that the appellant has charged capitation fees in cash for the under graduate and post-graduate courses.

. . .Similarly annexure LP-2, page 26 which is a piece of paper recovered from Shri Ram Murti Samarak College of Engineering and Technology, Bareilly, the name of Ms. Ambika Mittal has been hand written and total amount written is Rs. 40,00,000. The case records show that she has been admitted for the course of MS in Ophthalmology course for the academic session 2014-15 in SRMS Institute of Medical Sciences, Bareilly and paid Rs. 11,25,000 for admission. The Assessing Officer held that page 26 of annexure LP-2 is a clear cut evidence that Rs. 40,00,000 as capitation fees has been paid by the appellant-trust. Shri Aditya Murti, consultant of the Trust, who of the trust, could not satisfactorily explain the seized/impounded documents, mentioned as above. The Assessing Officer made an addition of Rs. 8,00,00,000 on account of undisclosed capitation fees charged by the appellant for under-graduate and post-graduate courses . . .

The appellant has stated that the contention of the Assessing Officer holding that the assessee is receiving capitation fees in the year under consideration is not supported by any documents and is solely and purely based on conjectures and surmises since no incriminating documents were found for the assessment year 2013-14, on the basis of which the Assessing Officer can claim that capitation fees was received by the appellant. . . .

The appellant has contended that the pillar of assessment on the basis of which assessment proceedings has been framed and completed are the 3 dumb documents only. There were no other documents found during the search proceedings from which some adverse inference could have been drawn. These dumb documents in itself can not in any circumstances become a conclusive evidence to prove that cash has been actually received. The assessee in its submission

clearly explained all these three loose slips. The assessee has submitted that, out of these slips, annexure A-11 is just an empty envelope which in itself does not prove anything, annexure LP-2, page No. 26 is just an visitor's slips which the assessee has substantiated during assessment proceedings as well and explained above and annexure LP-1, page No. 27 is some rough calculations only, incidentally name of 2 students are mentioned in front of them. The learned Assessing Officer has grossly erred in concluding that the assessee is receiving capitation fees on the basis of above slips only, which is nothing but dumb documents. . . .

The appellant has further stated that the addition has been made by the Assessing Officer by extrapolating on the basis of loose slips found and by assuming that capitation fees has been received for all students despite the fact that only 3 loose slips found wherein name of the 3 students were mentioned, out of these 3 students, 2 were admitted in the academic session 2013-14 and one student was admitted in the academic session 2014-15. The appellant has contended that the Assessing Officer was not justified in extrapolating the average of capitation fees received in the case of M/s. Rohilkhand Educational and Charitable Trust in the case of the appellant. . . .

On examination, I find that incriminating document annexure LP-1 page 1 to 27 were found and seized from the bedroom of Shri Aditya Murti who is the, consultant and looking after day to day management of the trust on which it is clearly written that the appellant has received Rs. 23,00,000 from Shri Shobhit Pal and Rs. 50,00,000 from Shri Anuj Agarwal. And the records of Shri Shobhit Pal and Shri Anuj Agarwal found and impounded as LP-6 and LP-7, showed that they have only paid Rs. 9,08,500 and was admission fees. The receipt of Rs. 23,00,000 from Shri Shobhit Pal and from Anuj Agarwal was also not found recorded in the books of account of the appellant and Shri Aditya Murti, son and consultant of the trust, could not explain the incriminating documents mentioned as above. Further, it is noted that cash of Rs. 6,30,53,000 was found during the course of search at 4-La Place, Shahnjaf Road, Lucknow residence of the trustee, out of which cash of Rs. 6,28,00,000 was seized. Shri Dev Murti, trustee of the trust did not satisfactorily explain the source of cash found during search hence it was treated as unexplained. Also during the course of search locker No. 5049 at Axis Bank, Ashok Marg, Lucknow in the name of Smt. Asha Murti and Shri Dev Murti, trustee of the trust was operated and cash of Rs. 1,00,00,000 was found kept in envelopes.

Rs. 25,00,000 and Rs. 20,00,000 were found in sealed envelopes P-1 and P-2. On P-1 it was written 'Donation received from Ankita Srivastava', on P-2 from Mr. Vineet Verma, SRMS. Rest of the amount was found in bundle of Rs. 1,00,00,000 with slips bearing signature and different dates. Shri Dev Murti could not satisfactorily explain the cash of Rs. 1,00,00,000 found in the locker. . . .

Considering the fact that the cash found during the course of search of Rs. 6,30,53,000 found (un)recorded in the books of account, on the date of search the reconciliation of cash submitted by the appellant during the assessment proceedings is considered as an afterthought and not found acceptable. The source of cash of Rs. 6,30,53,000 and Rs. 1,00,00,000 found during the course of search have been found to be not satisfactorily explained by Shri Dev Murti, trustee of the trust. The documents found during the course of search, i. e., LP-1, page 1 to 27, LP-6, LP-7, LP-2, LP-8 and the cash found during the course of search of Rs. 6,30,53,000 and Rs. 1,00,00,000 have to be examined together rather than in isolation and it reflects the true state of affairs of the appellant-trust. It substantiates the fact that the appellant has charged capitation fees over and above the admission fees charged for under graduate and post-graduate courses for the year under consideration. Hence, the appellant's contention that the documents found and seized during the course of search are rough and dumb documents and no incriminating documents were found during search is devoid of any merit and is found to be unacceptable. . . .

Considering the totality of facts and circumstances of the case and the material on record, I find that the appellant has charged capitation fees, over and above the admission fees charged for graduate and under graduate courses for the year under consideration, hence the addition of Rs. 8,00,00,000 made by the Assessing Officer on account of undisclosed receipts of capitation fees on the basis of the comparable case of M/s. Rohilkhand Educational and Charitable Trust is held to be justified and is hereby upheld."

**22** Aggrieved with the order of the learned Commissioner of Income-tax (Appeals), the assessee filed an appeal before the Income-tax Appellate Tribunal, Lucknow.

**23** During the arguments before us, the learned authorised representative reiterated the arguments taken before the learned Commissioner of Income-tax (Appeals). It was argued that the loose slips found during the course of search relates to the financial year 2014-15 only. It was argued

that there were empty envelops and no cash has been found in the envelopes hence, this cannot be treated that any amount has been received from the college students. It was explained that the discretion of the college to admit the students is minimal and the students are allotted to different medical colleges by the U. P. unaided medical colleges welfare association (UPUMCWA). The association in turn calls for advertisement for admission from the eligible people and a merit list is declared by the UPUMCWA on the basis of the entrance test or any other criteria prescribed. The learned authorised representative has took us to the process of admission of Anuj Agarwal, Shobhit Pal and Ambika Mittal. It was argued that the seat allotment was given to Ambika Mittal vide letter dated April 14, 2014 in the case of Anuj Agarwal vide letter dated May 22, 2013. Similarly in the case of Shobhit Pal, the allotment letter has been issued on July 6, 2013 based on the general merit of the student. Since the allotment letters also show different financial year, the addition made by the assessee based on the scribbling on the empty envelopes cannot be held to be legally valid. Further, the hand writing on the letters was not examined by the Revenue but only the presumption clause has been invoked just because the envelopes have been found from the premises of the one of the trustees, namely, Aditya Murti. It was also argued that the reliance on the case of Rohilkhand Educational and Charitable Trust is totally unwarranted as the facts of that case are totally different to the operations of the assessee-trust. Regarding the extrapolation, the learned authorised representative argued that the order of the Revenue extrapolating the amounts for the period of seven years based on three loose slips is totally unwarranted as no evidences of collection of donation has been found during the search.

**24** On the other hand, the learned Departmental representative argued that the provisions of section 132(4A) allows the Revenue to presume that the contents of the books of account or other documents are true and in cases wherein it is reasonably assumed to have been signed, stamped, executed or attested. Coupled with the fact that there has been seizure of Rs. 6.30 crores of cash during the search only reflects that the assessee is in the course of collection of capitation fees on a regular basis.

**25** Heard the arguments of both the parties and perused the records available before us.

**26** We have gone through the seized materials mainly page No. 27 of annexure LP1, page No. 26 of LP 2 and annexure A-11, the same are as under :

* * * * * * * * *[1]

1. Scanned copies are not printed here.—*Ed.*

*perspective it was clear that the amounts of the sundry creditors may not pertain to the assessment year 2014-15. How they were brought forward from the earlier year and how they had been appearing in the books of account could be verified by filing the balance-sheet of the preceding assessment years, particularly, for the preceding assessment year 2013-14. If the credits appearing in the books of account pertained to earlier years, the addition could not be made in the assessment year2014-15. Further the balance-sheet of the assessee for the assessment year 2013-14 and even in earlier years had not been brought on record nor were they filed before the authorities. Therefore, the matter was remanded to the Assessing Officer with a direction to redecide the issue in the light of the material brought on record. The assessee was directed to file a copy of the balance-sheet for the preceding assessment year 2013-14 as well as for earlier years to prove that the balances were brought forward in the assessment year 2014-15. The Assessing Officer shall give a specific finding whether or not the credits appearing in the assessment year 2014-15 were credits brought forward from the earlier years.*

**I. T. A. No. 4226/Delhi/2019 (assessment year 2014-15).**

*R. S. Singhvi* and *Satyajeet Goel*, Chartered Accountants, for the assessee.

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

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

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**[2020] 81 ITR (Trib) (S. N.) 17 (Kolkata)**

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

## ELECTRO URBAN CO-OPERATIVE CREDIT SOCIETY LTD.

***v.***

## PRINCIPAL COMMISSIONER OF INCOME-TAX

**P. M. Jagtap *(Vice-President)*** and **S. S. Godara *(Judicial Member)***

July 10, 2020.

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

Revision—Heads of income—Income from holiday homes some owned by assessee and some managed by assessee declared under

HEAD "OTHER SOURCES"—ASSESSING OFFICER ASSESSING INCOME UNDER BUSINESS INCOME—HEAD OF INCOME UNDER WHICH INCOME TAXABLE PURELY A DEBATABLE ISSUE—ASSESSING OFFICER TAKING POSSIBLE VIEW—REVISION TO TAX INCOME FROM HOLIDAY HOMES OWNED BY ASSESSEE UNDER "HOUSE PROPERTY" AND THAT FROM HOMES MANAGED BY IT UNDER "OTHER SOURCES"—NOT VALID—INCOME-TAX ACT, 1961, S. 263.

*The assessee, a co-operative society, owned four holiday homes and maintained other holiday homes which it provided to its members in lieu of charging concessional maintenance charges. The Assessing Officer completed the regular assessment assessing the assessee's taxable income at Rs. 3,67,94,200 under the head "Other sources" as claimed. The Principal Commissioner, in revision, took the view that the assessee's income from holiday homes under its ownership had to be assessed as income from house property and that from the other holiday homes was to be treated as income from other sources followed by the corresponding consequential computation. On appeal :*

Held, *that the Assessing Officer had examined the very issue and assessed the assessee's income from the holiday homes under the business head rather than as claimed, as income from other sources. The Assessing Officer had not only carried out necessary enquiries but had changed the head of its income from "other sources" to business. Whether it was income from house property as per the Principal Commissioner, or business income going by the Assessing Officer in assessment and the residuary head of "other" sources in its computation, was purely a debatable issue. It could not be held that the Assessing Officer's action was erroneous and causing prejudice to interests of the Revenue.*

**I. T. A. No. 806/Kolkata/2019 (assessment year 2014-15).**

*Sanjay Bhattacharya*, Fellow Chartered Accountant, for the assessee.

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

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**[2020] 81 ITR (Trib) (S. N.) 19 (Jaipur)**

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

**ASHOK KUMAR DUSAD**

***v.***

**INCOME-TAX OFFICER**

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

July 7, 2020.

**SS ▸ ITA 1961, s 54**
**AY ▸ 2010-11**
**HF ▸ Department**

CAPITAL GAINS—COST OF IMPROVEMENT—INCONSISTENCY IN SALE DEED WITH RESPECT TO EXACT DESCRIPTION OF PROPERTY—NOTHING ON RECORD TO CORROBORATE ASSESSEE'S CLAIM THAT PLOT OF LAND WITH CONSTRUCTION THEREON HAD BEEN SOLD—ASSESSEE NOT ENTITLED TO COST OF CONSTRUCTION—INCOME-TAX ACT, 1961, S. 54.

*The Assessing Officer allowed the assessee the benefit of the indexed cost of acquisition of the plot at Rs. 4,82,765 but did not allow deduction of the cost of improvement of Rs. 4,18,500 on the ground that no supporting bills or vouchers in support thereof were produced by the assessee. The contract note and affidavit produced by the assessee were without any supporting evidence. Accordingly, he computed the long-term capital gain at Rs. 4,17,235. The Commissioner (Appeals) confirmed the disallowance made by the Assessing Officer. On appeal :*

Held, *that the assessee owned a plot of land measuring 200 square yards and a part of the plot measuring 133.33 square yards was sold during the year 2010-11. The description of the property sold was shown as residential plot and the site plan attached with the sale deed also depicted the plot of land and did not show any constructed area thereon. At the same time, there was an averment towards the end of the sale deed that in the plot sold, there was a constructed area of 900 square feet. There was an inconsistency in the sale deed executed with respect to the exact description of the property. It was unclear why the description of the property had been shown in the sale deed as plot of land only and not as a plot of land with construction thereon. Further, there was nothing on record in terms of the buyer's confirmation or affidavit or photographs of the property at the time of sale which could corroborate that what had been purchased or sold was not just a plot of land but a plot of land with construction thereon. Therefore, the claim of the assessee*

*that out of 1200 square feet of plot of land, there was construction of 900 square feet and what had therefore been sold was a plot of land along with construction thereon could not be accepted. The agreement with the contractor and subsequent affidavit of the contractor did not inspire any confidence and could not be accepted. Unless the assessee was able to demonstrate with verifiable evidence that there was actual construction on the property sold, the agreement and affidavit could not come to the aid of the assessee. The agreement was only an understanding between the two parties to carry out certain work and could not be relied on to support the actual construction on the part of the plot of land sold by the assessee. The assessee had failed to discharge the necessary onus placed on him in support of his claim of construction on the property at the time of sale and the cost of construction as claimed had therefore rightly been rejected by the authorities.*

**I. T. A. No. 383/Jaipur/2019 (assessment year 2010-11).**

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

*Ms. Chanchal Meena*, Additional Commissioner of Income-tax, for the Department.

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**[2020] 81 ITR (Trib) (S. N.) 20 (Hyderabad)**

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

**ARUNA KOMMURI**

***v.***

**ASSISTANT COMMISSIONER OF INCOME-TAX**

**A. MOHAN ALANKAMONY *(Accountant Member)***

July 23, 2020.

**SS ▸ ITA 1961, ss 50C, 54**
**AY ▸ 2006-07**
**HF ▸ Assessee/Department**

CAPITAL GAINS—FULL VALUE OF CONSIDERATION—TRANSFER OF LITIGATED PROPERTY—ASSESSING OFFICER TO OBTAIN VALUATION REPORT FROM DISTRICT VALUATION OFFICER—MARKET VALUE OF PROPERTY COULD NOT EXCEED ACTUAL SALE CONSIDERATION RECEIVED BY ASSESSEE—NOT APPROPRIATE TO ADOPT VALUE OF STAMP VALUATION AUTHORITY FOR PURPOSE OF COMPUTATION OF CAPITAL GAINS—ASSESSING OFFICER DIRECTED TO COMPUTE CAPITAL GAINS IN THE HANDS OF

ASSESSEE BASED ON ACTUAL SALE CONSIDERATION RECEIVED BY ASSESSEE—INCOME-TAX ACT, 1961, S. 50C.

CAPITAL GAINS—EXEMPTION—CLAIM THAT ASSESSEE INVESTED IN RESIDENTIAL HOUSE PROPERTY BY WAY OF PAYMENT THROUGH CHEQUE TO HER SPOUSE—ALONE WOULD NOT ESTABLISH THAT SHE ACTUALLY ACQUIRED RESIDENTIAL HOUSE—NOT SUFFICIENT TO ALLOW EXEMPTION—INCOME-TAX ACT, 1961, S. 54.

*The assessee, an individual filed her return for the assessment year 2006-07 declaring a total income of Rs. 12, 83,434 and agricultural income of Rs. 50,000. The return was processed. Subsequently, the case of the assessee was reopened because it was revealed that the sale consideration disclosed in the return towards the sale of her immovable property was lower than the Sub-Registrar Office value. During the course of scrutiny assessment proceedings, it was observed by the Assessing Officer that the assessee had sold her land consisting of 359.16 square yards and 1153.33 square yards for an amount aggregating to Rs. 7,56,250. It was further revealed that the value adopted for the purpose of stamp duty towards the registration of the property was Rs. 16,52,000. The Assessing Officer rejected the submission of the assessee holding that there was no scope to adopt the actual sale value received by her by virtue of section 50C of the Income-tax Act, 1961 because the assessee had not challenged the valuation before the Stamp Valuation Officer while registering the property. Accordingly, the Assessing Officer invoked the provisions of section 50C and adopted the Sub-Registrar Office value as the sale consideration, viz., Rs. 16,54,500 for the purpose of computing the capital gains in the hands of the assessee. Further, he denied the exemption under section 54F because the assessee had failed to furnish evidence for the investment made in the acquisition of another residential house property. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal :*

Held, *that there was some litigation with respect to the property sold by the assessee. If the title to the property was defective the market value of the property would be considerably reduced. In this situation, it would have been appropriate on the part of the Assessing Officer to have obtained a valuation report from the District Valuation Officer in accordance with the provisions of section 50C as the assessee had challenged the valuation before him and thereafter adopted the value determined by the District Valuation Officer for the purpose of computing the capital gains in the hands of the assessee. However, the Assessing Officer had failed to do so. It was apparent that the sale value declared by the assessee was only 46 per cent. of the Sub-Registrar Office value of Rs. 16,54,500 (Rs. 7,56,250 X 100 / 16,54,500). Since the*

*property sold by the assessee was a litigated property, the market value of the property could not exceed the actual sale consideration received by the assessee of Rs. 7,56,250. Hence, it was not appropriate to adopt the Sub-Registrar Office value for the purpose of computation of the capital gains in the hands of the assessee. Rather it would be appropriate to adopt the actual market value of the property taking into consideration of the litigation involved in the property, which was nothing but the actual sale consideration received by the assessee. Therefore, the Assessing Officer was directed to compute the capital gains in the hands of the assessee based on the actual sale consideration received by the assessee of Rs. 7,56,250. As regards the deduction under section 54F the assessee had not produced any evidence to prove that she had invested in another residential house property. The claim of the assessee that she had invested in residential house property for Rs. 27,50,000 by way of payment through cheque to her spouse alone would not establish that she had actually acquired the residential house by complying with all the other provisions of the Act. Therefore, the assessee was not entitled to exemption.*

**I. T. A. No. 2030/Hyd/2017 (assessment year 2006-07).**

*G. Kalyandas* for the assessee.

*Sunil Kumar Pandey* for the Department.

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**[2020] 81 ITR (Trib) (S. N.) 22 (Delhi)**

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

**MUKESH CHAND GARG**

***v.***

**INCOME-TAX OFFICER**

**BHAVNESH SAINI *(Judicial Member)*** and
**B. R. R. KUMAR *(Accountant Member)***

July 23, 2020.

**SS ▶ ITA 1961, ss 147, 148**
**AY ▶ 2010-11**
**HF ▶ Assessee**

INCOME FROM UNDISCLOSED SOURCES—INFORMATION OF MISUSE OF CLIENT CODE MODIFICATION FACILITY—NO CONTENTION THAT CLIENT CODE MODIFICATION FACILITY OFTEN MISUSED TO PASS ON LOSSES TO INVESTORS, WHO MAY HAVE SIZABLE PROFIT ARISING OUT OF COMMODITY

TRADING AGAINST WHICH SUCH LOSSES COULD BE SET OFF—INCOME ESCAPING ASSESSMENT ALONE CAN BE TAXED—ASSESSING OFFICER ADDING ENTIRE AMOUNT OF DOUBTFUL TRANSACTIONS BY WAY OF ASSESSEE'S ADDITIONAL INCOME—IMPERMISSIBLE—INCOME-TAX ACT, 1961, SS. 147, 148.

*The assessee filed his return for the assessment year 2010-11 and declared an income of Rs. 7,76,730. The return was processed. Subsequently, assessment proceedings under section 147 of the Income-tax Act, 1961 were initiated after getting necessary approval on the basis of the information that the assessee had availed of contrived losses of Rs. 12,25,412 through brokers by changing the client codes in the sale and purchase of securities after the trades were conducted which lead to the tax evasion. The assessee submitted that the original return may be treated as return filed in response to the notice under section 148. The Assessing Officer on going through the details provided by the Investigation Wing found that on the directions of the assessee, on many instances, the broker had changed the original client code eight times from the different client code of the assessee which lead to bogus transactions in the nature of accommodation entries. After considering the explanation of the assessee, the Assessing Officer made an addition of Rs. 12,25,412 under section 69A. The Commissioner (Appeals) confirmed the addition. On appeal :*

Held, *that the Assessing Officer had passed the assessment order which was similarly worded in the preceding assessment year 2009-10 in the assessee's case. In that case though the Tribunal had accepted the Department's theory of misuse of clients code modification facility, it had accepted the assessee's explanation and discarded the Department's theory that profits of the assessee were passed on to the clients. The Tribunal noticed that the Department had not contended that the client code modification facility was often misused by the assessee to pass on losses to the investors, who may have sizable profit arising out of commodity trading against which such losses could be set off. What could be taxed in the hands of the assessee was the income escaping assessment. Even if the Department's theory of the assessee having enabled the clients to claim contrived losses, it had to bring on record some evidence of the income earned by the assessee in the process, be it in the nature of commission or otherwise. In the present case, the Assessing Officer had added the entire amount of doubtful transactions by way of the assessee's additional income, which was wholly impermissible. The Tribunal deleted the addition on the merits and quashed the reopening of the assessment holding that the addition made by the authorities on account of client codes*

*modification was not justified. The orders of the authorities were set aside and the entire addition was deleted.*

MUKESH CHAND GARG *v.* ITO [2019] 76 ITR (Trib) 344 (Delhi) *followed*.

**I. T. A. No. 5418/Delhi/2019 (assessment year 2010-11).**

*Ved Jain*, Advocate, and *Ashish Goel*, Chartered Accountant, for the assessee

*Rakesh Gupta*, Senior Departmental representative, for the Department.

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**[2020] 81 ITR (Trib) (S. N.) 24 (Cuttack)**

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

## SUREKHA BUILDERS AND DEVELOPERS PVT. LTD.

***v.***

## PRINCIPAL COMMISSIONER OF INCOME-TAX

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

July 17, 2020.

**SS ▸ ITA 1961, s 263**
**AY ▸ 2013-14**
**HF ▸ Assessee**

REVISION—ERRONEOUS AND PREJUDICIAL TO REVENUE—METHOD OF ACCOUNTING—HOUSING PROJECT—ASSESSING OFFICER MAKING PROPER, SUFFICIENT AND ADEQUATE ENQUIRY ON ISSUES INCLUDING ISSUE OF REVENUE RECOGNITION OF ASSESSEE ADOPTING PERCENTAGE COMPLETION METHOD AND PROJECT-WISE REVENUE RECOGNITION—NOT A CASE OF NO ENQUIRY, INADEQUATE ENQUIRY OR INSUFFICIENT ENQUIRY—ASSESSEE RECOGNISING REVENUE TOWARDS ITS PROJECT AT MUCH HIGHER FIGURE IN COMPARISON TO ESTIMATE MADE BY PRINCIPAL COMMISSIONER—ORDER NOT ERRONEOUS AND PREJUDICIAL TO INTERESTS OF REVENUE—REVISION NOT VALID—INCOME-TAX ACT, 1961, S. 263.

*The assessee, a builder, in the previous year relevant to the assessment year 2013-14, developed three projects : SR, SV and E. It followed the percentage completion method of accounting and recognised the revenue in accordance with Accounting Standard 7. It declared a total income of Rs. 49,27,330. The Assessing Officer enhanced the income to Rs. 56,02,560. The Principal Com-*

*missioner noticed that the revenue of Rs. 12,04,63,062 from the SV project was recognised only in the financial year 2012-13 and that due to non-availability of the project report, the profit element could not be accounted for, which should have been recognised in the financial year 2012-13. Therefore, an amount of Rs. 3,45,32,078 had not been brought to tax by the Assessing Officer erroneously. He issued a show-cause notice under section 263(1) of the Income-tax Act, 1961 to the assessee. In compliance, the assessee submitted the required documents and clarifications. The Principal Commissioner opined that the assessee had not followed the proper method leading to incorrect revenue recognition for the SV project. Accordingly, he observed that complete and proper verification to recognise the revenue was not done at the time of assessment and set aside the assessment and directed the Assessing Officer to make the assessment de novo on this issue. On appeal :*

Held, *that at the end of the financial period on March 31, 2013, the SV project was completed to the extent of 29 per cent., which was discernible from the certificate issued by the architect which certified that 29 per cent. of the SV project had been completed as on March 31, 2013. The Principal Commissioner had not disputed that the assessee had booked 61 per cent. of the total project area till the end of the financial year 2012-13 against which the assessee received estimated and recognised sales revenue of Rs. 12,04,63,062 by taking 61 per cent. of 29 per cent. of the estimated project cost of Rs. 53,44,66,000. In addition to the revenue recognition of Rs. 1,204,63,062.30 the assessee had also shown work-in-progress of Rs. 6,04,44,098.66, on the SV project, which had also been shown in the credit side of the balance-sheet. The assessee had already recognised the revenue at a much higher figure than the amount of Rs. 18,09,11,160 (Rs. 12,04,63,062 + Rs. 6,04,48,098) in comparison to the estimate made by the Principal Commissioner for holding the assessment order erroneous and prejudicial to the interests of the Revenue. The Principal Commissioner had noted the estimated project cost and percentage of completion of the SV project and the E project and from the calculation placed by the assessee and also noted by the Principal Commissioner for revenue recognition and work-in-progress, it was clearly discernible that the assessee had adopted the methodology for revenue recognition for both the projects adopting the percentage completion method but the Principal Commissioner had only disputed the revenue recognition of the SV project, leaving aside the E project for which the assessee also recognised the revenue following the same calculation, pattern and methodology. During the assessment proceedings, the Assessing Officer had made proper, sufficient and adequate enquiry on the issues including the issue of revenue recognition of*

*the assessee following the percentage completion method and project-wise revenue recognition. Therefore, it was not a case of no enquiry, inadequate enquiry or insufficient enquiry. The assessment order was not erroneous or prejudicial to the interests of the Revenue.*

**I. T. A. No. 207/Cuttack/2018 (assessment year 2013-14).**

*S. K. Agarwal*, authorised representative, for the assessee.

*M. K. Gautam*, Commissioner of Income-tax-Departmental representative, for the Department.

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**[2020] 81 ITR (Trib) (S. N.) 26 (Delhi)**

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

**SULEKH CHAND SINGHAL**

***v.***

**ASSISTANT COMMISSIONER OF INCOME-TAX**

**BHAVNESH SAINI *(Judicial Member)*** and
**B. R. R. KUMAR *(Accountant Member)***

July 23, 2020.

**SS ▸ ITA 1961, s 132**
**AY ▸ 2007-08**
**HF ▸ Assessee**

SEARCH AND SEIZURE—UNACCOUNTED INCOME—MEDICAL COLLEGE—DONATIONS AND CAPITATION FEES—ONUS UPON ASSESSING OFFICER TO PROVE THROUGH COGENT AND RELIABLE EVIDENCE THAT ASSESSEE IN FACT PAID CASH BY WAY OF DONATION OF CAPITATION FEES TO MEDICAL COLLEGE AND CHAIRMAN—ENTIRE ADDITION BASED ON STATEMENT MADE BY CHAIRMAN OF TRUST—NO CROSS-EXAMINATION ALLOWED ON BEHALF OF ASSESSEE AT ASSESSMENT STAGE—NO OTHER MATERIAL AVAILABLE ON RECORD SO AS TO MAKE ANY ADDITION AGAINST ASSESSEE—ADDITION UNSUSTAINABLE—INCOME-TAX ACT, 1961, S. 132.

*The assessee declared an income of Rs. 78,263. The return was processed. Later on information was received from the Investigation Wing that search was conducted in the S group of institutions and the chairman of the trust. During the search, certain documents and books of account were seized from their premises and administrative block at Ghaziabad which revealed receipt of donation and capitation fees over and above the regular course fees paid in*

*cash by the parents of the students for taking admission in various medical courses. During the course of recording statement the chairman was confronted with the relevant seized document in which he had categorically admitted accepting donation/capitation fees in cash. He offered the unaccounted money for taxation in the relevant assessment years. The Assessing Officer on the basis of such information found that the assessee had already paid cash of Rs. 27 lakhs for admission of his son to MBBS course. On the basis of this information he reopened the assessment under section 147/148 of the Income-tax Act, 1961. The statement of the assessee was recorded but he failed to explain correctly that he had not given the donation. The assessee denied giving any cash for admission of his son. The Assessing Officer was not satisfied with the explanation of the assessee and made the addition of Rs. 27 lakhs. The Commissioner (Appeals) confirmed the reopening of the assessment in the matter and recorded that at the appellate stage he had directed the Assessing Officer to arrange a meeting with the chairman and allow an opportunity to the assessee for cross-examination of the chairman. The Assessing Officer in response thereto issued summons but the chairman did not appear before the Assessing Officer for cross-examination on behalf of the assessee. The Commissioner (Appeals) noted that the right of cross-examination was not the absolute right of the assessee. He confirmed the addition on the merits. On appeal :*

Held, *that the entire addition was based on the statement made by the chairman in which, he had admitted to have received donation/capitation fees in cash which was surrendered for taxation. The assessee denied to have paid any amount in cash on account of donation/capitation fees to the chairman or the college in which his son was admitted for MBBS course. Since the Department alleged that the assessee had paid cash of Rs. 27 lakhs as donation/capitation fees, the onus was upon the Assessing Officer to prove through cogent and reliable evidence that the assessee had in fact paid cash by way of donation of capitation fees to the medical college and the chairman. In the present case, the entire case was set up on the basis of the statement of the chairman recorded during the course of search in which he had admitted to have received donation/capitation fees in cash. However, the assessment order was silent if any right of cross-examination had been allowed on behalf of the assessee at the assessment stage. The Commissioner (Appeals) at the appellate stage asked the Assessing Officer to allow the assessee an opportunity for cross-examination. The Assessing Officer issued summons to the chairman at the appellate stage for providing an opportunity to the assessee to cross-examine his statement but the chairman did not appear at the appellate stage.*

*Therefore, the fact remained that the assessee had been denied the right to cross-examination the chairman on his statement. Thus, the statement of the chairman could not be relied upon against the assessee. There was no other material available on record so as to make any addition against the assessee. Thus, the onus upon the Department to prove that the assessee paid cash to the chairman was not discharged in the present case. Therefore the addition was deleted.*

KISHINCHAND CHELLARAM *v.* CIT [1980] 125 ITR 713 (SC) *and* ANDAMAN TIMBER INDUSTRIES *v.* CCE [2016] 38 GSTR 117 (SC) *relied on*.

**I. T. A. No. 6700/Delhi/2019 (assessment year 2007-08).**

*Raj Kumar Gupta,* Chartered Accountant, and *Sumit Goel*, Chartered Accountant, for the assessee.

*Rakesh Gupta*, Senior Departmental representative, for the Department.

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**[2020] 81 ITR (Trib) (S. N.) 28 (Kolkata)**

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

**BAIDYA NATH DEY**

***v.***

**INCOME-TAX OFFICER**

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

July 24, 2020.

**SS ▶ ITA 1961, s 68**
**AY ▶ 2011-12**
**HF ▶ Assessee**

CASH CREDITS—CASH DEPOSITS—ASSESSEE SALARIED EMPLOYEE HAVING THREE BANK ACCOUNTS—CIRCUITOUS DEPOSITS—NOTHING TO SHOW THAT CASH WITHDRAWALS UTILISED BY ASSESSEE SOMEWHERE ELSE—SOME PAYMENTS MADE BY ASSESSEE BY CHEQUES AS REFLECTED IN HIS BANK ACCOUNTS TOWARDS PERSONAL AND HOUSEHOLD EXPENSES—FAIR AND PROPER TO TREAT CASH WITHDRAWALS MADE BY ASSESSEE FROM HIS BANK ACCOUNTS AS UTILISED FOR PERSONAL AND HOUSEHOLD EXPENSES TO THAT EXTENT—INCOME-TAX ACT, 1961, S. 68.

*The assessee was an individual who was employed with Eastern Coalfields. He did not file a return for the year 2011-12. On the basis of the information received by the Assessing Officer regarding cash deposits of Rs. 13,81,000 found to be made by the assessee in his savings bank account during the year 2011-12, a notice under section 148 was issued by the Assessing Officer to the assessee. No return in response to the notice was initially filed by the assessee. The Assessing Officer issued letters to Eastern Coalfields and the banks where the assessee maintained his accounts during the year 2011-12 and to the assessee. Thereafter, the assessee filed his return for the year 2011-12 declaring a total income of Rs. 3,38,630 which was comprised of income from salary and income from other sources. The information received by the Assessing Officer from the banks revealed that the assessee had deposited cash aggregating to Rs. 1,32,000 and Rs. 13,81,000 during the year 2011-12 in his bank accounts. When the assessee was called upon by the Assessing Officer to explain the source of the deposits, he submitted inter alia that all the deposits were from his past savings from salary income and were transfers from one bank account to another. He also submitted that the assessee being a salaried employee of Eastern Coalfields his only source of income was salary and there was no question of any undisclosed source of income. This explanation of the assessee was not found acceptable by the Assessing Officer. According to him, there was no cogent and tangible explanation offered by the assessee why he had withdrawn cash from one of his bank accounts and deposited it in another. The Assessing Officer was also of the view that no person would make cash withdrawal from his bank account merely for the sake of accumulation and not for utilisation. Therefore, he held that the explanation offered by the assessee was neither valid nor logical and treated the cash deposits aggregating to Rs. 15.13 lakhs made in the bank accounts of the assessee as unexplained. The Commissioner (Appeals) held that this was not a case which merited determination of the peak of credits. Peak credits are required to be determined only in situations where there were multiple withdrawals and redeposits and also of intra-account and inter-account transactions as a result of which it was difficult to ascertain the amount deposited by the assessee. However, in the present case, cash was deposited and it was transferred out to specified accounts such as LSC or towards repayment of loans, or towards fixed deposits. It was not a case of inter-bank or even intra-bank transactions. He held that this case did not call for determination of peak credits. On appeal :*

Held, *that in addition to the two bank accounts maintained with State Bank of India and Allahabad Bank, the assessee had also maintained a bank*

*account with Punjab National Bank wherein his salary income was credited. Cash withdrawals of Rs. 5,05,000, Rs. 2,55,000 and Rs. 3,15,000 were made by the assessee during the year 2011-12 from the bank accounts maintained with Allahabad Bank, State Bank of India and Punjab National Bank. At the same time, there were other transactions involving debits and credits to these three bank accounts of the assessee including cash deposits of Rs. 15,13,000. As far as the transactions involving debits and credits arising from bank transfers were concerned, neither the Assessing Officer nor the Commissioner (Appeals) had raised any dispute about the transactions. They had treated only the cash deposits aggregating to Rs. 15,13,000 reflected in the bank accounts of the assessee as unexplained on the ground that the assessee failed to explain the source of the income. There were cash withdrawals made by the assessee from his bank accounts during the year 2011-12 aggregating to Rs. 10,75,000 and since there was nothing to show that the cash withdrawals were utilised by the assessee somewhere else, the income could be treated as available to the assessee except to the extent that some of the withdrawals were required to be used by the assessee for his personal and household expenses. Some of the payments made by the assessee by cheques as reflected in his bank accounts were towards the personal and household expenses and if these were taken into consideration along with the other facts of the case including the quantum of salary income of the assessee, the cash withdrawals made by the assessee from his bank accounts could be considered as utilised for personal and households expenses to the extent of Rs. 3,00,000, i. e., Rs. 25,000 per month. Thus the cash withdrawals made by the assessee during the year 2011-12 from his bank accounts to the extent of Rs. 7,75,000 could reasonably be treated as available with the assessee to explain the cash deposits made by him in the bank accounts during the year 2011-12. The addition of Rs. 15,13,000 made by the Assessing Officer and confirmed by the Commissioner (Appeals) on account of unexplained cash deposits found to be made by the assessee in his bank accounts to the extent of Rs. 7,38,000 was sustained.*

**I. T. A. No. 331/Kolkata/2020 (assessment year 2011-12).**

***Suvo Chakraborty***, Advocate, for the assessee.

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

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**[2020] 81 ITR (Trib) (S. N.) 31 (Delhi)**

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

**1. RAJ BALA**

(I. T. A. Nos. 3396-97/Delhi/2017)

**2. JOGINDER DAHIYA**

(I. T. A. Nos. 3398-99/Delhi/2017)

***v.***

**INCOME-TAX OFFICER**

**R. K. PANDA *(Accountant Member)*** and
**AMIT SHUKLA *(Judicial Member)***

July 24, 2020.

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

REASSESSMENT—SCOPE OF PROCEEDINGS—POWER OF ASSESSING OFFICER TO TAX INCOMES OTHER THAN THOSE IN RESPECT OF WHICH PROCEEDINGS INITIATED—NOT AVAILABLE WHEN REASONS FOR INITIATION OF THOSE PROCEEDINGS CEASE TO SURVIVE—ASSESSING OFFICER EXCEEDED JURISDICTION IN REASSESSING ISSUES OTHER THAN ISSUES IN RESPECT OF WHICH PROCEEDINGS INITIATED SINCE REASONS FOR INITIATION OF THOSE PROCEEDINGS CEASED TO SURVIVE—INCOME-TAX ACT, 1961, SS. 147, 148.

*The assessee was an individual and filed her return of income declaring a total income at Rs. 9,43,897. Since the return was filed beyond the time allowed of one year from the relevant assessment year, the return was treated as invalid. The Assessing Officer issued notice under section 148 of the Income-tax Act, 1961. He mentioned that there was information that the assessee had deposited cash amounting to Rs. 10,10,000 in her savings bank account with HSBC Bank, Rs. 6,86,000 and Rs. 10,00,000 in the savings bank account held jointly with J. He completed the assessment determining the total income at Rs.50,12,770. The Commissioner (Appeals) upheld the validity of the reassessment proceedings. However, she gave partial relief to the assessee by restricting the addition of Rs. 23,10,000 to Rs. 11,66,103 and deleting the addition of Rs. 10 lakhs. However, she sustained the remaining additions. On appeal :*

Held, *that the Assessing Officer had the jurisdiction to reassess issues other than the issues in respect of which proceedings were initiated but he was not so justified when the reasons for the initiation of those proceedings cease*

*to survive. Since the Assessing Officer had initiated proceedings under section 147 for escapement of income of Rs. 9,43,897 which was the returned income filed prior to issue of notice under section 148 in the belated return and as well as in the return filed in response to the notice under section 148 and since the Assessing Officer had accepted the returned income and proceeded to make various other additions without issuing fresh notice under section 147/148, the Assessing Officer had exceeded his jurisdiction in reassessing issues other than those in respect of which the proceedings were initiated since reasons for the initiation of those proceedings ceased to survive. The various other additions made by the Assessing Officer were not in accordance with law being without jurisdiction and, therefore, were to be deleted.*

RANBAXY LABORATORIES LTD. *v.* CIT [2011] 336 ITR 136 (Delhi) *relied on*.

**I. T. A. Nos. 3396-99/Delhi/2017 (assessment year 2010-11).**

*Kapil Goel*, Advocate, for the assessee.

*Saras Kumar*, Senior Departmental representative, for the Department.

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

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**[2020] 81 ITR (Trib) (S. N.) 32 (Delhi)**

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

## DE DIAMOND ELECTRIC INDIA PVT. LTD.

***v.***

## ASSISTANT COMMISSIONER OF INCOME-TAX

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

July 23, 2020.

**SS ▸ ITA 1961, s 40A(2)(b)**
**AY ▸ 2016-17**
**HF ▸ Assessee**

BUSINESS EXPENDITURE—DISALLOWANCE—EXCESSIVE OR UNREASONABLE PAYMENTS—UNREGISTERED AGREEMENT CANNOT BASIS FOR DISALLOWANCE—ASSESSING OFFICER TO FORM AN OPINION THAT EXPENSES MORE THAN FAIR MARKET VALUE OR NOT ACCORDING TO LEGITIMATE NEEDS OF BUSINESS OR NO BENEFIT DERIVED—ASSESSING OFFICER ONLY COMPARING ROYALTY EXPENSES OF PRECEDING ASSESSMENT YEAR—ASSESSING OFFICER REQUIRED TO COMPARE ROYALTY EXPENSES PAID IN